

**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 ARMSTRONG FLOORING, INC., AFI LICENSING LLC,
ARMSTRONG FLOORING LATIN AMERICA, INC. AND ARMSTRONG FLOORING
CANADA LTD. (THE "DEBTORS")**

**APPLICATION OF ARMSTRONG FLOORING CANADA LTD. UNDER SECTION 46
OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED**

BOOK OF AUTHORITIES

September 27, 2022

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C

Tel: 416-367-6266
Email: rjaipargas@blg.com

Lawyers for Armstrong Flooring, Inc., AFI Licensing
LLC, Armstrong Flooring Latin America, Inc. and
Armstrong Flooring Canada Ltd.

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**ONTARIO
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(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
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AMENDED**

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Tab 1

CITATION: Zochem Inc. (Re), 2016 ONSC 958
COURT FILE NO.: CV-16-11271-00CL
DATE: 20160208

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 CERTAIN PROCEEDINGS TAKEN IN THE UNITED
STATES BANKRUPTCY COURT WITH RESPECT TO HORSEHEAD HOLDING
CORP., HORSEHEAD CORPORATION, HORSEHEAD METAL PRODUCTS, LLC,
THE INTERNATIONAL METALS RECLAMATION COMPANY, LLC AND
ZOCHEM INC. (collectively, the "Debtors")

APPLICATION OF ZOCHEM INC.
UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT

HEARD: February 5, 2016

COUNSEL:

Sam Babe, Martin E. Kohnats, Jeffrey Merk and J. Nemers, for the Applicant

Ryan Jacobs, Jane Dietrich and Natalie Levine, for the DIP lenders

Christopher G. Armstrong, Sydney Young and Caroline Descours, for Richter Advisory Group
as proposed Information Officer

Linc A. Rogers and Christopher Burr, for PNC Bank, National Association

Denis Ellickson, for UNIFOR Local 591G

Newbould J.

[1] On February 5, 2016 an application was brought by Zochem Inc. ("Zochem"), in its capacity as foreign representative of itself as well as Horsehead Holding Corp., Horsehead Corporation, Horsehead Metal Products, LLC ("Horsehead Metals"), and The International

Metals Reclamation Company, LLC (“INMETCO”) for orders pursuant to sections 46 through 49 of the *CCAA* recognizing First Day Orders made by Judge Mary Walrath of the U.S. Bankruptcy Court for the District of Delaware in chapter 11 proceedings brought by the debtors under the U.S. Bankruptcy Code.

[2] At the conclusion of the hearing I made the orders sought with reasons to follow. These are my reasons for making the orders.

[3] The debtors operate in the zinc and nickel-bearing waste industries through three business units: Horsehead Corporation and its subsidiaries (collectively, “Horsehead”), Zochem, and INMETCO. Horsehead is a prominent recycler of electric arc furnace (“EAF”) dust, a zinc-containing waste generated by North American steel “mini-mills”, and in turn uses the recycled EAF dust to produce specialty zinc and zinc-based products. Zochem is a producer of zinc oxide. INMETCO is a recycler of nickel-bearing wastes and nickel-cadmium batteries, and a producer of nickel-chromium-molybdenum-iron remelt alloy for the stainless steel and specialty steel industries. Collectively, the debtors hold a market-leading position in zinc production in the United States, zinc oxide production in North America, EAF dust recycling in North America, and are a leading environmental service provider to the U.S. steel industry.

[4] Zochem is a Canada Business Corporations Act corporation with its head office in Pittsburgh, Pennsylvania and its operations located in owned premises at 1 Tilbury Court, Brampton, Ontario. Zochem’s registered office address is the Ontario premises.

[5] Zochem is one of the largest single-site producers of zinc oxide in North America. Zinc oxide is used as an additive in various materials and products, including plastics, ceramics, glass, rubbers, cement, lubricants, pigments, sealants, ointments, fire retardants, and batteries. The debtors sell zinc oxide to over 250 producers of tire and rubber products, chemicals, paints, plastics, and pharmaceuticals, and have supplied zinc oxide to the majority of their largest customers for over ten years.

[6] As of December 31, 2015, Zochem had 19 salaried personnel and 25 hourly personnel. Approximately 25 of these employees are organized under Unifor and its Local 591-G-850, whose collective labour agreement is set to expire on June 30, 2016.

[7] Zochem maintains separate pension plans for its salaried and hourly personnel, which have been closed to new members since July 1, 2012. Newer employees have joined Zochem's group RRSP. According to a report prepared by Corporate Benefit Analysis, Inc., the pensions were, collectively, overfunded as at December 31, 2015, though the salaried plan had a small unfunded projected benefit obligation in the amount of \$181,499, which is to be paid next week. Neither plan has been wound up.

[8] On April 29, 2014, Zochem, as borrower, and Horsehead Holding, as guarantor, entered into a U.S. \$20 million secured revolving credit facility (the "Zochem Facility") with PNC Bank, National Association ("PNC"), as agent and lender. The Zochem Facility is secured by a first priority lien (subject to certain permitted liens) on substantially all of Zochem's tangible and intangible personal property, and a charge on the Brampton, Ontario premises of Zochem. Zochem's obligations to PNC are guaranteed by its parent, Horsehead Holding. On January 27, 2016, PNC assigned its position as lender under the Zochem Facility to an arm's length party. PNC remains the agent under Zochem Facility.

[9] Three out of four of Zochem's officers and three out of four of its directors are residents of Pennsylvania. Most of Zochem's officers are also officers of each of the other debtors. Zochem's statutorily required one Canadian director (representing 25% of the board) is a partner at the law firm Aird & Berlis LLP, the debtors' Canadian counsel. The only Zochem officer resident in Canada is the plant's general manager, who formerly was resident in Pennsylvania and employed by the U.S. debtors. Otherwise, all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh, Pennsylvania headquarters in the United States.

[10] Zochem and the U.S. debtors maintain a highly integrated business. Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh. Zochem's accounts receivable, accounts payable and treasury departments are also located in Pittsburgh.

[11] Zochem operates a cash management system whereby:

- a. all receipts flow into a collection account at PNC in the United States, in part via a lockbox maintained at PNC;
- b. funds from the PNC collection account are transferred daily into an operating account at PNC in the United States; and
- c. funds are then transferred, as the debtors' treasury department (in Pittsburgh) determines is required, to a U.S. dollar operating account and a Canadian dollar operating account at Scotiabank in Canada to pay vendors and payroll, as applicable.

[12] The debtors in the United States have had limited access to liquidity since January 5, 2016 when their lender, Macquarie Bank Limited ("Macquarie"), issued a notice of default and froze certain of their bank accounts, including their main operating account. On January 6, 2016, Zochem's lender, PNC, also asserted an event of default. On January 13, 2016, PNC froze certain of the debtors' bank accounts associated with their Zochem operations, and demanded immediate payment of all outstanding obligations. PNC's demand was accompanied by a notice of intention to enforce security under section 244 of the *BIA*. Although the debtors entered into forbearance agreements with Macquarie and PNC, the term of those agreements expired on February 1, 2016.

[13] With the assistance of Lazard Middle Market LLC, the debtors reached agreement for a senior secured super priority debtor-in-possession credit facility in the amount of U.S. \$90 million from a group of Horsehead Holding secured noteholders. The DIP facility is intended to pay off the Zochem's obligations to PNC and to finance the debtors' operations and the chapter 11 proceedings. A condition of advance under the DIP facility is the granting of a super-priority charge over the assets of the debtors in Canada in favour of the DIP lender.

[14] On February 3, 2016 Judge Walrath of the U.S. Bankruptcy Court granted the following First Day Orders:

- (a) Joint Administration Order;
- (b) Foreign Representative Order;
- (c) Interim Cash Management Order;
- (d) Interim Wages and Benefits Order;
- (e) Interim Shippers and Lien Claimants Order;
- (f) Interim Utilities Order;
- (g) Interim Insurance Order;
- (h) Interim Prepetition Taxes Order;
- (i) Interim Critical Vendors Order; and
- (j) Interim Financing Order.

Analysis

[15] The purpose of Part IV of the *CCAA* is to effect cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. See my comments on the *BIA* version of the same provisions in *MtGox Co., Ltd (Re)* (2014), 20 C.B.R. (6th) 307.

[16] Pursuant to section 46(1) of the *CCAA*, a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

[17] Pursuant to section 47 of the *CCAA*, two requirements must be met for an order recognizing a foreign proceeding:

- a. the proceeding is a “foreign proceeding”; and
- b. the applicant is a “foreign representative” in respect of that foreign proceeding.

[18] Section 45(1) of the *CCAA* defines a “foreign proceeding” as any judicial proceeding, including interim proceedings, in a jurisdiction outside of Canada dealing with creditors’ collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company’s business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

[19] Section 45(1) of the *CCAA* defines a “foreign representative” to include one who is authorized in a foreign proceeding in respect of a debtor company to act as a representative in respect of the foreign proceeding. In the chapter 11 proceeding, the debtors applied to have Horsehead Holding Corp. named as the foreign representative. Judge Walrath for reasons I will discuss had concerns regarding the position of Zochem and directed that Zochem be named as the foreign representative.

[20] There is no question but that the chapter 11 proceeding is a foreign proceeding and that Zochem is a foreign representative. Thus it has been established that the chapter 11 proceeding should be recognized in this Court as a foreign proceeding.

[21] Once it has determined that a proceeding is a foreign proceeding, a court is required, pursuant to section 47(2) of the *CCAA*, to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

[22] Section 45(1) of the *CCAA* defines a foreign main proceeding as a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests” (“COMI”). Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be its COMI. In circumstances where it is necessary to go beyond the s. 45 (2) registered office presumption, the following principal factors, considered as a whole, will indicate whether the location in which the proceeding has been filed is the debtor's centre of main interests:

- (1) the location is readily ascertainable by creditors,
- (2) the location is one in which the debtor’s principal assets or operations are found;
and
- (3) the location is where the management of the debtor takes place.

[23] See *Lightsquared LP, Re*, (2012), 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]). In *Lightsquared*, Justice Morawetz further stated:

26. In most cases, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, there may be conflicts among the factors, requiring a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor’s true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

[24] In this case, all of the factors do not point to a single jurisdiction as the COMI as Zochem’s operations are located in Brampton, Ontario.

[25] In the present case, the applicants, supported by the proposed Information Officer, contend that Zochem’s COMI is in the United States because:

- (i) all the debtors other than Zochem, comprising Zochem's corporate family, are incorporated, and have their registered head office, in the United States;
- (ii) all the debtors, including, Zochem are managed from Pittsburgh, Pennsylvania;
- (iii) all three of Zochem's "inside" directors (comprising 75% of the board) are residents of Pennsylvania;
- (iv) all of Zochem's officers are Pennsylvania residents, with the one exception of its general manager who is a former Pennsylvania resident and employee of the other debtors;
- (v) most of Zochem's officers are also officers of each of the other debtors;
- (vi) Zochem is operational in its focus and all local functions associated with managing and operating the Zochem facility are performed from the debtors' Pittsburgh headquarters;
- (vii) Zochem's communications decisions, pricing decisions, and business development decisions are made in Pittsburgh;
- (viii) Zochem's accounts receivable, accounts payable and treasury departments are located in Pittsburgh;
- (ix) Zochem's cash management system is centred in the United States;
- (x) Zochem's existing credit facilities are with a bank in Pittsburgh; and

- (xi) the debtors are all managed in the United States as an integrated group from a corporate, strategic, financial and management perspective.

[26] In this case it is perhaps an academic exercise to decide if the foreign proceeding is a main or non-main proceeding because it is appropriate for a stay to be ordered in either event. However, I am satisfied that for our purposes the applicants have established that the foreign proceeding is a foreign main proceeding.

[27] The only matter that is somewhat contentious is the recognition of the interim financing order (interim DIP order) made by Judge Walrath and the request for an order providing for a charge for the benefit of the DIP lender.

[28] Counsel for the Union went on the record as opposing the granting of a charge because although there will be no underfunding of the pension plans upon the granting of the DIP facility, it is possible in the future that there may be underfunding. The pension plans are not being wound up and there is no evidence at the moment that there is a risk of future underfunding or in what amount. In the circumstances I do not see the position of the Union as an impediment to the granting of the relief requested.

[29] When recognizing a financing order granted by a foreign court, consideration should be given as to whether there would be any material adverse interest to any Canadian interests. See *Re Xinergy Ltd.*, 2015 ONSC 2692 (Ont. S.C.J. [Commercial List]), at para 20.

[30] It was such a concern that led Judge Walrath to require changes to the interim DIP order that was applied for.

[31] The debtors sought interim approval from the U.S. Court of a senior secured super priority DIP credit facility in the amount of \$90 million offered by the DIP lenders. The Proposed DIP Facility contemplated that the liens granted in connection with the DIP Facility

would be first-priority liens over a portion of the debtors' assets (including all of the assets of Zochem and the assets of the debtors subject to a first-priority lien in respect of the Senior Secured Notes), and second-priority liens with respect to the assets of the U.S. debtors that are presently subject to a first-priority lien in favour of Macquarie.

[32] Under the Proposed DIP Facility, the maximum amount permitted to be advanced on an interim basis was \$40 million, and it was contemplated that all of the debtors would be jointly and severally liable for all advances made. The contemplated uses of the initial \$40 million DIP advance were approximately \$18.5 million to pay out the Zochem Facility (including a \$1 million forbearance fee), with the balance of the advances being used to fund the operations and restructuring activities of the Debtors during the interim period until a final order approving the Proposed DIP Facility is sought from the U.S. Court in late February.

[33] At the hearing on February 3, 2016, Judge Walrath raised concerns about the position of Zochem, including her concern that no independent counsel for Zochem considered whether the DIP facility was in the best interest of Zochem as there was a conflict of interest in the three U.S. directors of Zochem approving Zochem to be jointly and severally liable for the entire DIP loan. Judge Walrath stated that she would consider a DIP facility that obligates Zochem only to the extent there is a direct benefit to Zochem, i.e. payment of its debt or a loan which they use in their operations for working capital.

[34] After an adjournment, the debtors and the DIP lenders agreed to certain interim amendments to the Proposed DIP Facility including a provision that the maximum liability of Zochem pursuant to the Proposed DIP Facility in the interim period would be capped at \$25 million (reduced from the prior contemplated maximum amount of \$40 million). Counsel for the debtors advised Judge Walrath that the \$25 million would reflect both the payoff of the PNC loan and reflect the fact that Zochem continues to have a funding need. The debtors also proffered testimony that

1. Zochem is approximately break-even on a cash flow basis, and was projected to be approximately \$1 million dollars cash flow positive over the following four week period, not accounting for any disruption in its business, including, for example, a notice that the debtors received from one of the largest vendors saying that they will reprice their business with the debtors, and that they will demand that the debtors pay one month in advance.
2. The break-even cash position did not take into account any bankruptcy related costs, all of which are allocated to Horsehead.
3. The debtors, in their business judgement, determined that it would not be prudent to operate the business on a break-even basis given business pressures, and liquidity from the Proposed DIP Facility would be available to Zochem to provide a liquidity cushion for the first four weeks of the case.

[35] What essentially Judge Walrath was told in answer to her concerns was that the difference between the approximately \$18.5 million needed to pay Zochem's loan facility with PNC and the \$25 million limit of Zochem's liability was to be used as a cushion for Zochem's cash flow needs. In the circumstances, and taken the proffered testimony that Zochem required a cushion, I suggested to the parties that a term of my order recognizing the U.S. interim financing order should be that the difference between the \$18.5 million and the \$25 million was in the interim to be used only for Zochem working capital requirements.

[36] After a break to permit the parties to discuss this situation, counsel for the DIP lenders said they were not prepared to lend on that basis and that they wished to adjourn the matter until the following Monday. The problem with this request was two-fold. The first was that it was a requirement of the DIP that an order be made by this Court by the date of the hearing on February 5, 2016, and without an order the debtors had no right to the DIP facility. The second was that the interim advance under the DIP was required to meet the payroll that day.

[37] The proposed Information Officer pointed out that it is estimated by the debtors that up to \$38.5 million will be drawn under the Proposed DIP Facility in the interim period to be used as follows:

(a) approximately \$18.5 million will be used to repay the Zochem Facility (including the \$1 million forbearance fee payable to PNC);

(b) approximately \$4 million will be used to pay fees associated with the Proposed DIP Facility; and

(c) approximately \$15.6 million will be used to finance the debtors' operations and restructuring activities pursuant to an agreed upon budget, including payment of professional fees, utility deposits and certain critical materials and freight vendors.

[38] In the circumstances I made the order recognizing the U.S. interim financing order, and granting the security requested for the DIP, which in my view met the tests as enunciated in the authorities, including the factors set out in *Indalex Ltd. (Re)*, (2009), 52 C.B.R. (5th) 61 for the guarantee of a Canadian debtor of its U.S. parent's obligations under the DIP facility, and as set out in *Crystallex International Corp. (Re)* (2012), 91 C.B.R. (5th) 169; aff'd (2012), 4 B.L.R. (5th) 1.

[39] However I stated at the hearing, and reiterate, that if in the interim period a request is made for further funding for working capital requirements of Zochem because not enough available cash was kept for that purpose, I would be extremely loathe to grant any such further relief.

[40] The directors of Zochem have fiduciary duties to Zochem. In *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123; aff'd (1991), 3 B.L.R. (2d) 113 at 122

Justice Farley stated clearly that the directors' duties are to the corporation of which they are directors and they cannot just be yes men for the controlling shareholders:

It may well be that the corporate life of a nominee director who votes against the interest of his "appointing" shareholder will be neither happy nor long. However, the role that any director must play (whether or not a nominee director) is that he must act in the best interests of the corporation. If the interests of the corporation (and indirectly the interests of the shareholders as a whole) require that the director vote in a certain way, it must be the way that he conscientiously believes after a reasonable review is the best for the corporation. The nominee director's obligation to his "appointing" shareholder would seem to me to include the duty to tell the appointer that his requested course of action is wrong if the director in fact feels this way. Such advice, although likely initially unwelcome, may well be valuable to the appointer in the long run. The nominee director cannot be a "Yes man"; he must be an analytical person who can say "Yes" or "No" as the occasion requires (or to put it another way, as the corporation requires).

[41] I trust the directors of Zochem will keep these principles in mind. I direct that they be given a copy of these reasons for judgment.

[42] I also recognized all of the other First Day Orders made by Judge Walrath. They were appropriate and no opposition to their recognition was voiced.

Newbould J.

CITATION: Zochem Inc. (Re), 2016 ONSC 958
COURT FILE NO.: CV-16-11271-00CL
DATE: 20160208

**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 CERTAIN
PROCEEDINGS TAKEN IN THE UNITED
STATES BANKRUPTCY COURT WITH
RESPECT TO HORSEHEAD HOLDING CORP.,
HORSEHEAD CORPORATION, HORSEHEAD
METAL PRODUCTS, LLC, THE
INTERNATIONAL METALS RECLAMATION
COMPANY, LLC AND ZOICHEM INC.
(collectively, the “Debtors”)**

**APPLICATION OF ZOICHEM INC. UNDER
SECTION 46 OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT***

REASONS FOR JUDGMENT

Newbould J.

Released: February 8, 2016

Tab 2

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE

JUSTICE MCEWEN

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FRIDAY THE 20TH

DAY OF JULY, 2018



**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")

APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

ORDER

(Sale/Final DIP/Retention/Intercompany Transfer Order)

THIS MOTION, made by Rockport Blocker, LLC ("**Rockport Blocker**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form enclosed in the Motion Record was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Paul Kosturos sworn July 19, 2018 and the exhibits thereto (the "**Third Kosturos Affidavit**"), the second report of Richter Advisory Group Inc. ("**Richter**") in its capacity as the Court-appointed information officer (the "**Information Officer**") dated July 19, 2018 (the "**Second Report**"), and on hearing the submissions of counsel

for the Debtors, counsel for the Information Officer, counsel for Citizens Business Capital, in its capacity as Administrative Agent and Collateral Agent for the lenders under the Senior Secured Super-Priority Debtor-in-Possession Revolving Credit Agreement (the "**DIP ABL Agent**"), counsel for the Senior Secured Noteholders and DIP Note Lenders, counsel for The Cadillac Fairview Corporation Limited, counsel for Cushman & Wakefield Asset Services Inc., Ivanhoe Cambridge Inc., RioCan Real Estate Investment Trust, counsel for Montez Hillcrest Inc., Hillcrest Holdings Inc., Scarborough Town Centre Holdings Inc., Oxford Properties Retail Holdings Inc., Oxford Properties Retail Holdings II Inc. and Yorkdale Shopping Centre Holdings Inc., and upon no one appearing for any other parties although duly served as appears from the Affidavit of Service of Mariela Adriana Gasparini sworn July 19, 2018, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Third Kosturos Affidavit.

RECOGNITION OF FOREIGN ORDERS

3. **THIS COURT ORDERS** that the following orders of the United States Bankruptcy Court for the District of Delaware (the "**US Court**") made in the insolvency proceedings of the Debtors under Chapter 11 of Title 11 of the United States Bankruptcy Code are hereby recognized and

given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

- a. an order, *inter alia*, (i) authorizing the Debtors to employ and retain Houlihan Lokey Capital, Inc. ("**Houlihan Lokey**") as their financial advisor and investment banker, *nunc pro tunc*, to the Filing Date, pursuant to that certain engagement letter dated December 11, 2017, a copy of which is attached to the Houlihan Retention Order as Exhibit 1 (the "**Houlihan Engagement Letter**"), by and between Houlihan Lokey and Rockport; (ii) approving the terms of the Houlihan Engagement Letter; (iii) waiving certain time-keeping requirements pursuant to Rule 2016-2(h) of the Local Rules of Bankruptcy Practice and Procedure of the US Court; and (iv) granting related relief (the "**Houlihan Retention Order**");
- b. a final order, *inter alia*, (i) approving post-Petition financing; (ii) granting liens and super-priority administrative expense claim status to the DIP ABL Agent on its own behalf and on behalf of the DIP ABL Lenders (as defined in the First Day Declaration); and (iii) modifying the automatic stay (the "**Final DIP Financing Order**");
- c. an order, *inter alia*, (i) authorizing and approving the sale (the "**Sale**") of the Purchased Assets (as defined in the asset purchase agreement dated as of May 13, 2018 (the "**Stalking Horse Agreement**") between the Debtors and Rockport Canada Holdings Ltd. (collectively, the "**Sellers**") and CB Marathon Opco, LLC ("**Marathon**"), an affiliate of Charlesbank Equity Fund IX, Limited Partnership, to Marathon of such assets as determined in accordance with the Bidding Procedures,

free and clear of all liens, claims, interests and encumbrances, except certain permitted encumbrances as determined by the Sellers and Marathon; (ii) authorizing the assumption and assignment of certain executory contracts and unexpired leases in connection with the proposed Sale and (iii) granting related relief (the “**Sale Order**”); and

- d. an order approving stipulation modifying final cash management order to permit intercompany transfers between Rockport Canada ULC and The Rockport Company, LLC (the “**Intercompany Payment Order**”);

provided, however, that in the event of any conflict between the terms of the Houlihan Retention Order, the Final DIP Financing Order, the Sale Order, the Intercompany Payment Order and the Orders of this Court made in these proceedings, the Orders of this Court shall govern with respect to the Property (as defined in the Supplemental Order (Foreign Main Proceeding) of this Court made in these proceedings on May 16, 2018) in Canada. Copies of the Houlihan Retention Order, the Final DIP Financing Order, the Sale Order and the Intercompany Payment Order are attached as Exhibits “F” to “I” to the Third Kosturos Affidavit.

VESTING OF PURCHASED ASSETS AND APPLICATION OF SALE PROCEEDS

4. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of a Foreign Representative certificate to the Purchaser, substantially in the form attached as Schedule A hereto (the “**Foreign Representative Certificate**”), all of the Sellers right, title and interest in and to the Purchased Assets (as defined in the Stalking Horse Agreement), shall vest absolutely in Marathon or a designated affiliate of Marathon, as provided for by the Stalking Horse Agreement (the “**Purchaser**”), free and clear of and from any and all security interests (whether

contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Supplemental Order (Foreign Main Proceeding) dated May 16, 2018; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of which are collectively referred to as the “**Encumbrances**”), and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

5. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets (as defined in the Stalking Horse Agreement) shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Foreign Representative Certificate, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets (as defined in the Stalking Horse Agreement) had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale and this Court further orders that the proceeds of the sale shall be applied as set forth in paragraph 28 and paragraph 29 of the Sale Order.

6. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Sellers are authorized and permitted

to disclose and transfer to the Purchaser all human resources and payroll information in the Sellers records pertaining to the Sellers past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Sellers.

7. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of Rockport Canada ULC ("**Rockport Canada**") and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of Rockport Canada;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of Rockport Canada and shall not be void or voidable by creditors of the Sellers, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

GENERAL

8. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Foreign Representative, the Sellers, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative, the Sellers, the Information Officer, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Foreign Representative, the Sellers, the Information Officer and their respective agents in carrying out the terms of this Order.

9. **THIS COURT ORDERS** that each of the Foreign Representative, the Debtors and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

A handwritten signature in black ink, appearing to be 'M. G. S.', written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUL 20 2018

PER / PAR:

Handwritten initials in blue ink, possibly 'HP'.

Schedule A – Form of Foreign Representative Certificate

Court File No. _____

**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 ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP
HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS,
LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT
COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES
LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")**

**APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

FOREIGN REPRESENTATIVE CERTIFICATE

RECITALS

A. All capitalized terms used and not otherwise defined herein shall have the meanings ascribed thereto in the asset purchase agreement dated as of May 13, 2018 between the Debtors and Rockport Canada Holdings Ltd. (collectively, the "**Sellers**") and CB Marathon Opco, LLC, an affiliate of Charlesbank Equity Fund IX, Limited Partnership (the "**Stalking Horse Agreement**").

B. Pursuant to the Initial Recognition Order (Foreign Main Proceeding) and Supplemental Order (Foreign Main Proceeding) of the Honourable Justice McEwen of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") each dated May 16, 2018, Rockport Blocker, LLC was appointed as the foreign representative (the "**Foreign Representative**") of the undertaking, property and assets of The Rockport Company, LLC, Rockport Blocker, LLC, The Rockport Group Holdings, LLC, TRG 1-P Holdings, LLC, TRG Intermediate Holdings, LLC, TRG Class D, LLC, The Rockport Group, LLC, Drydock Footwear, LLC, DD Management Services LLC and Rockport Canada ULC (the "**Debtors**").

C. Pursuant to an Order of the Court dated July 20, 2018, the Court approved the Stalking Horse Agreement between the Sellers and the Purchaser and provided for the vesting in the Purchaser of the Seller's right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Foreign Representative to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in Article X of the Stalking Horse Agreement have been satisfied or waived by the Sellers and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Foreign Representative.

D. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Stalking Horse Agreement.

THE FOREIGN REPRESENTATIVE CERTIFIES the following:

1. The Purchaser has paid the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Staking Horse Agreement;
2. The conditions to Closing as set out in Article X of the Stalking Horse Agreement have been satisfied or waived by the Sellers and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Foreign Representative.
4. This Certificate was delivered by the Foreign Representative at _____ [TIME] on _____ [DATE].

**ROCKPORT BLOCKER, LLC, in its
capacity as Foreign Representative of the
Debtors, and not in its personal capacity**

Per: _____

Name:

Title:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG
INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK
FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")

APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985,
c. C-36, AS AMENDED

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDINGS COMMENCED AT TORONTO

ORDER

(Sale/Final DIP/Retention/Intercompany Transfer Order)

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C

Tel: 416-367-6266
rjaipargas@blg.com

Alex MacFarlane – LSO No. 28133Q

Tel: 416-367-6305
amacfarlane@blg.com

Evita Ferreira – LSO No. 69967K

Tel: 416-367-6708
eferreira@blg.com

Lawyers for Rockport Blocker, LLC, The Rockport Group
Holdings, LLC, TRG 1-P Holdings, LLC, TRG Intermediate
Holdings, LLC, TRG Class D, LLC, The Rockport Group, LLC,
The Rockport Company, LLC, Drydock Footwear, LLC, DD
Management Services LLC and Rockport Canada ULC

Tab 3

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 JACK COOPER VENTURES, INC., JACK COOPER
DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS
CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING
CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT
RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT
SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER
INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK
COOPER TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK
COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP,
JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

THE HONOURABLE MR.

JUSTICE HAINEY

)
)
)

THE 18th DAY

OF OCTOBER, 2019

SALE RECOGNITION AND VESTING ORDER

THIS MOTION, made by Jack Cooper Ventures, Inc. (the "**Foreign Representative**"),
in its capacity as foreign representative for itself as well as Jack Cooper Diversified, LLC, Jack
Cooper Enterprises, Inc., Jack Cooper Holdings Corp., Jack Cooper Transport Company, Inc.,
Auto Handling Corporation, CTEMS, LLC, Jack Cooper Logistics, LLC, Auto & Boat
Relocation Services, LLC, Axis Logistic Services, Inc., Jack Cooper CT Services, Inc., Jack
Cooper Rail And Shuttle, Inc., Jack Cooper Investments, Inc., North American Auto
Transportation Corp., Jack Cooper Transport Canada Inc., Jack Cooper Canada GP 1 Inc., Jack
Cooper Canada GP 2 Inc., Jack Cooper Canada 1 Limited Partnership, and Jack Cooper Canada
2 Limited Partnership (collectively, the "**Chapter 11 Debtors**" and each, a "**Chapter 11**

Debtor”), pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the “**CCAA**”) for an order substantially in the form enclosed at Tab 3 of the Motion Record, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Greg R. May, sworn October 15, 2019 (the “**May Affidavit**”), the Third Report of Alvarez & Marsal Canada Inc., in its capacity as Information Officer, the affidavits of the Information Officer and its counsel, Stikeman Elliott LLP (“**Stikeman**”), as to their respective fees and disbursements (the “**Fee Affidavits**”), each filed.

AND UPON HEARING the submissions of counsel for the Foreign Representative, the Information Officer, JC Buyer Company, Inc. (the “**Buyer**”) and those other parties present, no one else appearing although duly served as appears from the affidavit of service of Jake Schmidt sworn October 16, 2019, and the affidavit of service of Ana Chalupa sworn October 16, 2019, filed.

DEFINED TERMS

1. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meaning given to them in the Asset Purchase Agreement dated as of August 22, 2019 by and among the Buyer, as buyer, and Jack Cooper Investments, Inc. and the other Chapter 11 Debtors, as sellers (as amended, restated, supplemented or modified from time to time, the “**Asset Purchase Agreement**”), a copy of which was attached as Exhibit “K” to the Affidavit of Waleed Malik affirmed September 5th, 2019.

SERVICE

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

RECOGNITION OF FOREIGN ORDERS

3. **THIS COURT ORDERS** that the following orders (collectively, the “**Foreign Orders**”) of the United States Bankruptcy Court for the Northern District of Georgia made in the cases

commenced by the Chapter 11 Debtors pursuant to Chapter 11 of the U.S. Bankruptcy Code are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to section 49 of the CCAA

- (a) *Order (i) Approving the Sale of the Acquired Assets Free and Clear of Claims, Liens, Interests and Encumbrances; (ii) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (iii) Granting Related Relief (the “Sale Order”); and*
- (b) *Order Authorizing the Debtors to Enter Into the Pension Plan Agreement and Release (the “Pension Approval Order”)*

(copies of each such Foreign Order are attached hereto as Schedules “A” and “B”, respectively);

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to the Property (as defined in the Supplemental Order granted in these proceedings on August 9, 2019, as amended (the “**Supplemental Order**”)).

VESTING OF CANADIAN ACQUIRED ASSETS

4. **THIS COURT ORDERS AND DECLARES** that the sale of the Acquired Assets that are situated in Canada (including for greater certainty Assumed Contracts to which Jack Cooper Transport Canada Inc., Jack Cooper Canada GP 1 Inc., Jack Cooper Canada GP 2 Inc., Jack Cooper Canada 1 Limited Partnership or Jack Cooper Canada 2 Limited Partnership (collectively, the “**Canadian Debtors**”) are parties) (the “**Canadian Acquired Assets**”) to the Buyer or a Buyer Designee, as applicable, pursuant to the Asset Purchase Agreement is hereby approved. The Chapter 11 Debtors are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the sale of the Canadian Acquired Assets to the Buyer or a Buyer Designee, as applicable, and for the conveyance of the Canadian Acquired Assets to the Buyer or a Buyer Designee, as applicable.

5. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a certificate of the Information Officer to the Buyer substantially in the form attached as Schedule “C” hereto (the “**Information Officer’s Certificate**”), all of the Chapter 11 Debtors’ right, title and interest in and to the Canadian Acquired Assets including, without limitation, the Assumed Contracts shall vest absolutely in the Buyer or a Buyer Designee, as applicable, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, including, without limitation, any claims relating to withdrawal liability of any of the Chapter 11 Debtors in respect of the Central States, Southeast and Southwest Areas Pension Fund under the *Employment Retirement Income Security Act of 1974* (as amended) or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Supplemental Order (Foreign Main Proceeding) dated August 9, 2019 (as amended from time to time) and the Recognition and Intercompany Charge Order dated September 9, 2019; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system ((i) and (ii) are collectively referred to as the “**Encumbrances**”), except as expressly provided in the Asset Purchase Agreement, the other Transaction Documents (including the Exit Facilities) and the Sale Order (collectively, the “**Permitted Encumbrances**”) and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Canadian Acquired Assets, other than the Permitted Encumbrances, are hereby expunged and discharged as against the Canadian Acquired Assets.

6. **THIS COURT ORDERS** that upon the registration in the Property Registry of Manitoba, Winnipeg Land Titles Office of a certified copy of this Order and the Information Officer’s Certificate, the District Registrar is hereby directed to and shall enter the Buyer or a Buyer Designee, as applicable, as the registered owner on title of the subject real property identified in Schedule “D” hereto (the “**Winnipeg Real Property**”) in fee simple, and is hereby directed to delete and expunge from title to the Winnipeg Real Property all of the Claims and Encumbrances listed in Schedule “E” hereto.

7. **THIS COURT ORDERS AND DECLARES** that, without in any way limiting the provisions of the Sale Order, the assignment of the rights and obligations of the Chapter 11 Debtors under the Assumed Contracts to the Buyer or a Buyer Designee, as applicable, is hereby authorized and is valid and binding on all of the counterparties to the Assumed Contracts forming part of the Canadian Acquired Assets, without further documentation, as if the Buyer or Buyer Designee, as applicable, was a party to such Assumed Contract, notwithstanding any restriction, condition or prohibition in any such Assumed Contracts relating to the assignment thereof, including any provision requiring the consent of any parties to such assignment. Nothing in this paragraph 7 derogates from the obligations of the Buyer or a Buyer Designee, as applicable, to perform their obligations under the Assumed Contracts, as provided in the Sale Order.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims and Encumbrances, the net proceeds from the sale of the Canadian Acquired Assets shall stand in the place and stead of the Canadian Acquired Assets, and that from and after the delivery of the Information Officer's Certificate, all Claims and Encumbrances, other than the Permitted Encumbrances, shall attach to the net proceeds from the sale of the Canadian Acquired Assets with the same priority as they had with respect to the Canadian Acquired Assets immediately prior to the sale, as if the Canadian Acquired Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

9. **THIS COURT ORDERS AND DIRECTS** the Information Officer to deliver an executed copy of the Information Officer's Certificate to the Buyer forthwith after the Information Officer receives confirmation from the Foreign Representative (or its counsel) and the Buyer (or its counsel) that: (a) the conditions to Closing as set out in the Asset Purchase Agreement have been satisfied or waived by the Chapter 11 Debtors and the Buyer, as applicable; and (b) subject only to the delivery of the Information Officer's Certificate, the transactions contemplated by the Asset Purchase Agreement have been completed to the satisfaction of the Chapter 11 Debtors and the Buyer. The Information Officer is hereby directed to file a copy of the Information Officer's Certificate with the Court forthwith after delivery thereof to the Buyer.

10. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Chapter 11 Debtors are authorized and permitted to disclose and transfer to the Buyer or Buyer Designee, as applicable, all human resources and payroll information in the Chapter 11 Debtors' records pertaining to the Chapter 11 Debtors' past and current employees, including personal information of those employees listed on Schedules "2.3(e)(i)" and "5.22(b)" to the Disclosure Schedules to the Asset Purchase Agreement. The Buyer or Buyer Designee, as applicable, shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Chapter 11 Debtors.

11. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Chapter 11 Debtors and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Chapter 11 Debtors;

the vesting of the Canadian Acquired Assets (including the assignment of the Assumed Contracts) in the Buyer or Buyer Designee, as applicable, pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Chapter 11 Debtors and shall not be void or voidable by creditors of the Chapter 11 Debtors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

12. **THIS COURT ORDERS AND DECLARES** that the Buyer and each Buyer Designee is discharged from any obligation under, and shall not incur any liability under, section 6 of the *Retail Sales Tax Act* (Ontario) and/or any equivalent or corresponding provision under any other

province or territory in Canada in respect of the Canadian Acquired Assets or the transactions contemplated in the Asset Purchase Agreement.

LOAD BROKER TRUST

13. **THIS COURT ORDERS** that on the Closing Date, the Information Officer shall be entitled to release all funds held by the Information Officer in the Load Broker Trust (as defined in the Supplemental Order) as of such date, net of any fees and disbursements paid pursuant to paragraph 18 hereof, to the Buyer or a Buyer Designee, as directed by the Buyer, and such funds shall form part of the Canadian Acquired Assets purchased by the Buyer or such Buyer Designee, as applicable, on Closing pursuant to the Asset Purchase Agreement, the Sale Order and this Order.

NAME CHANGE

14. **THIS COURT ORDERS** that on or after the Closing, each of the Canadian Debtors are hereby permitted to execute and file articles of amendment or such other documents or instruments as may be required to change their respective legal names in accordance with section 8.8 of the Asset Purchase Agreement, and such articles, documents or other instruments shall be deemed to be duly authorized, valid and effective and shall be accepted by the Director (as defined in the *Business Corporations Act* (Ontario) and the *Canada Business Corporations Act*) and the Registrar (as defined in the *Limited Partnerships Act* (Ontario)) without the requirement (if any) of obtaining director, partner or shareholder approval pursuant to any federal or provincial legislation.

APPROVAL OF FEES AND ACTIVITIES

15. **THIS COURT ORDERS** that the First Report of the Information Officer dated September 6, 2019, the Second Report of the Information Officer dated September 17, 2019 and the Third Report and the activities and the conduct of the Information Officer described therein are hereby approved.

16. **THIS COURT ORDERS** that the fees and disbursements of the Information Officer and Stikeman, as counsel to the Information Officer, as set out in the Third Report and the Fee Affidavits, are hereby approved.

17. **THIS COURT ORDERS AND DECLARES** that the fees and disbursements of the Information Officer and Stikeman, respectively, that are not set out in the Third Report and Fee Affidavits but that have been or will be incurred in performance of the duties of the Information Officer up to the date of the filing of the Information Officer's Certificate ("**Discharge Date**") or incidental duties that may be required to complete the administration of these proceedings following the Discharge Date are hereby authorized and approved up to a maximum of CDN\$30,000 plus any applicable taxes and disbursements in the case of the Information Officer and CDN\$20,000 plus any applicable taxes and disbursements in the case of Stikeman.

18. **THIS COURT ORDERS** that the Information Officer is hereby authorized and directed to pay any outstanding fees and disbursements owing to Canadian counsel to the Chapter 11 Debtors, the Information Officer and Stikeman as of the Closing Date from the Load Broker Trust prior to paying any remaining balance to the Buyer or a Buyer Designee, as directed by the Buyer, in accordance with paragraph 13 hereof.

TERMINATION OF CCAA PROCEEDINGS

19. **THIS COURT ORDERS** that upon the repayment in full in cash of all indebtedness outstanding under the U.S. Revolver Facility and the Canadian Sub-Facility as of the Closing Date, the DIP ABL Charge (as defined in the Supplemental Order) shall be terminated, released and discharged.

20. **THIS COURT ORDERS** that upon Closing, the DIP Term Loan Charge (as defined in the Supplemental Order) and, subject to payment of the outstanding fees and disbursements of the Information Officer and its counsel, the Administration Charge (as defined in the Supplemental Order), in each case shall be terminated, released and discharged.

21. **THIS COURT ORDERS** that upon the payment of the outstanding fees and disbursements of the Information Officer and its counsel and the filing of the Information Officer's Certificate in accordance with paragraph 9, these CCAA recognition proceedings shall be terminated.

22. **THIS COURT ORDERS** that upon the filing of the Information Officer's Certificate, Alvarez & Marsal Canada Inc. ("**A&M**") shall be and is discharged as the Information Officer in these proceedings effective on the Discharge Date; provided that the Information Officer shall

continue to have the benefit of the provisions of all Orders made in these proceedings, including all approvals, protections and stays of proceedings in favour of the Information Officer.

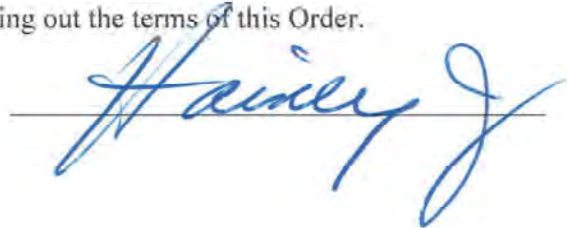
23. **THIS COURT ORDERS AND DECLARES** that upon the filing of the Information Certificate in accordance with paragraph 9 hereof, A&M and Stikeman shall be released and discharged from any and all liability that A&M and Stikeman now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of A&M while acting in its capacity as Information Officer and Stikeman while acting in its capacity as counsel to the Information Officer, save and except for any gross negligence or wilful misconduct on the Information Officer's part. Without limiting the generality of the foregoing, upon the filing of the Information Officer's Certificate, A&M and Stikeman shall be forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within CCAA proceedings, save and except for any gross negligence or wilful misconduct on their part.

24. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Information Officer in any way arising from or related to its capacity or conduct as Information Officer except with prior leave of this Court and on prior written notice to the Information Officer.

GENERAL

25. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective counsel and agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective counsel and agents in carrying out the terms of this Order.

26. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

A handwritten signature in blue ink, appearing to read "Hainey J", is written over a horizontal line.

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ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 18 2019

PER / PAR: *RW*

SCHEDULE A – SALE ORDER



IT IS ORDERED as set forth below:

Date: October 11, 2019

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	) Chapter 11
	)
JACK COOPER VENTURES, INC., <i>et al.</i> , ¹	) Case No. 19-62393 (PWB)
	)
Debtors.	) (Jointly Administered)
	)
	) Re Docket Nos. 21, 224

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Jack Cooper Ventures, Inc. (0805); Jack Cooper Diversified, LLC (9414); Jack Cooper Enterprises, Inc. (3001); Jack Cooper Holdings Corp. (2446); Jack Cooper Transport Company, Inc. (3030); Auto Handling Corporation (4011); CTEMS, LLC (7725); Jack Cooper Logistics, LLC (3433); Auto & Boat Relocation Services, LLC (9095); Axis Logistic Services, Inc. (2904); Jack Cooper CT Services, Inc. (3523); Jack Cooper Rail and Shuttle, Inc. (7801); Jack Cooper Investments, Inc. (6894); North American Auto Transportation Corp. (8293); Jack Cooper Transport Canada Inc. (8666); Jack Cooper Canada GP 1 Inc. (7030); Jack Cooper Canada GP 2 Inc. (2373); Jack Cooper Canada 1 Limited Partnership (3439); and Jack Cooper Canada 2 Limited Partnership (7839). The location of the Debtors' corporate headquarters and service address is: 630 Kennesaw Due West Road NW, Kennesaw, Georgia 30152.

ORDER (I) APPROVING THE SALE OF THE ACQUIRED ASSETS FREE AND CLEAR OF CLAIMS, LIENS, INTERESTS AND ENCUMBRANCES; (II) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES; AND (III) GRANTING RELATED RELIEF

Upon the motion [Docket No. 21] (the “Motion”)² of the Debtors, dated August 6, 2019, for, among other things, entry of an order (this “Order”): (I) approving the sale of the Acquired Assets (the “Sale Transaction”) pursuant to the Stalking Horse APA, as amended, and which for purposes of this Order shall include all exhibits, schedules and ancillary documents related thereto, including the Transaction Documents and the Escrow Agreement, free and clear of all claims, liens, interests and encumbrances (other than Assumed Liabilities and Permitted Encumbrances); (II) authorizing the assumption and assignment of certain executory contracts and unexpired leases (the “Assumed Contracts”) and the assumption of the Assumed Liabilities, each as more fully described in the Stalking Horse APA; and (III) granting related relief, including as provided in the Committee Settlement (as defined below); and the Court having held a hearing on October 11, 2019 (the “Sale Hearing”) to approve the Sale Transaction; and the Court having reviewed and considered the relief sought in the Motion with respect to the Sale Transaction, the declarations submitted in support of the Motion, all objections to the Motion and the Debtors’ reply thereto, and the arguments of counsel made, and the testimony and evidence proffered or adduced, at the Sale Hearing; and all parties in interest having been heard or having had the opportunity to be heard regarding the Sale Transaction and the relief requested in this Order; and due and sufficient notice of the Sale Hearing and the relief sought therein having been given under the particular circumstances and in accordance with the Bidding Procedures Order; and it appearing that no other

² Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to them in the Motion, the Bidding Procedures Order (defined below) or the Stalking Horse APA (defined below), as applicable.

or further notice need be provided; and it appearing that the relief requested in the Motion with respect to the Sale Transaction is in the best interests of the Debtors, their estates, their creditors and other parties in interest; and upon the record of the Sale Hearing and these chapter 11 cases (the "Chapter 11 Cases"), and after due deliberation thereon, and good cause appearing therefor, it is hereby

FOUND, CONCLUDED AND DETERMINED THAT:³

A. This Court has jurisdiction over the Motion and the Sale Transaction pursuant to 28 U.S.C. §§ 157 and 1334 and may enter a final order on the Motion consistent with Article III of the United States Constitution. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409. The legal predicates for the relief requested in the Motion are Bankruptcy Code sections 105, 363, 364, 365 and 503. Such relief is also warranted pursuant to Bankruptcy Rules 2002, 6004, 6006, 9006, 9007, and 9014.

B. A reasonable opportunity to object or to be heard regarding the requested relief has been afforded to all interested parties and entities. Certain parties filed objections to the Motion (each, an "Objection" and, collectively, the "Objections") as more particularly identified and described in Exhibit B to the *Debtors' Omnibus Reply In Support of Entry of the Order Approving the Sale of the Acquired Assets Free and Clear of Claims, Liens and Encumbrances; (II) Approving*

³ The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such. Furthermore, any findings of fact or conclusions of law made by the Court on the record at the close of the Sale Hearing are incorporated herein pursuant to Fed. R. Bank. P. 7052.

the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (III) Granting Related Relief [Docket No. 362].

C. On August 22, 2019, the Debtors entered into the Stalking Horse APA subject to higher or better offers.

D. On September 3, 2019, the Court entered an order [Docket No. 224] (the “Bidding Procedures Order”), which, among other things, (i) authorized the Debtors’ entry into the Stalking Horse APA, (ii) approved the Bidding Procedures, (iii) approved the Expense Reimbursement, (iv) scheduled the Bid Deadline, the Auction, the Sale Objection Deadline, and the Sale Hearing, (v) approved the form and manner of notice with respect to the Sale (the “Sale Notice”), and (vi) approved the Assumption and Assignment Procedures and the form and manner of the Cure Notice in connection thereto. In accordance with the Bidding Procedures Order, the Stalking Horse APA was deemed a Qualified Bid and the Buyer was eligible to participate in the Auction as a Qualified Bidder. The Bidding Procedures were substantively and procedurally fair to all parties and all potential bidders and afforded notice and a full, fair and reasonable opportunity for any person to make a higher or otherwise better offer to purchase the Acquired Assets. The Debtors conducted the sale process without collusion and in accordance with the Bidding Procedures. The Debtors and their professionals adequately marketed the Acquired Assets and conducted the marketing and sale process in compliance with the Bidding Procedures and the Bidding Procedures Order. Based upon the record of these proceedings, creditors and other parties in interest and prospective purchasers were afforded a reasonable and fair opportunity to bid for the Acquired Assets. The Debtors and their professionals conducted the sale process in compliance with the Bidding Procedures Order, and afforded potential purchasers a full, fair and reasonable opportunity

to make a higher or otherwise better offer for the Acquired Assets than that reflected in the Stalking Horse APA.

E. On October 10, 2019, the Debtors, the Committee, the Buyer, Wells Fargo, Cerberus, and Wilmington Trust National Association entered into that certain Stipulation of Settlement (the “Settlement Stipulation” and the “Committee Settlement,” as applicable), a copy of which is attached hereto as Exhibit 1, pursuant to which the parties thereto consensually resolved all of the Committee’s issues in relation to the Challenge Period, Sale Motion, and other matters set forth therein. The effectiveness of the Committee Settlement is conditioned upon entry of this Order, and the Committee’s support for the Sale Transaction is conditioned upon approval of the Committee Settlement.

F. The Debtors have articulated good and sufficient business reasons for the Court to authorize (i) the Debtors’ entry into the Stalking Horse APA and consummation of the Sale Transaction including the sale of the Acquired Assets to the Stalking Horse Bidder or any Buyer Designee (collectively, the “Buyer”) pursuant to the terms of the Stalking Horse APA, (ii) the assumption and assignment of the Assumed Contracts as set forth herein and in the Stalking Horse APA, (iii) the Committee Settlement, and (iv) the assumption of the Assumed Liabilities as set forth herein and in the Stalking Horse APA. Entry into the Stalking Horse APA and the Committee Settlement, and consummation of the Sale Transaction are sound exercises of business judgment, and such acts are in the best interests of the Debtors, their estates and creditors, and all parties in interest.

G. The Debtors have articulated good and sufficient business reasons justifying the sale of the Acquired Assets to the Buyer. Additionally: (i) the Debtors conducted a robust

marketing process to sell the Acquired Assets and the Stalking Horse APA constitutes the highest and best offer for the Acquired Assets; (ii) the Bidding Procedures utilized were designed to yield the highest or otherwise best bids for the Acquired Assets; (iii) the Stalking Horse APA and the closing of the Sale Transaction present the best opportunity to realize the highest value for the Acquired Assets; (iv) there is risk of deterioration of the value of the Acquired Assets if the Sale Transaction is not consummated promptly; (v) the Stalking Horse APA and the sale of the Acquired Assets to the Buyer provide greater value to the Debtors' estates than would be provided by any other presently available alternative; and (vi) based upon the Committee Settlement, the Committee supports consummation of the Sale Transaction. Good and sufficient reasons for approval of the Stalking Horse APA and the Sale Transaction have been articulated by the Debtors. The Debtors have demonstrated compelling circumstances and a good, sufficient and sound business purpose for the sale outside: (i) the ordinary course of business, pursuant to Bankruptcy Code section 363(b); and (ii) a plan of reorganization, in that, among other things, the immediate consummation of the Sale Transaction is necessary and appropriate to maximize the value of the Debtors' estates. To maximize the value of the Acquired Assets and preserve the viability of the operations to which the Acquired Assets relate, it is essential that the Sale Transaction occur within the time constraints set forth in the Stalking Horse APA and the Restructuring Support Agreement. Time is of the essence in consummating the Sale Transaction.

H. Sound business justifications also exist for the establishment of the Professional Fees Escrow Account and the Wind-Down Escrow Account (together, the "Escrows") pursuant to the Escrow Agreement as provided in Section 4.2 of the Stalking Horse APA. The Escrows will avoid a freefall shutdown of the Debtors' remaining estates, provide for, among other things, the

payment of accrued and unpaid professional fees and expenses in accordance with the Stalking Horse APA, the implementation of the Committee Settlement, the payment of payroll, withholding taxes, and other related expenses accrued and unpaid as of the Closing Date, and provide a mechanism to assist in the orderly and responsible wind-down of the Debtors' estates.

I. As evidenced by the affidavits of service [Docket Nos. 45, 120, 128, 164, 166, 254, 262, 311, 313 and 342] and publication [Docket No. 264] previously filed with the Court, and based on the representations of counsel at the Sale Hearing, (i) proper, timely, adequate and sufficient notice of the Motion, the Sale Hearing, the Sale Transaction, the Assumption and Assignment Procedures and the assumption and assignment of the Assumed Contracts and the applicable Cure Amounts (as defined herein) has been provided in compliance with the Bidding Procedures Order and in accordance with Bankruptcy Code sections 102(I), 363, and 365, and Bankruptcy Rules 2002, 4001, 6004, 6006, 9006, 9007 and 9014, (ii) such notice was good and sufficient, and appropriate under the particular circumstances, and (iii) no other or further notice of the Motion, the Sale Hearing, the Sale Transaction, the assumption and assignment of the Assumed Contracts or the Cure Amounts is or shall be required. With respect to entities whose identities were not reasonably ascertained by the Debtors, publication of the Sale Notice was made in the *USA Today (National Edition)* on September 10, 2019. Such notice was sufficient and reasonably calculated under the circumstances to reach all known and unknown holders of claims and interests and non-Debtor counterparties to executory contracts.

J. The Debtors' marketing process with respect to the Sale afforded a full, fair and reasonable opportunity for any person or entity to make a higher or otherwise better offer. No other person or entity or group of entities or persons submitted a Qualified Bid prior to the Bid

Deadline. Therefore, in accordance with the Bidding Procedures Order, no Auction was conducted and the Debtors determined that the Stalking Horse APA constituted the highest and best offer and selected the Stalking Horse APA as the Successful Bid. The Debtors therefore determined in a valid and sound exercise of their business judgment, and in accordance with the Bidding Procedures and Bid Procedures Order, that the highest and best Qualified Bid for the Acquired Assets is that of the Buyer and that the Stalking Horse APA will provide a greater recovery for the Debtors' estates than would be provided by any other available alternative. The Stalking Horse APA was negotiated and is undertaken by the Debtors and the Buyer at arm's-length, without collusion or fraud, and in good faith within the meaning of Bankruptcy Code section 363(m). The Buyer is not an "insider" of any of the Debtors as that term is defined by Bankruptcy Code section 101(31). The Buyer recognized that the Debtors were free to deal with any other party interested in acquiring the Acquired Assets, complied with the Bidding Procedures Order, and agreed to, and did, subject its bid to the competitive Bidding Procedures approved in the Bidding Procedures Order. All releases and payments to be made by the Buyer and other agreements or arrangements entered into by the Buyer in connection with the Sale Transaction, including the Committee Settlement, have been disclosed. The Buyer has not violated Bankruptcy Code section 363(n) by any action or inaction on its part. As a result of the foregoing, the Buyer is entitled to the protections of Bankruptcy Code section 363(m), including in the event this Order or any portion thereof is reversed or modified on appeal, and otherwise has proceeded in good faith in all respects in connection with these cases.

K. Pursuant to the Bidding Procedures, applicable law, including Bankruptcy Code sections 363(b) and 363(k), and in accordance with the DIP Financing Orders, the Buyer (on behalf

of the Junior Term Loan Lenders (as defined in the RSA)) was authorized to credit bid for the Acquired Assets, the obligations arising under the Junior Credit Agreements, and the DIP Term Loan Credit Agreement, as well as adequate protection obligations granted pursuant to the DIP Financing Orders, in each case, as contemplated by the Stalking Horse APA and the Bidding Procedures Order. Pursuant to the Stalking Horse APA, the Buyer credit bid (the "Credit Bid and Release") a portion of such obligations, with the balance of the Purchase Price being paid in cash and the assumption of liabilities. The Credit Bid and Release, plus the assumption of the Assumed Liabilities and the cash consideration provided for under the Stalking Horse APA, was a valid and proper offer pursuant to the Bidding Procedures Order and Bankruptcy Code sections 363(b) and 363(k). There is no cause to limit the amount of the Credit Bid and Release pursuant to section 363(k) of the Bankruptcy Code.

L. The Acquired Assets sought to be transferred and/or assigned, as applicable, by the Debtors to the Buyer pursuant to the Stalking Horse APA are property of the Debtors' estates and title thereto is vested in the Debtors' estates. The Debtors: (i) have full power and authority to execute the Stalking Horse APA and all other documents contemplated thereby, (ii) have all of the power and authority necessary to consummate the transactions contemplated by the Stalking Horse APA, and (iii) have taken all corporate action necessary to authorize and approve the Stalking Horse APA, the sale of the Acquired Assets, and all other actions required to be performed by the Debtors in order to consummate the transactions contemplated in the Stalking Horse APA. No consents or approvals, other than those already obtained or expressly provided for in the Stalking Horse APA or this Order, are required for the Debtors to consummate the Sale Transaction.

M. The total consideration provided by the Buyer for the Acquired Assets represents the highest and best offer received by the Debtors, and the Purchase Price constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code, the Uniform Voidable Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act and any other applicable laws, and may not be avoided under Bankruptcy Code section 363(n) or any provision of chapter 5 of the Bankruptcy Code or under any other law of the United States, any state, territory, possession thereof, or the District of Columbia, or any other applicable law. The Exit Facilities are being extended in good faith and for fair value and, therefore, the obligations thereunder and the liens granted therein are valid and binding and may not be avoided under the Bankruptcy Code, the Uniform Voidable Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, and any other applicable laws. No other person or entity or group of persons or entities has offered to purchase the Acquired Assets for an amount that would provide greater economic value to the Debtors' estates than the Buyer. The Debtors' determination that the Stalking Horse APA constitutes the highest and best offer for the Acquired Assets constitutes a valid and sound exercise of the Debtors' business judgment. The Court's approval of the Motion, the Sale Transaction, the Committee Settlement, and the Stalking Horse APA is in the best interests of the Debtors, their estates and creditors and all other parties in interest.

N. The Buyer would not have entered into the Stalking Horse APA and would not consummate the Sale Transaction if the sale of the Acquired Assets to the Buyer were not free and clear of all claims, liens, interests and encumbrances (other than Permitted Encumbrances and

Assumed Liabilities)⁴ pursuant to Bankruptcy Code section 363(f) or if the Buyer would, or in the future could, be liable for any of such claims, liens, interests and encumbrances. Unless expressly included in the Assumed Liabilities and Permitted Encumbrances, neither the Buyer nor any of the Buyer's affiliates (including any subsidiary of Buyer, any person or entity that could be treated as a single employer with the Buyer pursuant to Section 4001(b) the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or Section 414(b), (c), (m) or (o) of the Internal Revenue Code of 1986, as amended ("IRC"), Solus Alternative Asset Management LP, any of its managed funds or accounts, any of its investors, shareholders, owners, representatives, officers, limited or general partners, directors, or agents or affiliates thereof (collectively, the "Buyer Group") shall be responsible for any claims, liens, liabilities, obligations, interests and encumbrances, including in respect of the following: (i) any labor or employment agreements (excluding, with respect to the Buyer, the Buyer's obligations under any Collective Bargaining Agreement and Key Employment Agreements that are assumed by the Buyer); (ii) any mortgages, deeds of trust and security interests; (iii) any intercompany loans and receivables between one or more of the Sellers and any Debtor; (iv) any pension, multiemployer plan (as such term is defined in Section 3(37) or Section 4001(a)(3) of ERISA), health or welfare, compensation or other employee benefit plans, agreements, practices and programs, including, without limitation, any pension plan of any of the Debtors or any multiemployer plan to which the Debtors have at any time contributed to or had any liability or potential liability, except, for the avoidance of doubt

⁴ For the avoidance of doubt, "Assumed Liabilities" includes those obligations under the Prepetition ABL Facility, the DIP ABL Facility and the Prepetition First Lien Term Loan Facility, in each case that are being amended, amended and restated, supplemented or replaced by the Exit Facilities. In addition, "Permitted Encumbrances" includes the liens on and security interests in the Acquired Assets held by the agents under the Prepetition ABL Facility, the DIP ABL Facility, and the Prepetition First Lien Term Loan Facility, in each case that are continuing under the Exit Facilities.

with respect to the Buyer, the Buyer's obligations under the Hybrid Plan Participation Agreement that was approved by the Court upon entry of the *Order Authorizing the Debtors to Enter Into the Pension Plan Agreement and Release* [Docket No. 374]; (v) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to (a) ERISA, (b) the Fair Labor Standards Act, (c) Title VII of the Civil Rights Act of 1964, (d) the Federal Rehabilitation Act of 1973, (e) the National Labor Relations Act, (f) the Age Discrimination and Employee Act of 1967 and Age Discrimination in Employment Act, as amended, (g) the Americans with Disabilities Act of 1990, (h) the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, including, without limitation, the requirements of Part 6 of Subtitle B of Title 1 of ERISA and Section 4980B of the IRC and of any similar state law (collectively, "COBRA"), (i) state discrimination laws, (j) state unemployment compensation laws or any other similar state laws, or (k) any other state or federal benefits or claims relating to any employment with the Debtors or any of their predecessors; (vi) any liabilities arising under any Environmental Laws with respect to any assets owned or operated by any of the Debtors or any corporate predecessor of any of the Debtors at any time prior to the Closing Date; (vii) any bulk sales or similar law; (viii) any tax statutes or ordinances, including, without limitation, the IRC; and (ix) any Excluded Liabilities. There is no better available alternative to maximize the value of the Acquired Assets than the Sale Transaction with the Buyer. The Sale Transaction contemplated by the Stalking Horse APA is in the best interests of the Debtors, their estates and creditors, and all other parties in interest.

O. The Debtors may sell the Acquired Assets free and clear of all claims, liens, interests and encumbrances (other than Assumed Liabilities and Permitted Encumbrances) because, with respect to each creditor asserting a claim, lien, interest or encumbrance, one or more of the standards set forth in Bankruptcy Code section 363(f)(1)-(5) has been satisfied. Those holders of claims, liens, interests or encumbrances that did not object to or that withdrew their objections to the sale of the Acquired Assets or the Motion, are deemed to have consented to the Motion and the Sale Transaction pursuant to Bankruptcy Code section 363(f)(2). Those holders of claims, liens, interests, or encumbrances that did object fall within one or more of the other subsections of Bankruptcy Code section 363(f) or are adequately protected. The Revolving Lenders' consent to the Motion and the Sale Transaction is conditioned upon the payment in full in cash (whether pursuant to the Exit Revolving Facility or otherwise), by no later than the Closing Date, of all due and payable Obligations (as defined in the Revolver DIP Agreement, which is defined in the Final DIP Order).

P. Neither the Debtors, the Buyer, the Committee, nor the administrative agents or lenders under the Exit Facilities engaged in any conduct that would cause or permit the Stalking Horse APA, the other Transaction Documents, including the Exit Facilities and the Committee Settlement, or the consummation of the Sale Transaction (including the extension of the Exit Facilities to the Buyer) to be avoided, or costs or damages to be imposed, under Bankruptcy Code section 363(n) or under any other law of the United States, any state, territory, possession thereof, the District of Columbia, or any other applicable law.

Q. The Stalking Horse APA and the consideration offered by the Buyer pursuant to the Stalking Horse APA constitute reasonably equivalent value and fair consideration. The

Stalking Horse APA was not entered into, and the Sale Transaction is not consummated, for the purpose of hindering, delaying or defrauding the Debtors' creditors under the Bankruptcy Code or under any other law of the United States, any state, territory, possession thereof, or the District of Columbia, or any other applicable law. Neither the Debtors, the Buyer, nor the administrative agents or lenders under the Exit Facilities has entered into the Stalking Horse APA, the Committee Settlement or the other Transaction Documents, including the Exit Facilities, or is consummating the Sale Transaction for any fraudulent or otherwise improper purpose. The Committee's support for the Sale Transaction, which was obtained by means of the Committee Settlement, is critical to both the Debtors and the Buyer.

R. For the avoidance of doubt, following the Closing, the Acquired Assets shall be subject in all respects to the liens securing the Exit Facilities, to the extent provided by the documents governing the Exit Facilities.

S. Upon the Closing, no member of the Buyer Group shall, or shall be deemed to, (i) be the successor of or successor employer to any of the Sellers, including without limitation, with respect to any Collective Bargaining Agreements, any Benefit Plans, or any Multiemployer Plans, and the Buyer shall instead be, and be deemed to be, a new employer, including with respect to, among other things, any and all federal or state unemployment laws, including any unemployment compensation or tax laws, or any other similar federal or state laws (provided that the Buyer shall pay any employee-related liabilities to the extent included in the Assumed Employee Liabilities); (ii) have any common law successorship liability in relation to any Benefit Plan or Multiemployer Plan, including with respect to withdrawal liability or contribution obligations; (iii) have, *de facto*, or otherwise, merged or consolidated with or into Sellers; (iv) be a mere continuation or substantial

continuation of Sellers or the enterprise(s) of Sellers; or (v) be liable for any acts or omissions of Sellers in connection with the Collective Bargaining Agreements, the conduct of the Business, or the operation, funding or administration of the Benefit Plans or Multiemployer Plans or arising under or related to the Acquired Assets other than as expressly set forth in the Stalking Horse APA and the Transaction Documents. Without limiting the generality of the foregoing, and except as otherwise provided in the Stalking Horse APA or the Committee Settlement, the parties intend and the Court hereby finds that the Buyer Group shall not be liable for any Encumbrance or Liability (other than Assumed Liabilities and Permitted Encumbrances) against any Seller, or any of its predecessors or affiliates, and the Buyer Group shall have no successor or vicarious liability of any kind or character whether known or unknown as of the Closing Date, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the Business, any Collective Bargaining Agreement, the operation, funding, or administration of the Benefit Plans or Multiemployer Plans, the Acquired Assets or any Liabilities of any Seller arising or attributable to periods prior to the Closing Date. The Buyer would not have acquired the Acquired Assets but for the foregoing protections against potential claims based upon "successor liability," *de facto* merger, or theories of similar effect.

T. The Debtors have proven and demonstrated that it is an exercise of their sound business judgment to assume and assign the Assumed Contracts to the Buyer in connection with the consummation of the Sale Transaction, and the assumption and assignment of the Assumed Contracts to the Buyer is in the best interests of the Debtors, their estates and creditors and all parties in interest. The Assumed Contracts being assigned to the Buyer are an integral part of the Acquired Assets being purchased by the Buyer, and accordingly, such assumption and assignment

of the Assumed Contracts is reasonable and enhances the value of the Debtors' estates. The cure amounts required to be paid pursuant to Bankruptcy Code section 365(b), whether agreed or judicially resolved (the "Cure Amounts"), are deemed to be the entire cure obligation due and owing under the Assumed Contracts under Bankruptcy Code section 365(b). To the extent that any non-Debtor counterparty to an Assumed Contract failed to timely file an objection to the proposed Cure Amount filed with the Bankruptcy Court, the Cure Amount listed in the Cure Notice shall be deemed to be the entire cure obligation due and owing under the applicable Assumed Contract.

U. Each provision of the Assumed Contracts or applicable non-bankruptcy law that purports to prohibit, restrict or condition, or could be construed as prohibiting, restricting or conditioning, assignment of any Assumed Contracts has been satisfied or is otherwise unenforceable under Bankruptcy Code section 365.

V. Assumption and assignment of any Assumed Contract to the Buyer pursuant to this Order and the Stalking Horse APA and full payment of any applicable Cure Amount shall result in the full release and satisfaction of any and all cures, claims or defaults, whether monetary or nonmonetary, including defaults of provisions restricting change in control or ownership interest composition or other bankruptcy-related defaults, arising under any Assumed Contract at any time prior to the Closing Date, and shall relieve the Debtors and their estates from any liability for any breach of such Assumed Contract occurring after such assignment.

W. No default exists under any of the Assumed Contracts to which General Motors LLC and/or General Motors Holdings LLC (collectively, "GM"), and, such contracts, the "GM

Contracts”) is a party, and therefore, the Debtors are not required to satisfy the requirements of section 365(b)(1) of the Bankruptcy Code.

X. The Buyer’s assumption of any Assumed Contracts to which GM is not a party, including the Agreement on Purchased Transportation between Jack Cooper Transport and Teamsters National Automobile Transporters Industry Negotiating Committee, shall not modify or change any right of GM, or the obligations of either GM or the Buyer under the GM Contracts.

Y. Among the GM Contracts is the Master Contract for Vehicle Haulaway Transportation Services and the Master Contract for Yard Management Services, each dated March 28, 2019 and between Debtor Jack Cooper Transport Company, Inc. and General Motors Holdings, LLC (the “Haulaway and Yard Management Contracts”). In addition to and notwithstanding anything to the contrary herein, and consistent with Section 365 of the Bankruptcy Code but restated here for the sake of clarity, the Buyer shall assume responsibility for the Debtors’ obligations under the Haulaway and Yard Management Contracts for unknown, unliquidated or pending amounts arising under “Section 7. Cargo Loss and Damage” of the Haulaway and Yard Management Contracts, that may have been incurred by the Debtors pre-Closing in the ordinary course, but which unknown, unliquidated or pending amounts only become known, liquidated and/or payable under Section 7 of the Haulaway Contract post-Closing, if any.

Z. The Buyer has demonstrated adequate assurance of future performance of all Assumed Contracts, including the GM Contracts, within the meaning of Bankruptcy Code section 365.

AA. Upon the assignment to the Buyer and the payment of the relevant Cure Amount (if applicable), (i) each Assumed Contract shall be deemed valid and binding and in full force and

effect in accordance with its terms, and all defaults thereunder, if any, shall be deemed cured, subject to the provisions of this Order; and (ii) the Buyer shall assume all obligations under each Assumed Contract.

BB. An injunction against creditors and third parties pursuing claims against, and liens, interests and encumbrances on, the Acquired Assets is necessary to induce the Buyer to close the Sale Transaction, and the issuance of such injunctive relief is therefore necessary to avoid irreparable injury to the Debtors' estates and will benefit the Debtors' creditors.

CC. The Sale Transaction does not constitute a *sub rosa* chapter 11 plan. The Sale Transaction neither impermissibly restructures the rights of the Debtors' creditors nor impermissibly dictates a Chapter 11 plan for any of the Debtors.

DD. This Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h) and 6006(d), the Court expressly finds that there is no just reason for delay in the implementation of this Order, and, sufficient cause having been shown, waives any such stay, and expressly directs entry of judgment as set forth herein. The Debtors have demonstrated compelling circumstances and a good, sufficient and sound business purpose and justification for the immediate approval and consummation of the Sale Transaction as contemplated by the Stalking Horse APA and the Committee Settlement. The Buyer, being a good faith purchaser under section 363(m) of the Bankruptcy Code, may close the Sale Transaction contemplated by the Stalking Horse APA at any time after entry of this Order.

EE. The relief granted herein is in the best interests of the Debtors, their estates and creditors, and other parties in interest.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is **GRANTED**, to the extent set forth herein.
2. Any Objection to the Motion, or any other relief granted in this Order, to the extent not resolved, adjourned for hearing on a later date, waived or withdrawn or previously overruled, and all reservations of rights included therein, is hereby **OVERRULED** and **DENIED** on the merits.
3. The Bidding Procedures utilized by the Debtors with respect to the Sale Transaction are hereby ratified and were appropriate under the circumstances in order to maximize the value obtained from the Sale Transaction for the benefit of the estates.
4. Pursuant to Bankruptcy Code sections 105, 363, 364, 365 and 503 and the Stalking Horse APA, the Credit Bid and Release, the Sale Transaction, and the Committee Settlement are hereby approved and the Debtors are authorized to enter into and perform under the Stalking Horse APA, the Committee Settlement and the other Transaction Documents. Pursuant to Bankruptcy Code sections 105, 363, 364, 365 and 503, each of the Debtors and the Buyer are hereby authorized and directed to take any and all actions necessary or appropriate to: (i) consummate the Sale Transaction and the Closing in accordance with the Motion, the Stalking Horse APA, and this Order; (ii) assume and assign the Assumed Contracts; (iii) provide for the assumption of the Assumed Liabilities; (iv) perform, consummate, implement and close fully the Stalking Horse APA together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Stalking Horse APA; (v) perform, consummate, and implement the Committee Settlement and the Settlement Stipulation, as applicable; (vi) establish and fund the Escrows; and (vii) enter into the Exit Facilities on the Closing Date. The Debtors and each other party to the Transaction Documents, including the Escrow Agreement (as defined in the Stalking

Horse APA) and the Committee Settlement, including the Escrow Agreement (as defined in the Settlement Stipulation) (the “Distribution Escrow Agreement”) are hereby authorized and directed to perform each of their covenants and undertakings as provided in the Stalking Horse APA and the Transaction Documents, including the Escrow Agreement, the Committee Settlement, and the Distribution Escrow Agreement, prior to or after the Closing Date without further order of the Court. The Buyer and the Debtors shall have no obligation to close the Sale Transaction except as is contemplated and provided for in the Stalking Horse APA.

5. Pursuant to Bankruptcy Code section 365(f), notwithstanding any provision of any Assumed Contract or applicable non-bankruptcy law that prohibits, restricts or conditions the assignment of the Assumed Contracts, the Debtors are authorized to assume the Assumed Contracts and to assign the Assumed Contracts to the Buyer or to any Buyer Designee, which assignment shall take place on and be effective as of the Closing or as otherwise provided by order of this Court. There shall be no accelerations, assignment fees, increases, or any other fees charged to the Buyer or the Debtors as a result of the assumption and assignment of the Assumed Contracts.

6. The Buyer shall have assumed the Assumed Contracts (including the Key Employment Agreements), and pursuant to section 365(f) of the Bankruptcy Code, the assignment by the Debtors of such Assumed Contracts shall not be a default thereunder. After the payment of the relevant Cure Amount (if applicable), neither the Debtors, their bankruptcy estates nor the Buyer shall have any further liabilities to the non-Debtor counterparties to the Assumed Contracts, other than the Buyer’s obligations under the Assumed Contracts that accrue or become due and payable on or after the Closing Date.

7. The Debtors' assumption of the Assumed Contracts is subject to the consummation of the Sale. To the extent that an objection by a counterparty to any Assumed Contract, including all objections related to Cure Amounts, is not resolved prior to the Closing Date, the Debtors, with the consent of the Buyer and in accordance with the Stalking Horse APA, may elect to: (i) not assume and assign to the Buyer the Assumed Contract; (ii) postpone the assumption of such Assumed Contract until the resolution of such objection; or (iii) reserve the disputed portion of the Cure Amount and assume the Assumed Contract on the Closing Date. So long as the claimed Cure Amount is held in reserve, and there are no other unresolved objections to the assumption and assignment of the applicable Assumed Contract, the Debtors can, without further delay, assume and assign the Assumed Contract that is the subject of the objection. Under such circumstances, the respective objecting counterparty's recourse would be limited to the funds held in reserve.

8. Notwithstanding anything to the contrary in the Motion, any Notices related thereto, or this Order, the Cigna Employee Benefits Agreements (as defined in the *Objection of Cigna Entities to Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Docket No. 337] ("Cigna Objection")) shall be assumed and assigned to the Buyer as of the Closing Date; provided, however, that: (i) any unpaid obligations to Cigna due and accruing under the Cigna Employee Benefits Agreements as of the Closing Date shall pass through to the Buyer and survive assumption and assignment so that nothing in this Order or 11 U.S.C. § 365 shall affect the obligations accruing under the Cigna Employee Benefits Agreements Contracts prior to the Closing Date; and (ii) prior to the Closing Date, the Buyer shall provide Cigna with an executed form W-9 for the Buyer, and contact information for a Buyer representative to whom Employee Benefits Agreement questions can be directed.

9. Notwithstanding anything to the contrary in the Motion, any Notices related thereto, or this Order, the Leases (as defined in the *Protective Objection of Stonebriar Commercial Finance LLC to Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* [Docket No. 335] (“Stonebriar Objection”)) shall be assumed and assigned to the Buyer as of the Closing Date; provided, however, that: (i) any unpaid obligations due under the Leases on and after November 1, 2019, shall pass through to the Buyer and survive assumption and assignment so that nothing in this Order or 11 U.S.C. § 365 shall affect the obligations accruing under the Leases.

10. Notwithstanding anything in this Order or the Stalking Horse APA to the contrary, with respect to certain commercial automobile liability, general liability and workers’ compensation insurance programs (collectively, the “Programs”) of the Debtors with National Interstate Insurance Company and its affiliates, including National Interstate Insurance Company of Hawaii, Inc., Triumphe Casualty Company, Vanliner Insurance Company, Hudson Indemnity, Ltd. and American Money Management Corporation (collectively, “NIIC”), the executory contracts related thereto, as are identified and agreed among the Debtors, Buyer and NIIC at or prior to Closing, shall be assumed by the Debtors and assigned to the Buyer with such amendments and modifications and/or commutation as may be mutually agreed among the Debtors, Buyer and NIIC at or prior to Closing; provided, that to the extent the parties are unable to mutually agree on such amendments and modifications and/or commutation, the Debtors and Buyer reserve the right to classify the Programs, and executory contracts related thereto, as Excluded Contracts at any time on or prior to the Closing Date. In addition, for avoidance of doubt, the terms of this Sale Order and the Stalking Horse APA shall, subject to any mutually agreed amendments and

modifications and/or commutation to the contracts related to the Programs, not alter, modify, affect or otherwise impair NIIC's rights and interests in the cash or other collateral maintained by NIIC related to the Programs, and such cash or other collateral remains subject to NIIC's rights under the contracts and applicable law that governs the Programs. Regardless of whether or not the contracts related to the Programs are Assumed Contracts, the reversionary interests of the Debtors to the cash or other collateral securing or otherwise relating to the Programs shall transfer to Buyer subject to the terms and conditions of the contracts and agreements related to the Programs, as may be amended.

11. Notwithstanding anything in this Order or the Stalking Horse APA to the contrary, all of the issued surety bonds (the "Bonds") referenced in the *Limited Objection of the Surety to the Stalking Horse APA* [Docket No. 317] (the "Surety Objection") shall be assumed by the Buyer, on the conditions that: (a) prior to the Closing, the Buyer and Surety (as defined in the Surety Objection) shall execute a general indemnity agreement, acceptable to the Surety and the Buyer (the "Indemnity Agreement"), regarding all of the assumed Bonds; and (b) the Buyer shall provide the Surety with a replacement irrevocable letter of credit issued by Wells Fargo, in its capacity as letter of credit issuer under the Exit Revolving Facility, in the amount of \$250,000 in favor of the Surety to secure the Bonds and Buyer's obligations under the Indemnity Agreement (the "New L/C"), after which the Surety shall execute appropriate documents with the Debtors and Wells Fargo to effect a release and cancellation of that certain irrevocable letter of credit issued by Wells Fargo, No. IS009842U (as amended), in the amount of \$250,000, obtained by one or more of the Debtors in favor of the Surety to collateralize the Bonds prior to the Petition Date. The issuance of the New L/C shall comply in all respects with the terms and conditions of the Exit Revolving

Facility. As part of the assumption of the Bonds, the Cure Amount shall be an amount equal to the Surety's reasonable and documented legal fees and costs in an amount not to exceed \$10,000, to be paid either at the Closing, or thereafter by a draw on the New L/C.

12. Upon the Closing: (a) the Debtors are hereby authorized and directed to consummate, and shall be deemed for all purposes to have consummated, the sale, transfer and assignment of all of the Debtors' rights, title and interest in the Acquired Assets (which for the avoidance of doubt, and subject to paragraphs 35 through 37 hereof, includes any affirmative claims, demands, remedies, rights and/or causes of action against any third-party) to the Buyer free and clear of all claims, liens, interests, and encumbrances (other than the Assumed Liabilities and Permitted Encumbrances) and (b) except as otherwise expressly provided in the Stalking Horse APA, all Encumbrances and Liabilities (other than the Assumed Liabilities and the Permitted Encumbrances) shall not be enforceable as against any member of the Buyer Group or the Acquired Assets. Unless otherwise expressly included in the Assumed Liabilities and Permitted Encumbrances, or as otherwise expressly provided by this Order, no member of the Buyer Group shall be responsible for any claims, liens, liabilities, obligations, interests or encumbrances, including in respect of the following: (i) any labor or employment agreements (excluding, with respect to the Buyer, the Buyer's obligations for any Collective Bargaining Agreement or Key Employment Agreement that is assumed by the Buyer); (ii) any mortgages, deeds of trust and security interests; (iii) any intercompany loans and receivables between one or more of the Sellers and any Debtor; (iv) any pension, multiemployer plan (as such term is defined in Section 3(37) or Section 4001(a)(3) of ERISA), health or welfare, compensation or other employee benefit plans, agreements, practices and programs, including, without limitation, any pension plan of any of the

Debtors or any multiemployer plan to which the Debtors have at any time contributed to or had any liability or potential liability, except, for the avoidance of doubt, with respect to the Buyer, the Buyer's obligations under the Hybrid Plan Participation Agreement; (v) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to (a) ERISA, (b) the Fair Labor Standards Act, (c) Title VII of the Civil Rights Act of 1964, (d) the Federal Rehabilitation Act of 1973, (e) the National Labor Relations Act, (f) the Age Discrimination and Employee Act of 1967 and Age Discrimination in Employment Act, as amended, (g) the Americans with Disabilities Act of 1990, (h) COBRA, (i) state discrimination laws, (j) state unemployment compensation laws or any other similar state laws, or (k) any other state or federal benefits or claims relating to any employment with the Debtors or any of their predecessors; (vi) any liabilities arising under any Environmental Laws with respect to any assets owned or operated by any of the Debtors or any corporate predecessor of any of the Debtors at any time prior to the Closing Date; (vii) any bulk sales or similar law; (viii) any tax statutes or ordinances, including, without limitation, the IRC, as amended; and (ix) any Excluded Liabilities. A certified copy of this Order may be filed with the appropriate clerk and/or recorder to act to cancel any such lien, claim, interest or encumbrance of record.

13. The transfer to the Buyer of the Debtors' rights, title, and interest in the Acquired Assets pursuant to the Stalking Horse APA shall be, and hereby is deemed to be, a legal, valid and effective transfer of the Debtors' rights, title, and interest in the Acquired Assets, and vests with or will vest in the Buyer all rights, title, and interest of the Debtors in the Acquired Assets, free and clear of all claims, liens, interests, and encumbrances of any kind or nature whatsoever (other

than the Permitted Encumbrances and the Assumed Liabilities), with any such claims, liens, interests, and encumbrances attaching to the net available proceeds with the same validity, extent, and priority as immediately prior to the sale of the Acquired Assets, subject to the provisions of the Stalking Horse APA and this Order, and any rights, claims, and defenses of the Debtors and other parties in interest. For the avoidance of doubt, the Acquired Actions shall include all of the Debtors' claims and causes of action arising under Chapter 5 of the Bankruptcy Code.

14. None of the Buyer or its affiliates, successors, assigns, equity holders, officers, directors, employees or professionals shall have or incur any liability to, or be subject to any action by any of the Debtors or any of their estates, predecessors, successors, or assigns, arising out of the negotiation, investigation, preparation, execution, or delivery of the Stalking Horse APA and the entry into and consummation of the sale of the Acquired Assets, except as expressly provided in the Stalking Horse APA, the Committee Settlement and this Order.

15. Except as expressly provided in the Stalking Horse APA, the other Transaction Documents, including the Exit Facilities and the Committee Settlement, or by this Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax and regulatory authorities, lenders, vendors, suppliers, employees, trade creditors, litigation claimants, and other persons, holding claims, liens, interests, or encumbrances of any kind or nature whatsoever against or in the Debtors or the Debtors' interests in the Acquired Assets (whether known or unknown, legal or equitable, matured or unmatured, contingent or noncontingent, liquidated, or unliquidated, asserted or unasserted, whether arising prior to or subsequent to the commencement of these Chapter 11 Cases, whether imposed by agreement, understanding, law, equity, or otherwise), including, without limitation, the non-Debtor party or

parties to each Assumed Contract, arising under or out of, in connection with, or in any way relating to, the Acquired Assets or the transfer of the Debtors' interests in the Acquired Assets to the Buyer shall be and hereby are forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing claims, liens, interests and encumbrances against the Buyer or its affiliates, successors, assigns, equity holders, directors, officers, employees or professionals, the Acquired Assets, or the interests of the Debtors in such Acquired Assets (other than Assumed Liabilities or Permitted Encumbrances). Following the Closing, no holder of a claim, lien, interest, or encumbrance against the Debtors (other than Assumed Liabilities or Permitted Encumbrances) shall interfere with the Buyer's title to or use and enjoyment of the Debtors' interest in the Acquired Assets based on or related to such claim, lien, interest or encumbrance, and, except as otherwise provided in the Stalking Horse APA, the Transaction Documents, including the Exit Facilities, the Escrow Agreement, the Committee Settlement or this Order, all such claims, liens, interests, or encumbrances, if any, shall be, and hereby are transferred and will attach to the net available proceeds from the sale of the Acquired Assets in the order of their priority, with the same validity, force, and effect which they have against such Acquired Assets as of the Closing, subject to any rights, claims and defenses that the Debtors' estates and the Debtors, as applicable, may possess with respect thereto. All persons are hereby enjoined from taking action that would interfere with or adversely affect the ability of the Debtors to transfer the Acquired Assets in accordance with the terms of the Stalking Horse APA, the Transaction Documents, including the Exit Facilities, the Escrow Agreements, the Committee Settlement and this Order.

16. Upon assumption of the Assumed Contracts by the Debtors and assignment of same to the Buyer, the Assumed Contracts shall be deemed valid and binding, in full force and effect in accordance with their terms, subject to the provisions of this Order. As of the Closing, subject to the provisions of this Order, the Buyer shall succeed to the entirety of Debtors' rights and obligations in the Assumed Contracts first arising and attributable to the time period occurring on or after the date the assignment of the Assumed Contracts becomes effective and shall have all rights thereunder.

17. Subject to paragraph 7 of this Order, upon the entry of this Order, (a) all defaults (monetary and non-monetary) under the Assumed Contracts through the Closing shall be deemed cured and satisfied through the payment of the Cure Amounts, (b) no other amounts will be owed by the Debtors, their estates, or the Buyer with respect to amounts first arising or accruing during, or attributable or related to, the period before Closing with respect to the Assumed Contracts, and (c) any and all persons or entities shall be forever barred and estopped from asserting a claim against the Debtors, their estates, or the Buyer that any additional amounts are due or defaults exist under the Assumed Contracts that arose or accrued, or relate to or are attributable to the period before the Closing, including defaults of provisions restricting change in control or ownership interest composition or other bankruptcy-related defaults, arising under any Assumed Contract at any time on or prior to the Closing Date. Assignment by the Debtors of any Assumed Contract to the Buyer or the Buyer Designee shall relieve the Debtors and their estates from any liability for any breach of such Assumed Contract occurring after such assignment.

18. The creation and funding of the Escrows and the implementation of the Committee Settlement is approved pursuant to Bankruptcy Code sections 105(a) and 363(b). The Debtors and

the other parties thereto are authorized, pursuant to Bankruptcy Code sections 105(a) and 363(b) and without further notice or relief from this Court, to enter into the Escrow Agreement, the Distribution Escrow Agreement, and the Committee Settlement, to take any and all actions that are necessary or appropriate in the exercise of their business judgment to implement the Escrow Agreement, the Distribution Escrow Agreement, and the Committee Settlement, including employing third party contractors in accordance therewith, including the applicable escrow agents, and to make or authorize the payments contemplated thereunder. Funds deposited in accordance with the Escrow Agreement, the Distribution Escrow Agreement, and the Committee Settlement shall not constitute property of any Debtor's estate or be subject to claw back or disgorgement, and such funds (including any residual funds) may be released and applied in accordance with the terms thereof, without further order of this Court. For the avoidance of doubt, no funds in the Professional Fees Escrow Account shall be property of the Debtors' estates, and the Professional Fee Escrow Account shall be maintained in trust solely for the benefit of the Professionals. The Escrow Agent (as defined in the Settlement Stipulation) is acting solely as a payment agent with respect to the Direct Distribution (as defined in the Settlement Stipulation) and shall not incur any liability or be subject to any action by any person or entity arising out of or related to the Distribution Escrow Agreement or the Direct Distribution.

19. The Stalking Horse APA has been entered into by the Buyer in good faith and the Buyer is a good faith purchaser of the Acquired Assets as that term is used in Bankruptcy Code section 363(m). The Buyer is entitled to all of the protections afforded by Bankruptcy Code section 363(m).

20. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the Sale Transaction. Except as otherwise provided in the Stalking Horse APA, the Transaction Documents, the Escrow Agreement and the Committee Settlement, no obligation or liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payment is due to any person in connection with the Stalking Horse APA, the other Transaction Documents, or the transactions contemplated hereby or thereby for which the Buyer is or will become liable.

21. The consideration provided by the Buyer for the Acquired Assets under the Stalking Horse APA, including the portion of the consideration that consisted of the Credit Bid and Release, shall be deemed for all purposes to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and any other applicable law, and the sale of the Acquired Assets may not be avoided, or costs or damages imposed or awarded under Bankruptcy Code section 363(n) or any other provision of the Bankruptcy Code, the Uniform Voidable Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, or any other similar federal or state laws.

22. Neither the Debtors nor the Buyer engaged in any conduct that would cause or permit the Stalking Horse APA or the consummation of the Sale Transaction to be avoided, or costs or damages to be imposed, under Bankruptcy Code section 363(n) or under any other law of the United States, any state, territory, possession thereof, the District of Columbia, or any other applicable law. Accordingly, the Stalking Horse APA and the Sale Transaction shall not be avoidable under section 363(n) or chapter 5 of the Bankruptcy Code, and no party shall be entitled

to any damages or other recovery pursuant to section 363(n) of the Bankruptcy Code in respect of the Stalking Horse APA or the Sale Transaction.

23. The Exit Facilities are being extended in good faith and for fair value and, therefore, the obligations thereunder and the liens granted therein are valid and binding and may not be avoided under the Bankruptcy Code, Uniform Voidable Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, and any other applicable laws.

24. On the Closing Date, this Order shall be construed and shall constitute for any and all purposes a full and complete general assignment, conveyance, and transfer of all of the Debtors' rights, title, and interest in the Acquired Assets or a bill of sale transferring good and marketable title in such Acquired Assets to the Buyer on the Closing Date pursuant to the terms of the Stalking Horse APA, free and clear of all claims, liens, interests, and encumbrances (other than Assumed Liabilities and Permitted Encumbrances).

25. Upon the Closing, no member of the Buyer Group shall, or shall be deemed to, (i) be the successor of or successor employer to any of the Sellers, including without limitation, with respect to any Collective Bargaining Agreements, any Benefit Plans, or any Multiemployer Plans, and the Buyer shall instead be, and be deemed to be, a new employer, including with respect to, among other things, any and all federal or state unemployment laws, including any unemployment compensation or tax laws, or any other similar federal or state laws (provided that the Buyer shall pay any employee-related liabilities to the extent included in the Assumed Employee Liabilities); (ii) have any common law successorship liability in relation to any Benefit Plan or Multiemployer Plan, including with respect to withdrawal liability or contribution obligations; (iii) have, *de facto*, or otherwise, merged or consolidated with or into Sellers; (iv) be a mere continuation or substantial

continuation of Sellers or the enterprise(s) of Sellers; or (v) be liable for any acts or omissions of Sellers in connection with the Collective Bargaining Agreements, the conduct of the Business, or the operation, funding, or administration of the Benefit Plans or Multiemployer Plans or arising under or related to the Acquired Assets, except as expressly provided in the Stalking Horse APA. Without limiting the generality of the foregoing, and except as otherwise provided in the Stalking Horse APA and the Committee Settlement, the parties intend and the Court hereby orders that no member of the Buyer Group shall be liable for any Encumbrance or Liability (other than Assumed Liabilities and Permitted Encumbrances) against any Seller, or any of its predecessors or affiliates, and no member of the Buyer Group shall have successor or vicarious liability of any kind or character whether known or unknown as of the Closing Date, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the Business, any Collective Bargaining Agreement, the operation, funding, or administration of the Benefit Plans or Multiemployer Plans, the Acquired Assets or any Liabilities of any Seller arising or attributable to periods prior to the Closing Date.

26. Other than the Buyer's assumption of the applicable Assumed Liabilities (including, for the avoidance of doubt, the Buyer's obligations under the Prepetition ABL Facility, the DIP ABL Facility, the Prepetition First Lien Term Loan Facility, in each case that are being amended and restated pursuant to the Exit Facilities) and the Buyer's obligations under the Stalking Horse APA, the Settlement Stipulation, and the other Transaction Documents, including the Exit Facilities, the Buyer Group and its respective affiliates, successors, assigns, members, partners, officers, directors, principals, and shareholders (or equivalent) shall have no obligations with respect to any Liabilities, including, without limitation, the Excluded Liabilities, and, upon

consummation of the Sale Transaction, the Debtors and their estates are deemed to release and forever discharge the Buyer Group and its affiliates, and their respective successors, assigns, members, partners, officers, directors, principals and shareholders (or equivalent) from any and all claims, causes of action, obligations, Liabilities, demands, losses, costs, taxes, and expenses of any kind, character, or nature whatsoever, known or unknown, fixed or contingent, relating to the sale of the Acquired Assets or assignments of the Assumed Contracts. For the avoidance of doubt, no member of the Buyer Group shall have any liability, responsibility, obligation, or duty under or related to the Direct Distribution, other than as expressly set forth in paragraph 2(c) of the Settlement Stipulation.

27. Upon the Closing, the Transferred Permits, including, but not limited to the Debtors' interstate motor carrier and property broker authorities, United States Department of Transportation ("DOT") numbers, and International Registration Plan accounts, vehicle registrations and license plates (all of which are set forth on Schedule 2.1(f) to the Stalking Horse APA), may be transferred to the Buyer without further consent or approval of any governmental agency or any other person. The Debtors shall take all required steps necessary to allow for the transfer of the applicable Transferred Permits to the Buyer, including, but not limited to, executing and delivering to the Federal Motor Carrier Safety Administration and/or DOT any necessary documentation or applications (*e.g.*, a Name Change Application) to allow for the transfer of the Debtors' interstate motor carrier and property broker authority and DOT numbers to the Buyer.

28. This Order: (a) is and shall be effective as a determination that other than Permitted Encumbrances and Assumed Liabilities, all claims, liens, interests and encumbrances of any kind or nature whatsoever existing as to the Acquired Assets prior to the Closing have been

unconditionally released, discharged, and terminated, and that the conveyances described herein have been effected, including claims in connection with any tax liability and (b) is and shall be binding upon and shall authorize all entities, including, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the Acquired Assets conveyed to the Buyer. Other than Permitted Encumbrances, and liens and security interests relating to the Assumed Liabilities, all recorded claims, liens, interests, and encumbrances against the Acquired Assets from their records, official and otherwise, shall be deemed stricken.

29. If any person or entity which has filed statements or other documents or agreements evidencing liens, interests, or encumbrances on, or claims against or interests in, the Acquired Assets shall not have delivered to the Debtors before the Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of liens and easements, and any other documents necessary for the purpose of documenting the release of all claims, liens, interests or encumbrances (other than Permitted Encumbrances and liens and security interests relating to the Assumed Liabilities) which the person or entity has or may assert with respect to the Acquired Assets, the Debtors and the Buyer are hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of such person or entity with respect to the Acquired Assets.

30. All counterparties to the Assumed Contracts shall cooperate and expeditiously execute and deliver, upon the reasonable requests of the Buyer, and shall not charge the Debtors or the Buyer for any instruments, applications, consents or other documents which may be required or requested by any public or quasi-public authority or other party or entity to effectuate the applicable transfers in connection with the sale of the Acquired Assets.

31. Each and every federal, state and governmental agency or department, and any other person or entity, is hereby authorized to accept any and all documents and instruments in connection with or necessary to consummate the Sale contemplated by the Stalking Horse APA.

32. Nothing in this Order or the Stalking Horse APA releases, nullifies, precludes, or enjoins the enforcement of any police or regulatory liability to a governmental unit that any entity would be subject to as the owner or operator of property after the Closing Date.

33. Without limiting the provisions of paragraph 32 above, but subject to Bankruptcy Code section 525(a), no governmental unit may revoke or suspend any right, license, trademark or other permission relating to the use of the Acquired Assets sold, transferred, or conveyed to the Buyer on account of the filing or pendency of these Chapter 11 Cases or the consummation of the sale of the Acquired Assets.

34. Notwithstanding anything herein to the contrary, upon the payment to the applicable mortgagee under the DSJL Mortgage and Westside Bank Mortgage (each as defined in the Restructuring Term Sheet) of a cure payment in the amount of \$0.00 and \$33,146.88 respectively, the Buyer shall be deemed to assume on the Closing Date the DSJL Mortgage and Westside Bank Mortgage, and in each case, to have cured all existing defaults thereunder, and the liens and security interests thereunder shall attached to the same property such liens and security

interests encumbered prior to the Petition Date, with the same priority in interest, and such claims, liens and security interests as against the Buyer and the applicable collateral shall otherwise be unaffected by the Sale Transaction.

35. Pursuant to this Order, the Stalking Horse APA and the other Transaction Documents, on the Closing Date, (a) the Buyer shall acquire the Acquired Actions as an Acquired Asset, and (b) the Acquired Actions shall be waived and released pursuant to the terms of the Waiver.

36. Section 12.16 of the Stalking Horse APA is approved in its entirety and incorporated herein as if fully stated herein. Additionally, except to the extent expressly preserved pursuant to the Stalking Horse APA, the other Transaction Documents, the Committee Settlement, and/or this Order, upon the Closing Date, (a) the Debtors, (b) the Buyer, (c) the Committee, and (d) the lenders and agents under the (i) First Lien Term Loan Facility, (ii) U.S. Revolver Facility, (iii) Canadian Sub-Facility, (iv) credit facilities under the Junior Credit Agreements, and (v) DIP Facilities (each a "Releasing Party"), to the fullest extent permissible under applicable law, mutually releases and discharges each other Releasing Party and such Releasing Parties' respective current and former affiliates, and such entities' and their current and former affiliates' current and former officers, managers, directors, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, and assigns, subsidiaries, and each of their current and former officers, managers, directors, equity holders, principals, members, incorporators, employees, agents, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such (collectively, in such capacity, the "Released Parties" and each a "Released Party"), from any and all claims and

causes of action, whether known or unknown, including any derivative claims that such Releasing Party would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), the Debtors' restructuring efforts, the formulation, preparation, dissemination, negotiation, or filing of the Restructuring Support Agreement, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Restructuring Support Agreement, the Stalking Horse APA, the U.S. Revolver Facility, the Canadian Sub-Facility, the DIP Facilities, the Exit Facilities, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the implementation of the Sale Transaction, the Committee Settlement, and any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Closing Date related or relating to the foregoing; provided, however, that this paragraph 36 shall not (a) affect the liability of any entity that otherwise would result from any act or omission to the extent that such act or omission is determined by a final, nonappealable order by the Bankruptcy Court or another court with jurisdiction to have constituted fraud, gross negligence, or willful misconduct of such entity, or (b) relieve any Released Party from any obligations under, or otherwise affect the terms and conditions of, the Stalking Horse APA, the other Transaction Documents, the DIP Loan Documents (as defined in the DIP Financing Orders), the agreements and documents governing the Exit Facilities, the Committee Settlement, and/or this Order; further provided, however, that the releases provided by the lenders and agents under the U.S. Revolver Facility, the Canadian Sub-Facility, and the Revolver Facility (as defined in the Final DIP Order) are conditioned upon the payment in full in cash (whether pursuant to the Exit Revolving Facility or otherwise), by no later than the Closing Date, of all due and payable

Obligations (as defined in the Revolver DIP Agreement, which is defined in the Final DIP Order). For the avoidance of doubt, upon (a) the Closing, including the execution of, and consummation of the transactions contemplated by, the Exit Facilities, and (b) the payment in full in cash of the DIP ABL Facility (whether pursuant to the Exit Revolving Facility or otherwise) by no later than the Closing Date of all due and payable Obligations (as defined in the Revolver DIP Agreement, which is defined in the Final DIP Order) and the amendment and restatement of the Prepetition First Lien Term Loan Facility into the applicable Exit Facility, the liens and claims, including superpriority claims, in respect of the Prepetition Obligations, the DIP Facilities or the Exit Facilities shall not extend to or encumber the Cash Consideration (as defined in the Stalking Horse APA).

37. To the fullest extent permissible under applicable law, except as otherwise provided in the Stalking Horse APA, the other Transaction Documents, and/or this Order, upon the Closing Date, none of the Released Parties shall have or incur any liability to, or be subject to any right of action by, any holder of a claim against, or equity interest in, any of the Debtors or any other party in interest, or any of their respective employees, representatives, financial advisors, attorneys, or agents, acting in such capacity, or any of their successors and assigns, for any act or omission in connection with, related to or arising out of, the Debtors' Chapter 11 Cases, the operation of the Debtors' businesses during the Chapter 11 Cases, the investigation, formulation, preparation, negotiation, execution, delivery, implementation, or consummation of the transactions contemplated by the Stalking Horse APA, including, without limitation, the Sale Transaction, the assumption and assignment of the Assumed Contracts, or any other contract, instrument, release, agreement, settlement, or document created, modified, amended, terminated, or entered into in

connection with the Stalking Horse APA, the Committee Settlement, or any other act or omission in connection with the Debtors' Chapter 11 Cases; provided, however, that this paragraph 37 shall not (a) affect the liability of any entity that otherwise would result from any act or omission to the extent that such act or omission is determined by a final, nonappealable order by the Bankruptcy Court or another court with jurisdiction to have constituted fraud, gross negligence, or willful misconduct by such entity, or (b) relieve any Released Party from any obligations under, or otherwise affect the terms and conditions of, the Stalking Horse APA, the other Transaction Documents, the DIP Loan Documents (as defined in the DIP Financing Orders), the agreements and documents governing the Exit Facilities, the Committee Settlement, and/or this Order; provided further, however, that upon (a) the Closing, including the execution of, and consummation of the transactions contemplated by, the Exit Facilities, and (b) the payment in full in cash of the DIP ABL Facility (whether pursuant to the Exit Revolving Facility or otherwise) by no later than the Closing Date of all due and payable Obligations (as defined in the Revolver DIP Agreement, which is defined in the Final DIP Order) and the amendment and restatement of the Prepetition First Lien Term Loan Facility into the applicable Exit Facility, the liens and claims, including superpriority claims, in respect of the Prepetition Obligations, the DIP Facilities or the Exit Facilities shall not extend to or encumber the Cash Consideration (as defined in the Stalking Horse APA).

38. To the extent this Order is inconsistent with any prior order or pleading filed in these Chapter 11 Cases, the terms of this Order shall govern. To the extent there is any inconsistency between the terms of this Order and the terms of the Stalking Horse APA, the terms of this Order shall govern.

39. Except as expressly provided in the Stalking Horse APA, the Committee Settlement or this Order, nothing in this Order shall be deemed to waive, release, extinguish, or estop the Debtors or their estates from asserting, or otherwise impair or diminish, any right (including, without limitation, any right of recoupment), claim, cause of action, defense, offset or counterclaim in respect of any asset that is not an Acquired Asset.

40. All entities (other than holders of Assumed Liabilities or Permitted Encumbrances) that are presently, or on the Closing Date may be, in possession of some or all of the Acquired Assets are hereby directed to surrender possession of the Acquired Assets to the Buyer on the Closing Date.

41. This Order shall not be modified by any chapter 11 plan of any of the Debtors confirmed in these Chapter 11 Cases.

42. This Order, the Stalking Horse APA, and the Committee Settlement shall be binding in all respects upon all creditors and interest holders of the Debtors, all non-debtor parties to the Assumed Contracts, the Committee, all successors and assigns of the Debtors and their affiliates and subsidiaries, and any trustees, examiners, "responsible persons" or other fiduciaries appointed in the Chapter 11 Cases or upon a conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code, including a chapter 7 trustee, and the Stalking Horse APA, including the Committee Settlement, the Transaction Documents and the Escrow Agreement, shall not be subject to rejection or avoidance under any circumstances. If any order under section 1112 of the Bankruptcy Code is entered, such order shall provide (in accordance with Bankruptcy Code sections 105 and 349) that this Order and the rights granted to the Buyer hereunder, and the rights and obligations of any escrow agent appointed under the Escrow Agreement or the Distribution

Escrow Agreement, shall remain effective and, notwithstanding such dismissal or conversion, shall remain binding on parties in interest.

43. The failure specifically to include or make reference to any particular provisions of the Stalking Horse APA or the Committee Settlement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Stalking Horse APA and the Committee Settlement are authorized and approved in their entirety.

44. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order, including, without limitation, the authority to: (a) interpret, implement and enforce the terms and provisions of this Order (including the injunctive relief provided in this Order) and the terms of the Stalking Horse APA, all amendments thereto and any waivers and consents thereunder; (b) protect the Buyer, or the Acquired Assets, from and against any of the claims, liens, interests or encumbrances (other than Assumed Liabilities and Permitted Encumbrances); (c) compel delivery of all Acquired Assets to the Buyer (other than those in the possession of the holder of an Assumed Liability or Permitted Encumbrance); (d) compel the Buyer to perform all of its obligations under the Stalking Horse APA, the Transaction Documents, and this Order; and (e) resolve any disputes arising under or related to the Stalking Horse APA, the Committee Settlement or the sale of the Acquired Assets.

45. The Stalking Horse APA, the Committee Settlement and any related agreements, documents or other instruments may be modified, amended or supplemented through a written document signed by the parties thereto (subject to any consents required under the Exit Facilities) in accordance with the terms thereof without further order of this Court; provided, however, that

any such modification, amendment, or supplement is neither material nor materially changes the economic substance of the transactions contemplated hereby.

46. Neither the Buyer nor the Debtors shall have an obligation to close the Sale Transaction until all conditions precedent in the Stalking Horse APA to each of their respective obligations to close the Sale Transaction have been met, satisfied, or waived in accordance with the terms of the Stalking Horse APA.

47. This Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding any provision in the Bankruptcy Rules to the contrary, including but not limited to Bankruptcy Rule 6004(h), the Court expressly finds there is no reason for delay in the implementation of this Order and, accordingly: (a) the terms of this Order shall be immediately effective and enforceable upon its entry; (b) the Debtors are not subject to any stay of this Order or in the implementation, enforcement, or realization of the relief granted in this Order; and (c) the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order.

48. The provisions of this Order are nonseverable and mutually dependent.

[END OF DOCUMENT]

Prepared and presented by:

/s/ Sarah R. Borders

Sarah R. Borders

Georgia Bar No. 625752

Leia Clement Shermohammed

Georgia Bar No. 972711

Britney Baker

Georgia Bar No. 610649

KING & SPALDING LLP

1180 Peachtree Street NE

Atlanta, Georgia 30309

Telephone: (404) 572-4600

Email: sborders@kslaw.com

Email: lshermohammed@kslaw.com

Email: bbaker@kslaw.com

-and-

Kelley A. Cornish (admitted *pro hac vice*)

New York Bar No. 1930767

Brian S. Hermann (admitted *pro hac vice*)

New York Bar No. 2810232

John T. Weber (admitted *pro hac vice*)

New York Bar No. 5151543

**PAUL, WEISS, RIFKIND, WHARTON &
& GARRISON LLP**

1285 Avenue of the Americas

New York, New York 10019

Telephone: (212) 373-3000

Email: kcornish@paulweiss.com

Email: bhermann@paulweiss.com

Email: jweber@paulweiss.com

Counsel for the Debtors in Possession

Exhibit 1

Settlement Stipulation

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	)	
	)	Chapter 11
JACK COOPER VENTURES, INC., <i>et al.</i> , ¹	)	
	)	Case No. 19-62393 (PWB)
Debtors.	)	(Jointly Administered)
	)	
	)	

STIPULATION OF SETTLEMENT

This Stipulation of Settlement (the “**Stipulation**”) is made by and among (i) Jack Cooper Ventures, Inc. and certain of its affiliates (collectively, the “**Debtors**”) that are debtors and debtors-in-possession in the above-referenced chapter 11 cases (the “**Chapter 11 Cases**”), (ii) the Official Committee of Unsecured Creditors appointed in these Chapter 11 Cases (collectively, the “**Committee**”), (iii) Solus Alternative Asset Management LP,

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Jack Cooper Ventures, Inc. (0805); Jack Cooper Diversified, LLC (9414); Jack Cooper Enterprises, Inc. (3001); Jack Cooper Holdings Corp. (2446); Jack Cooper Transport Company, Inc. (3030); Auto Handling Corporation (4011); CTEMS, LLC (7725); Jack Cooper Logistics, LLC (3433); Auto & Boat Relocation Services, LLC (9095); Axis Logistic Services, Inc. (2904); Jack Cooper CT Services, Inc. (3523); Jack Cooper Rail and Shuttle, Inc. (7801); Jack Cooper Investments, Inc. (6894); North American Auto Transportation Corp. (8293); Jack Cooper Transport Canada, Inc. (8666); Jack Cooper Canada GP 1 Inc. (7030); Jack Cooper Canada GP 2 Inc. (2373); Jack Cooper Canada 1 Limited Partnership (3439); and Jack Cooper Canada 2 Limited Partnership (7839). The location of the Debtors’ corporate headquarters and service address is: 630 Kennesaw Due West Road NW, Kennesaw, Georgia 30152.

on behalf of certain of its affiliates and managed funds and accounts, in its or such affiliates' capacity as a Prepetition Secured Party, DIP Secured Party, and as the Purchaser (collectively with the other Solus Entities (as defined below) "**Solus**," and, together with the Debtors and the Committee, the "**Principal Parties**"), (iv) Wells Fargo Capital Finance, LLC, in its capacity as ABL Agent and Revolver Administrative Agent, (v) Cerberus Business Finance Agency, LLC, in its capacity as Prepetition First Lien Agent and Prepetition First Lien Lender (as defined below), and (vi) Wilmington Trust National Association, in its capacity as DIP Term Administrative Agent, Prepetition 1.5 Lien Agent and Prepetition Second Lien Agent (collectively, the "**Parties**").² The Parties, through their respective undersigned counsel, hereby stipulate and agree as follows:

RECITALS

A. The Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") and commenced the Chapter 11 Cases on August 6, 2019 (the "**Petition Date**") in the United States Bankruptcy Court for the Northern District of Georgia (the "**Bankruptcy Court**"). These Chapter 11 Cases are jointly administered and have been consolidated for procedural purposes only.

B. The Debtors continue to manage and operate their businesses and properties as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Chapter 11 Cases.

C. On the Petition Date, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter Into and Perform Under the Stalking Horse Asset Purchase Agreement, (II) Approving Bidding Procedures for the Sale of the Debtors'*

² Capitalized terms used herein but not defined herein shall have the meanings ascribed to them in the Final DIP Order (as defined herein).

Assets, (III) Approving the Expense Reimbursement, (IV) Scheduling Hearings and Objection Deadlines With Respect to the Sale, (V) Scheduling Bid Deadlines and an Auction, (VI) Approving the Form and Manner of Notice Thereof, (VII) Approving Contract Assumption and Assignment Procedures, and (VIII) Granting Related Relief [Docket No. 21] (the “**Sale Motion**”), seeking, among other things, the authority to sell (the “**Sale**”) substantially all of their assets pursuant to a stalking horse asset purchase agreement (as amended prior to the date hereof, the “**Stalking Horse APA**”) with JC Buyer Company, Inc. (“**New Jack Cooper**” or “**Purchaser**”), an affiliate of Solus, subject to higher or better offers. Solus, New Jack Cooper and their affiliates shall be collectively referred to herein as, the “**Solus Entities**.”

D. Also, on the Petition Date, the Debtors filed the *Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Obtain Senior and Junior Secured Superpriority Postpetition Financing, (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection to Certain Prepetition Lenders; (III) Authorizing the Use of Cash Collateral; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing; and (VI) Granting Related Relief* [Docket No. 18] (the “**DIP Motion**”), seeking, among other things, authority to enter into a junior secured superpriority multi-draw term loan credit facility in an aggregate principal amount of \$15 million with Wilmington Trust, National Association, as agent under the DIP Term Loan Facility.

E. On August 19, 2019, the United States Trustee appointed the Committee [Docket No. 142].

F. On September 3, 2019, this Court entered the *Order (I) Authorizing the Debtors to Enter Into and Perform Under the Stalking Horse Asset Purchase Agreement, (II) Approving Bidding Procedures for the Sale of the Debtors' Assets, (III) Approving the Expense Reimbursement, (IV) Scheduling Hearings and Objection Deadlines With Respect to the Sale, (V) Scheduling Bid Deadlines and an Auction, (VI) Approving the Form and Manner of Notice Thereof, (VII) Approving Contract Assumption and Assignment Procedures, and (VII) Granting Related Relief* [Docket No. 224] (the “**Bidding Procedures Order**”).

G. The Bidding Procedures Order provided that the deadline for submitting Qualified Bids (as defined in the Bidding Procedures Order) was October 1, 2019, at 5:00 p.m. (Eastern Time) and, if more than one Qualified Bid was timely received, an auction would be conducted on October 4, 2019, at 10:00 a.m. (Eastern Time). No other Qualified Bids were submitted and, as such, on October 1, 2019, the Debtors filed the *Notice of No Auction* [Docket No. 332] cancelling the auction, and are seeking approval of the Stalking Horse APA at the hearing to approve the Sale on October 10, 2019 at 2:30 p.m. (Eastern Time) (the “**Sale Hearing**”).

H. On September 13, 2019, the Bankruptcy Court entered the *Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior and Junior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection to Certain Prepetition Lenders; (III) Authorizing the Use of Cash Collateral; (IV) Modifying the Automatic Stay; and (V) Granting Related Relief* [Docket No. 279] (the “**Final DIP Order**”). Pursuant to the Final DIP Order, the Debtors stipulated as follows:

i. the Prepetition ABL Facility was secured by (a) first priority security interests in and liens on the Prepetition ABL Priority Collateral; and (b) fourth priority security interests in and lien on the Prepetition Term Loan Priority Collateral (such liens and security interests in clauses (a) and (b), the “**Prepetition ABL Liens**”); *provided* that the Prepetition ABL Canadian Sub-Facility was secured by a first priority security interest in substantially all of the assets of those Debtors organized under the laws of Canada or any province thereof. Pursuant to the terms of the Final DIP Order, the Prepetition ABL Facility was refinanced in full by the Revolver Facility.

ii. The Prepetition First Lien Term Loan Facility is secured by (a) first priority security interests in and liens on the Prepetition Term Loan Priority Collateral and (b) second priority security interests in and liens on the Prepetition ABL Priority Collateral (such liens and security interests in clauses (a) and (b), the “**Prepetition First Lien Term Loan Liens**”).

iii. The Prepetition 1.5 Lien Term Loan Facility is secured by (a) second priority security interests in and liens on the Prepetition Term Loan Priority Collateral and (b) third priority security interests in and liens on the Prepetition ABL Priority Collateral (such liens and security interests in clauses (a) and (b), the “**Prepetition 1.5 Lien Term Loan Liens**”).

iv. The Prepetition Second Lien Term Loan Facility is secured by (a) third priority security interests in and liens on the Prepetition Term Loan Priority Collateral and (b) fourth priority security interests in and liens on the Prepetition ABL Priority Collateral (such liens and security interests in clauses (a) and (b), the

“Prepetition Second Lien Term Loan Liens” and, together with the Prepetition First Lien Term Loan Liens and the Prepetition 1.5 Lien Term Loan Liens, the **“Prepetition Term Loan Liens,”** and, together with the Prepetition ABL Liens, the **“Prepetition Liens”**).

v. The Prepetition Obligations owing to the Prepetition Secured Parties constitute legal, valid, and binding obligations of the Debtors and their applicable affiliates, enforceable against them in accordance with their respective terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and no portion of the Prepetition Obligations owing to the Prepetition Secured Parties is subject to avoidance, recharacterization, reduction, set-off, offset, counterclaim, cross-claim, recoupment, defenses, disallowance, impairment, recovery, subordination, or any other challenges pursuant to the Bankruptcy Code or applicable non-bankruptcy law or regulation by any person or entity, including in any case under chapter 7 of the Bankruptcy Code upon the conversion of any of these Cases.

I. The Final DIP Order contemplated that the Committee may, subject to any standing requirements, commence a Challenge Proceeding, if any, with respect to the Prepetition Obligations and the Prepetition Liens by no later than (i) the earlier of (A) October 22, 2019 and (B) the date objections to the Sale are due, and (ii) any such later date as has been agreed to, in writing, by the applicable Prepetition Agent (with the consent of the applicable Prepetition Secured Parties) (such time period is referred to in the Final DIP Order as the **“Challenge Period”**).

J. On October 1, 2019, the Court entered the *Stipulation and Consent Order Extending the Challenge Period in the Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, 503, and 507 (I) Authorizing the Debtors to Obtain Senior and Junior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection to Certain Prepetition Lenders; (III) Authorizing Use of Cash Collateral; (IV) Modifying the Automatic Stay; and (V) Granting Related Relief* [Docket No. 327] (the “**Extension Stipulation**”), which extended the Challenge Period to October 10, 2019. Pursuant to the Extension Stipulation, the Committee agreed that it would, if at all, file a motion for standing to commence a Challenge Proceeding by no later than October 4, 2019.

K. In accordance with the Final DIP Order, the Committee undertook an investigation (the “**Committee Investigation**”) into the validity, enforceability, perfection and avoidability of the Prepetition Liens and the Prepetition Obligations, among other things, and concluded that certain of the Debtors’ assets were not subject to the Prepetition Liens (the “**Potential Challenge**”).

L. On October 2, 2019, the Committee served the Debtors and the Solus Entities with a draft objection to the Sale Motion (the “**Objection**”), but, as the Parties were engaged in ongoing settlement negotiations, refrained from filing the Objection.

M. Also on October 2, 2019, the Committee served the Debtors and the Solus Entities with a draft *Motion of the Official Committee of Unsecured Creditors For Leave, Standing and Authority to Prosecute Causes of Action on Behalf of the Debtors’ Estates* (the “**Standing Motion**”).

N. On October 4, 2019 at 4:00 p.m., as required by the Extension Stipulation, the Committee filed the Standing Motion [Docket No. 346] seeking standing to assert the Potential Challenge as well as certain claims pursuant to chapter 5 of the Bankruptcy Code (the “**Potential Avoidance Claims**”). On October 7, 2019, the Committee filed the *Notice of Withdrawal of Motion of the Official Committee of Unsecured Creditors for Leave Standing and Authority to Prosecute Causes of Action on Behalf of the Debtors’ Estates* [Docket No. 352].

O. The Parties have engaged in extensive good faith, arm’s length negotiations regarding the Committee Investigation, the Objection, the Potential Challenge, the Sale and the Potential Avoidance Claims, including the D&O Claims (as defined below), among other things, and have agreed to the terms hereof to resolve same and obtain the support of the Committee for the Sale.

P. The Debtors have advised the Committee that (i) there are no estate funds available to make distributions to unsecured creditors and limited funds to reconcile claims and to continue the Chapter 11 Cases for any significant period past the Closing Date and (ii) they will seek to dismiss or convert the Chapter 11 Cases as soon as practicable.

Q. The Debtors have advised the Committee that absent a Sale to the Purchaser, the Debtors will not be able to continue as a going concern and would be forced to liquidate, which would result in, among other things, the loss of employment for the approximately 3,000 employees of the Debtors and a significant increase in the amount of unsecured and administrative expense claims being asserted against the Debtors.

R. The Parties desire to enter into this Stipulation to resolve any and all disputes and issues existing between the Committee, on the one hand, and the other Parties,

on the other, with respect to the Chapter 11 Cases and the Sale, including without limitation, all disputes and issues regarding the Sale, the transfer and waiver of the Acquired Actions (as defined in the Stalking Horse APA), the Potential Challenge, and the Committee Investigation (the "**Settlement**") and to seek the Court's approval of the Settlement as set forth in this Stipulation in connection with, and as an exhibit to, the Sale Order (as defined below).

NOW, THEREFORE, after good faith, arm's-length negotiations without collusion, in consideration of the mutual representations, warranties, agreements and covenants contained in this Stipulation and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged by each of the Parties), the Parties hereby agree and stipulate as follows:

1. **Challenge Investigation.** On the terms and conditions set forth in this Stipulation, the Committee agrees to (i) support the Sale and the relief requested in the Sale Motion, including the releases provided for in the Sale Order (as defined below), and the transfer to and waiver by the Purchaser of the Acquired Actions, including the Potential Avoidance Claims and D&O Claims, (ii) withdraw the Standing Motion and refrain from filing the Objection and (iii) conclude the Committee Investigation. Upon the Effective Date (as defined below), the Challenge Period shall be deemed to have expired or terminated without the commencement of a Challenge, and, without limiting the foregoing or any provisions of the Final DIP Order, the stipulations, admissions and releases and other provisions contained in paragraph E of the Final DIP Order with respect to the Prepetition Liens and Prepetition Obligations, among other things, shall be binding on the Committee and such other parties in interest as set forth in the Final DIP Order. Subject to

the terms hereof, the Committee shall not take any action that is inconsistent with, or is likely to interfere with, the Debtors' efforts to obtain the relief requested in the Sale Motion, including entry of the Sale Order, and to effectuate the Sale. The Debtors acknowledge and agree that the making of the Cash Payment by the Purchaser as provided below shall satisfy the Purchaser's obligations under Section 3.1(a)(iii) of the Stalking Horse APA, and the Parties otherwise agree that the Acquired Actions secure the DIP Facilities.

2. **Creditor Distribution Escrow**

(a) No later than three (3) business days prior to the Closing Date, the Debtors shall use commercially reasonable efforts to provide the Committee with a list (the "**Creditor List**") of all known unsecured claims (excluding any Prepetition Obligations) that will remain unpaid as of the Closing Date (the holders thereof, the "**Subject Creditors**"), and which are not otherwise being paid or assumed in connection with the Sale;

(b) The Creditor List shall be compiled with information contained in the Debtors' schedules (not including creditors scheduled as disputed, contingent or unliquidated), as reduced by authorized post-petition payments of all or a portion of such claims, and such other reasonably available information, including, as necessary, proofs of claim, and other claims filed pursuant to Bankruptcy Rule 3002 that are allowed;

(c) On the Closing Date, the Purchaser shall deposit the amount of \$750,000 in cash (the "**Cash Payment**") with an escrow agent (the "**Escrow Agent**")

pursuant to an escrow agreement (the “**Escrow Agreement**”)³ in form and substance reasonably acceptable to the Debtors and the Committee;

(d) As soon as practicable following the Closing Date, in consultation with the Committee, the Escrow Agent shall utilize the Cash Payment to make distributions to the Subject Creditors (the “**Direct Distribution**”) in the manner set forth in the Escrow Agreement;

(e) The Escrow Agent shall act solely as a payment agent and shall incur no liability to any person or entity with respect to the Direct Distribution;

(f) Effective as of the Closing Date, each Prepetition Secured Party, including each Solus Entity, shall, and hereby does, waive its right to a distribution from the Direct Distribution on account of the Prepetition Obligations;

(g) Neither the Debtors, the Purchaser, any Solus Entity, any DIP Secured Party, the Committee or its members, the Escrow Agent, nor any Prepetition Secured Party shall have any responsibility, obligation, or duty with respect to the Direct Distribution other than as expressly set forth herein;

(h) The Debtors shall not be required to continue the Chapter 11 Cases beyond December 31, 2019 to allow for the completion of the foregoing process; and

(i) If the Direct Distribution contemplated in paragraph 2(d) is not approved by the Bankruptcy Court in connection with the Sale Order, the Cash Payment will be held in escrow pending a further determination by the Bankruptcy Court.

³ The Escrow Agreement will be filed with the Bankruptcy Court prior to the Closing Date.

3. **Committee Fees and Expenses.** Notwithstanding anything in Section 5.4 of the Final DIP Order to the contrary, the reasonable and documented fees and expenses of counsel to the Committee in connection with the preparation of the Standing Motion, including the draft complaint and all other exhibits thereto, shall be considered incurred under, but subject to the limits of, the DIP Budget and paid from the proceeds of the DIP Facilities, the DIP Collateral, or Cash Collateral to the extent provided in the Final DIP Order.

4. **Trustee Fees and Expenses.** On the Closing Date, the Debtors shall pay the reasonable and documented fees and out-of-pocket expenses of U.S. Bank, National Association, the indenture trustee under that certain Fourth Supplemental Indenture, dated as of June 30, 2017, and its counsel, in an amount not to exceed \$50,000.

5. **Sale Order.** The Debtors shall include this Stipulation as an exhibit to the Sale Order and seek approval of the Settlement in connection therewith. The Committee shall support the entry of the Sale Order that incorporates the Settlement and the transactions and releases contemplated thereby, including the transfer and release of the Acquired Actions, which, for the avoidance of doubt, include any and all estate claims against the Debtors' directors and officers (the "**D&O Claims**"), as contemplated by the Stalking Horse APA. Moreover, upon entry of the Sale Order incorporating this Settlement, the Committee on behalf of itself and any successor hereby covenants and agrees not to pursue any such Acquired Actions, including D&O Claims. Approval of this Stipulation and the terms contained herein is an express condition to the Committee's support for the Sale.

6. **Effectiveness.** This Stipulation shall be effective (the “**Effective Date**”) upon (a) the Bankruptcy Court’s entry of an order with incorporates this Settlement (the “**Sale Order**”), in form and substance acceptable to the Debtors, the Committee and Solus, approving the Sale and this Stipulation, and (b) execution by the Parties of this Stipulation; *provided* that the form of Sale Order, which incorporates this Settlement, filed with the Bankruptcy Court contemporaneously herewith shall be deemed acceptable to the Committee.

7. **Termination.** If the Closing of the Sale to the Purchaser does not occur by November 19, 2019 (the “**Deadline**”), unless the Parties hereto otherwise agree in writing to extend the Deadline, then this Stipulation shall terminate and be of no further force and effect, and the Challenge Period shall be deemed to be extended to the date that is ten (10) business days following the Deadline.

8. **Further Actions.** The terms of this Stipulation shall be incorporated in any chapter 11 plan in these Chapter 11 Cases or in any order converting or dismissing these Chapter 11 Cases, and the Parties shall support certain further actions and agreements consistent with this Stipulation and the Sale Order that may be reasonably necessary to obtain entry of an order confirming a chapter 11 plan or converting or dismissing these Chapter 11 Cases. This Stipulation shall survive the dismissal or conversion of these Chapter 11 Cases, and shall be binding upon (a) any trustee appointed, whether pursuant to a plan or following conversion to chapter 7 of the Bankruptcy Code, or (b) any other successor of the Debtors, the Committee and the other Parties hereto.

9. **Discovery.** All pending discovery and litigation initiated by the Committee with respect to the Committee Investigation, the Objection, the Standing

Motion and the Sale Motion shall be stayed immediately, and upon the Closing Date terminated, and all matters related thereto, including document collection, review and production, depositions and related actions and proceedings directed at a Party in the Chapter 11 Cases shall be stayed immediately, and upon the Closing Date terminated. Unless required by law to be retained, the Committee shall use commercially reasonable efforts to return or destroy within a reasonable time following the Closing Date all documents and other materials furnished to the Committee by the Debtors in connection with the Committee Investigation.

10. **Immediate Effectiveness.** Notwithstanding the provisions of Bankruptcy Rule 6004(h), this Stipulation shall be effective and enforceable immediately upon approval by the Bankruptcy Court and shall be binding upon and inure to the benefit of any and all successors, permitted assigns and other representatives of the Parties, including, without limitation, any chapter 11 or chapter 7 trustee or other fiduciary hereafter appointed in these Chapter 11 Cases as a legal representative of the Debtors or their estates, as if such successor, permitted assign or other representative was an original signatory to this Stipulation.

11. **Representations.** The undersigned Parties, by and through their respective counsel, hereby represent and warrant that (a) they have full authority to execute this Stipulation; (b) they have full knowledge of, and have consented to, this Stipulation; and (c) they are fully authorized to bind themselves to all of the terms and conditions of this Stipulation. The Parties shall take such actions as may be reasonably required to obtain the Bankruptcy Court's approval of this Stipulation.

12. **Governing Law; Jurisdiction.** This Stipulation shall be governed by and shall be interpreted in accordance with the laws of the State of New York, except to the extent that the Bankruptcy Code applies, without regard to New York's rules governing conflicts of laws. Each of the Parties hereby irrevocably consents to the jurisdiction of the Bankruptcy Court with respect to any action to enforce the terms and provisions of this Stipulation and expressly waives any right to commence any such action in any other forum. The Bankruptcy Court shall retain jurisdiction, and each Party hereby submits to such retention of jurisdiction, to hear, resolve and determine any and all matters, claims and disputes arising from or relating to this Stipulation. Any motion or application brought before the Bankruptcy Court to resolve a dispute arising from or related to this Stipulation shall be brought on proper notice upon the undersigned parties in accordance with the relevant Federal Rules of Bankruptcy Procedure and the Local Rules of the United States Bankruptcy Court for the Northern District of Georgia.

13. **Counterparts.** This Stipulation may be executed in counterparts by facsimile, email, or other similar electronic transmission, each of which shall be deemed an original as against any party whose signature appears thereupon and all of which when taken together shall constitute one document. This Stipulation shall be deemed fully executed when one or more counterparts hereof, individually or taken together, shall bear the signature of each of the Parties.

14. **Entire Agreement; Modifications.** This Stipulation constitutes the entire agreement, and supersedes all prior agreements, understandings (including letters of intent or term sheets), representations and warranties, both written and oral, between the Parties with respect to the subject matter of this Stipulation. This Stipulation may only be

modified, altered, amended or supplemented by means of a writing signed by the Principal Parties, *provided* that any amendment or modification of this Stipulation that adversely affects the rights or obligations of any other Party hereto shall also require the express written consent of such Party.

15. **Stalking Horse APA.** Except as expressly set forth in this Stipulation, nothing contained in this Stipulation shall expand, reduce, or otherwise alter the rights and obligations of the Parties under the Stalking Horse APA, the other Transaction Documents or the Sale Order.

IN WITNESS WHEREOF, this Stipulation is executed as of October 10, 2019.

/s/ Sarah R. Borders

Sarah R. Borders
Georgia Bar No. 610649
Leia Clement Shermohammed
Georgia Bar No. 972711
Britney Baker
Georgia Bar No. 625752
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Email: sborders@kslaw.com
Email: lshermohammed@kslaw.com
Email: bbaker@kslaw.com

-and-

Kelley A. Cornish, Esq.
New York Bar No. 1930767
Brian S. Hermann, Esq.
New York Bar No. 2810232
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
Email: kcornish@paulweiss.com
Email: bhermann@paulweiss.com

*Counsel for Debtors
and Debtors in Possession*

/s/ J. Robert Williamson

J. Robert Williamson
Georgia Bar No. 765214
Ashley R. Ray
Georgia Bar No. 601559
J. Hayden Kepner, Jr.
Georgia Bar No. 416616
SCROGGINS & WILLIAMSON, P.C.
4401 Northside Parkway, Suite 450
Atlanta, Georgia, Suite 450
Telephone: (404) 893-3880
Facsimile: (404) 893-3886
Email: rwillamson@swlawfirm.com
Email: aray@swlawfirm.com
Email: hkepner@swlawfirm.com

-and-

Michael G. Burke, Esq.
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
Email: mgburke@sidley.com

-and-

Matthew A. Clemente, Esq.
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036
Email: mclemente@sidley.com

Counsel for the Committee

/s/ Erich N. Durlacher

Erich N. Durlacher
Georgia Bar No. 235563
BURR & FORMAN LLP
171 Seventeenth Street, N.W.
Atlanta, Georgia 30363
Telephone: (404) 685-4313
Email: edurlacher@burr.com

-and-

Ariel A. Berrios
Julian Gurule
BUCHALTER, P.C.
1000 Wilshire Boulevard, Suite 1500
Los Angeles, California 90017
Telephone: (213) 891-0700
Email: aberrios@buchalter.com
Email: jgurule@buchalter.com

*Counsel for the Prepetition ABL Agent and
the Revolver Administrative Agent*

/s/ Todd C. Meyers

Todd C. Meyers
Georgia Bar No. 503756
Colin M. Bernardino
Georgia Bar No. 054879
**KILPATRICK TOWNSEND &
STOCKTON LLP**
1100 Peachtree Street, NE, Suite 2800
Atlanta, Georgia 30309
Telephone: (404) 815-6500
Email: tmeyers@kilpatricktownsend.com
Email: cbernardino@kilpatricktownsend.com

-and-

Adam C. Harris
G. Scott Leonard
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, New York 10022
Telephone: (212) 756-2000
Email: adam.harris@srz.com
Email: Gregory.leonard@srz.com

*Counsel for the Prepetition
First Lien Secured Parties*

/s/ Mark I. Duedall

Mark I. Duedall
Georgia Bar No. 231770
**BRYAN CAVE LEIGHTON PAISNER
LLP**
One Atlantic Center, 14th Floor
1201 West Peachtree Street, NW
Atlanta, Georgia 30309
Telephone: (404) 572-6600
Email: mark.duedall@bclplaw.com

-and-

Marc Kieselstein
Illinois Bar No. 6199255
Alexandra Schwarzman
Illinois Bar No. 6310133
Stephen L. Iacovo
Illinois Bar No. 6324094
Scott J. Vail
Illinois Bar No. 6324780
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Email: marc.kieselstein@kirkland.com
Email: alexandra.schwarzman@kirkland.com
Email: stephen.iacovo@kirkland.com
Email: scott.vail@kirkland.com

Counsel for the Solus Entities

/s/ David A. Wender

David A. Wender
Thomas P. Clinkscales
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
Telephone: (404) 881-7000
Facsimile: (404) 881-7777
Email: david.wender@alston.com
Email: tom.clinkscales@alston.com

*Counsel for the DIP Term Administrative
Agent, Prepetition 1.5 Lien Agent and
Prepetition Second Lien Agent*

*** END OF DOCUMENT ***

Prepared and presented by:

/s/ Sarah R. Borders

Sarah R. Borders

Georgia Bar No. 610649

Leia Clement Shermohammed

Georgia Bar No. 972711

Britney Baker

Georgia Bar No. 625752

KING & SPALDING LLP

1180 Peachtree Street NE

Atlanta, Georgia 30309

Telephone: (404) 572-4600

Email: sborders@kslaw.com

Email: bbaker@kslaw.com

-and-

Kelley A. Cornish (admitted *pro hac vice*)

New York Bar No. 1930767

Brian S. Hermann (admitted *pro hac vice*)

New York Bar No. 2810232

PAUL, WEISS, RIFKIND, WHARTON &

GARRISON LLP

1285 Avenue of the Americas

New York, New York 10019

Telephone: (212) 373-3000

Email: kcornish@paulweiss.com

Email: bhermann@paulweiss.com

Counsel for the Debtors in Possession

SCHEDULE B – PENSION APPROVAL ORDER



IT IS ORDERED as set forth below:

Date: October 11, 2019

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	)	Chapter 11
JACK COOPER VENTURES, INC., <i>et al.</i> , ¹	)	Case No. 19-62393 (PWB)
Debtors.	)	(Jointly Administered)

**ORDER AUTHORIZING THE DEBTORS TO ENTER
INTO THE PENSION PLAN AGREEMENT AND RELEASE**

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: Jack Cooper Ventures, Inc. (0805); Jack Cooper Diversified, LLC (9414); Jack Cooper Enterprises, Inc. (3001); Jack Cooper Holdings Corp. (2446); Jack Cooper Transport Company, Inc. (3030); Auto Handling Corporation (4011); CTEMS, LLC (7725); Jack Cooper Logistics, LLC (3433); Auto & Boat Relocation Services, LLC (9095); Axis Logistic Services, Inc. (2904); Jack Cooper CT Services, Inc. (3523); Jack Cooper Rail and Shuttle, Inc. (7801); Jack Cooper Investments, Inc. (6894); North American Auto Transportation Corp. (8293); Jack Cooper Transport Canada Inc. (8666); Jack Cooper Canada GP 1 Inc. (7030); Jack Cooper Canada GP 2 Inc. (2373); Jack Cooper Canada 1 Limited Partnership (3439); and Jack Cooper Canada 2 Limited Partnership (7839). The location of the Debtors' corporate headquarters and service address is: 630 Kennesaw Due West Road NW, Kennesaw, Georgia 30152.

Upon the motion (the "Motion")² of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (this "Order"), (a) authorizing the Debtors to enter into the Pension Plan Agreement and Release (attached hereto as **Exhibit 1**), and (b) granting related relief, all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The Pension Plan Agreement and Release is the product of arm's-length and good faith negotiations by and among the Debtors, New Jack Cooper, and the CSPF, and entering into

² Capitalized terms used but not otherwise defined herein have the meaning ascribed to them in the Motion.

the Pension Plan Agreement and Release and performance thereunder is in the best interests of the Debtors' estates.

3. The terms of the Pension Plan Agreement and Release are hereby approved.

4. Pursuant to sections 105 and 363 of the Bankruptcy Code, the Debtors are authorized to enter into the Pension Plan Agreement and Release and perform thereunder.

5. Nothing in this Order shall restrict, impair or modify the rights of any party in interest to object to the amount of any claim filed by CSPF in the Debtors' bankruptcy cases.

6. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a), the Bankruptcy Local Rules for the Northern District of Georgia, and the Complex Case Procedures are satisfied by such notice.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

8. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

9. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Final Order, except as set forth in the Pension Plan Agreement and Release.

END OF ORDER

Prepared and presented by:

/s/ Sarah R. Borders

Sarah R. Borders

Georgia Bar No. 610649

Leia Clement Shermohammed

Georgia Bar No. 972711

Britney Baker

Georgia Bar No. 625752

KING & SPALDING LLP

1180 Peachtree Street NE

Atlanta, Georgia 30309

Telephone: (404) 572-4600

Email: sborders@kslaw.com

Email: lshermohammed@kslaw.com

Email: bbaker@kslaw.com

-and-

Kelley A. Cornish (admitted *pro hac vice*)

New York Bar No. 1930767

Brian S. Hermann (admitted *pro hac vice*)

New York Bar No. 2810232

**PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP**

1285 Avenue of the Americas

New York, New York 10019

Telephone: (212) 373-3000

Email: kcornish@paulweiss.com

Email: bhermann@paulweiss.com

Counsel for the Debtors in Possession

Exhibit 1

Pension Plan Agreement and Release

AGREEMENT AND RELEASE

THIS AGREEMENT is made by and among, each intending to be legally bound, the Central States, Southeast and Southwest Areas Pension Fund ("**Pension Fund**"), Jack Cooper Transport Company, Inc. ("**JC**") and Auto Handling Corporation ("**AHC**" and together with JC, "**Old JC**"), JC Buyer Company, Inc. ("**New JC**"), and, solely for purposes of Sections 6.2 and 6.6, Solus Alternative Asset Management LP on behalf of itself and each of its managed funds and accounts ("**Initial Investor**") and certain of its and their affiliates and transferees as described in such section (Old JC, New JC, the Pension Fund and, solely for purposes of Sections 6.2 and 6.6, the Initial Investor are collectively referred to herein as the "**Parties**," and each a "**Party**").

A. The Pension Fund is a multiemployer pension plan within the meaning of 29 U.S.C. §§ 1002(37) and 1301(a)(3).

B. JC and AHC are corporations organized under the laws of the State of Delaware.

C. New JC is a corporation organized under the laws of the State of Delaware.

D. Old JC is currently signatory to the 2015 National Master Automobile Transporters Agreement ("**NMATA**"), under which Old JC is required to make contributions to the Pension Fund on behalf of certain of its employees.

E. Old JC failed to remit any contributions to the Pension Fund with respect to the June 2019 billing period, which began May 26, 2019.

F. On July 25, 2019, the Parties finalized a term sheet (the "**Term Sheet**") that described the terms and conditions related to Old JC's and New JC's participation in the Pension Fund. Under the Term Sheet and the subsequently executed Pension Plan Treatment Agreement, each Party has agreed (subject to certain contingencies and conditions precedent) to support Old JC's Restructuring (as defined below) to the extent commercially reasonable.

G. On August 5, 2019, the trustees of the Pension Fund voted to terminate Old JC's participation in the Pension Fund retroactively effective to May 26, 2019 (the start of the June 2019 billing period). Accordingly, Old JC and its controlled group effected a complete withdrawal from the Pension Fund (within the meaning of 29 U.S.C. § 1383) on May 26, 2019.

H. On August 6, 2019, Old JC, along with certain related entities, commenced jointly administered voluntary cases under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Georgia (the "Bankruptcy Court") to implement a restructuring (the "Restructuring") that the parties anticipate will involve the sale pursuant to Section 363 of the Bankruptcy Code (the "Sale Transaction") of all, or substantially all, of Old JC's assets to New JC, which is a third-party and newly created entity that has not previously participated in the Pension Fund.

I. On August 6, 2019, the Parties entered into that certain Pension Plan Treatment Agreement to express to each other their mutual support and commitment in respect of the Restructuring and to agree that, in connection with the Restructuring, Old JC will permanently cease to have an obligation to contribute to, and completely withdraw from, the Pension Fund on or before the consummation of the Sale Transaction with New JC, and that the Parties will consummate the transactions contemplated by the Term Sheet by, among other things, entering into the Pension Fund's participation agreement whereby New JC commences participation in the Pension Fund as a New Employer under the Pension Fund's hybrid plan rules, and this Agreement, which contains additional provisions concerning New JC commencing participation in the Pension Fund as a New Employer and also provides New JC, the Initial Investor and affiliated parties the releases contemplated by the Term Sheet.

J. In connection with the Sale Transaction, New JC will offer employment, effective immediately following the closing of the Sale Transaction, on terms set forth under the Modified CBA, to substantially all of Old JC's International Brotherhood of Teamsters affiliates (collectively, "Union")-represented employees who were participating in the Pension Fund immediately prior to the Sale Transaction.

K. Pursuant to 29 U.S.C. § 1391(c)(5), the Pension Fund adopted an alternative method for determining an employer's allocable share of unfunded vested benefits ("**Alternative Method**"), and the Pension Benefit Guaranty Corporation approved such Alternative Method effective October 14, 2011 ("**Alternative Method Date**"), and such Alternative Method became part of Appendix E to the Pension Fund's plan document (the "**Plan**").

L. Pursuant to the Alternative Method, on or after the Alternative Method Date an employer that has never been an "Old Employer," as that term is defined in the Plan, may become a "New Employer," as that term is defined in the Plan, by commencing an obligation to contribute to the Pension Fund (such participation in the Pension Fund as a New Employer is hereinafter referred to as participation in the "**Hybrid Plan**") at rates established in a collective bargaining agreement ("**CBA**").

M. On [DATE], Old JC entered into an agreement with the Union which modified the NMATA (the "**Modified CBA**") to provide that New JC would participate in the Pension Fund as a New Employer and contribute to the Hybrid Plan an amount of \$150 per week per covered employee from the closing date of the Sale Transaction through and including December 31, 2024. In connection with the Sale Transaction, New JC is obligated to assume, as of the closing date of the Sale Transaction the Modified CBA (the "**Sale Closing Date**" refers to the specific

date on which the Sale Transaction closes, which shall be the same date on which New JC assumes the Modified CBA);

NOW THEREFORE, in consideration of the mutual promises and agreements contained herein, the parties agree as follows:

Article 1 – Old JC Withdrawal from the Pension Fund; Adjustable Benefits.

1.1 The Parties agree that, effective May 26, 2019, Old JC permanently ceased to have an obligation to contribute to, and has completely withdrawn from, the Pension Fund and that New JC shall have no obligation or liability with respect to Old JC's participation in the Pension Fund, including Old JC's withdrawal liability. Notwithstanding the foregoing, New JC shall nonetheless be required to remit the Special Contribution described in Article 2 of this Agreement.

1.2 Notwithstanding Old JC's withdrawal from the Pension Fund as described in Section 1.1, the Pension Fund will not curtail, reduce, eliminate or otherwise adversely affect any benefit that Old JC's Union participants in the Pension Fund (including current employees or former employees eligible for or receiving benefits from the Pension Fund) would otherwise be eligible to receive from the Pension Fund, including, without limitation, any "adjustable benefits" or any accrued vested pension benefits; provided, however, that subsequent to the Sale Closing Date employees will earn future benefits in accordance with the terms of the Plan and the Modified CBA (including the new contribution rates set forth therein). Further, nothing contained in this Agreement shall limit the Pension Fund's rights to curtail, reduce, eliminate or otherwise adversely affect any benefit that Old JC's participants in the Pension Fund (including current employees or former employees eligible for or receiving benefits from the Pension Fund) would be eligible to receive from the Pension Fund (including, without limitation, any "adjustable benefits", or any accrued vested pension benefits) subsequent to the Sale Closing

Date due to any circumstance that would otherwise allow the Pension Fund to do so (other than the circumstances arising exclusively from the Restructuring itself).

Article 2 – Special Contribution Obligation of New JC and Benefit Restoration Commitment of the Pension Fund

2.1 New JC shall, on or before the 18-month anniversary of the Sale Closing Date, pay a special contribution to the Pension Fund equal in amount to the aggregate amount of contributions not paid by Old JC (or which would have been paid by Old JC but for the termination of its participation in the Pension Fund) for work performed from May 26, 2019 through the Sale Closing Date (the “Special Contribution”), plus interest calculated as follows: (a) with respect to the period beginning on the date the contributions were due (or would have been due from Old JC but for the termination of its participation in the Pension Fund) and ending on the day prior to the Sale Closing Date, interest shall be computed at an annualized rate of 4.93%; and (b) with respect to the period beginning on the Sale Closing Date and ending on the date the Special Contribution is actually paid, interest shall be computed at the greater of: (i) an annualized interest rate equal to two percent (2%) plus the prime interest rate established by JPMorgan Chase Bank, NA for the fifteenth (15th) day of the month for which the interest is charged, or (ii) an annualized interest rate of 7.5%. The Special Contribution obligation shall be secured by a lien on New JC’s assets junior to liens in favor of New JC’s lenders and other liens permitted to be incurred under New JC’s financing agreements.

2.2 Promptly after full and timely payment of the Special Contribution and all accrued interest, the Pension Fund shall retroactively credit any benefit accruals that the Pension Fund did not grant on account of (a) any Old JC contribution delinquencies or (b) Old JC’s discontinuation of participation in and/or withdrawal from the Pension Fund, in each case, in

respect of individuals who were Old JC's employees on or prior to the Sale Closing Date, whether or not such individuals enter New JC's employ.

Article 3 – New JC's Participation in the Hybrid Plan as a New Employer

3.1 Effective as of the Sale Closing Date, New JC shall commence participation in the Pension Fund as a New Employer at a contribution rate of \$150 per week per covered employee as established by the Modified CBA and shall enter into the Pension Fund's participation agreement attached hereto as Exhibit A (the "**Participation Agreement**"), which such Participation Agreement shall at all times be read in conjunction with, and interpreted in a manner consistent with, this Agreement. The Parties acknowledge and agree that Sections 5 and 6 of the Participation Agreement shall not be construed to prevent New JC and the Union from bargaining for a cessation of New JC's obligation to contribute to the Pension Fund at the expiration of the Modified CBA and Guarantee Period (as defined below), subject to the requirements of Sections 5 and 6 of the Participation Agreement. New JC's employees participating in the Pension Fund pursuant to the Modified CBA will earn future benefits under the Pension Fund based on such contribution rate in accordance with the terms of the Pension Fund's Hybrid Plan. New JC agrees to be bound by, and comply with, the Pension Fund's trust agreement (the "**Trust Agreement**"), the Plan, the Participation Agreement, and all rules and policies of the Pension Fund, in each case to the extent not inconsistent with this Agreement. In addition, the Pension Fund shall not be bound by the Modified CBA to the extent the Modified CBA contains terms contrary to those contained in this Agreement.

3.2 New JC's participation in the Pension Fund during the entire Guarantee Period (as defined below) shall be pursuant to the terms of the Qualifying New ("Hybrid Method") Employers Schedule contained in Appendix M of the Plan, and New JC shall enter into a CBA

(or a series of CBAs) that (a) includes an obligation to contribute to the Hybrid Plan and which embodies such requirements, (b) expires on the last day of the Guarantee Period (the relevant provisions of the initial collective bargaining period shall cover a period of five years), and (c) covers all of the work including, without limitation, job classifications and locations, covered under Old JC's NMATA (and all supplements and addendums thereto).

3.3 For each of the calendar years 2020 through 2024 (as well as for a prorated portion of calendar year 2019) ("**Guarantee Period**"), New JC's contribution base units ("**CBUs**") shall be at least 68,619 per plan year (prorated for 2019) ("**Guaranteed CBUs**").¹ The amount of Guaranteed CBUs is subject to adjustment as set forth in Sections 3.8 and 3.10 of this Agreement.

3.4 During the Guarantee Period, New JC's employees that participate in the Pension Fund shall not participate in any 401(k) or other pension plan established by New JC or contributed to by New JC.

3.5 If the actual CBUs during the Guarantee Period are less than the Guaranteed CBUs for the Guarantee Period, New JC shall remit to the Pension Fund additional contributions in order to meet the Guaranteed CBUs for the Guarantee Period ("**Additional Contributions**"). CBUs in excess of the Guaranteed CBUs for any plan year shall be credited toward any other plan year in which the actual CBUs are less than Guaranteed CBUs. The dollar amount of the Additional Contributions owed by New JC to the Pension Fund in order to meet the Guaranteed CBUs for the Guarantee Period shall be calculated as follows: the net difference between the Guaranteed CBUs and the actual CBUs for New JC for the Guarantee Period, multiplied by \$150. By way of example, if the actual CBUs are less than the Guaranteed CBUs by 100 CBUs

¹ The amount of Guaranteed CBUs was calculated as 85% of two times the CBUs that Old JC reported for the period December 30, 2018 through June 29, 2019 as follows (.85*(2*40,364)).

for the Guarantee Period, then the Additional Contributions owed by New JC would be \$15,000 (100 CBUs multiplied by \$150).

3.6 Except as otherwise provided in this Agreement, the Additional Contributions which New JC must remit to the Pension Fund shall be remitted by New JC such that it is received in full by the Pension Fund on or before the second anniversary following the end of the Guarantee Period (*i.e.*, December 31, 2026). By way of example, if New JC failed to meet the Guaranteed CBUs for the entire Guarantee Period, New JC's Additional Contributions shall be due in full on or before the second anniversary following the end of the Guarantee Period. Any and all Additional Contributions due under this Agreement that New JC fails to remit when due shall be deemed to be delinquent contributions due under the terms of the Plan and 29 U.S.C. § 1145, and the Pension Fund shall be entitled to all remedies available under 29 U.S.C. § 1132(g)(2).

3.7 Old JC and New JC understand and agree that any Additional Contributions owed under this Agreement will not be attributable to any particular participant or group of participants in the Pension Fund, and shall not result in any additional benefit accruals.

3.8 In the event that (a) New JC (or any member of New JC's controlled group, determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)), or (b) any person, or group of persons together, that directly or indirectly, within the meaning of 26 C.F.R. § 1.414(c)-4, has a 51% or greater ownership interest in New JC, and acting alone or with New JC (or any member of New JC's controlled group, determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)), acquires at least a 51% interest in any trade or business (within the meaning of 29 U.S.C. § 1301(b)(1)) which participates in the Pension Fund and which, at any time before the acquisition, conducted any operations (regardless of location) of

the type covered by any of the CBAs that Old JC was a party to during any part of January 1, 2013 through the Sale Closing Date ("**Ownership Transaction**"), New JC agrees that the amount of Guaranteed CBUs for each plan year in the Guarantee Period subsequent to the plan year of the Ownership Transaction will be increased by 85% of the CBUs attributable to the acquired trade or business for the plan year prior to the plan year of the Ownership Transaction. For the plan year in which the Ownership Transaction occurs, the increase to the Guaranteed CBUs shall consist of adding 85% of the CBUs attributable to the acquired trade or business for the plan year prior to the plan year of the Ownership Transaction, multiplied by the number of weeks in the plan year of the Ownership Transaction subsequent to the Ownership Transaction, divided by the total number of weeks in the plan year of the Ownership Transaction. For purposes of meeting the Guaranteed CBUs, the CBUs of an acquired trade or business shall be counted toward meeting the Guaranteed CBUs only with respect to CBUs accruing in weeks subsequent to the Ownership Transaction. By way of example, if the Guaranteed CBUs on January 1 for the plan year in question is 100 CBUs and on September 30 of such plan year an Ownership Transaction occurs and the CBUs attributable to the acquired trade or business for such plan year is 100 CBUs, then the Guaranteed CBUs for such plan year shall be 121.25 CBUs $= ((100 \times 9) / 12) + (((85\% \times 100) + 100) \times 3) / 12$.

3.9 The contribution rate for the acquired trade or business in an Ownership Transaction shall be the higher of \$150 per week or the rate in effect prior to the acquisition (including any required contribution rate increases).

3.10 In the event that (a) New JC (or any member of New JC's controlled group, determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)), or (b) any person, or group of persons together, that directly or indirectly, within the meaning of 26 C.F.R.

§ 1.414(c)-4, has a 51% or greater ownership interest in New JC, and acting alone or with New JC (or any member of New JC's controlled group, determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)), acquires or acts as lessee (or sublessee) of at least 50% of the assets used in any covered operations of any trade or business (within the meaning of 29 U.S.C. § 1301(b)(1)) that participates in the Pension Fund ("Asset Transfer Transaction"), New JC agrees that the amount of Guaranteed CBUs for each plan year in the Guarantee Period subsequent to the plan year of the Asset Transfer Transaction will be increased by 85% of the CBUs attributable to the operations related to the Asset Transfer Transaction for the plan year prior to the plan year of the Asset Transfer Transaction. For the plan year in which the Asset Transfer Transaction occurs, the increase to the Guaranteed CBUs shall consist of adding 85% of the CBUs attributable to the operations related to the Asset Transfer Transaction for the plan year prior to the Asset Transfer Transaction, multiplied by the number of weeks in the plan year of the Asset Transfer Transaction subsequent to the Asset Transfer Transaction, divided by the total number of weeks in the plan year of the Asset Transfer Transaction. For purposes of meeting the Guaranteed CBUs, the CBUs attributable to the operations transferred in the Asset Transfer Transaction shall be counted toward meeting the Guaranteed CBUs only with respect to CBUs accruing in weeks subsequent to the Asset Transfer Transaction with respect to such operations. By way of example, if the Guaranteed CBUs on January 1 for the plan year in question is 100 CBUs and on September 30 of such plan year an Asset Transfer Transaction occurs and the CBUs attributable to the operations related to the Asset Transfer Transaction for such plan year is 100 CBUs, then the Guaranteed CBUs for such plan year shall be 121.25 CBUs $= ((100 \times 9) / 12) + (((85\% \times 100) + 100) \times 3) / 12$.

3.11 The contribution rate for the acquired operations in an Asset Transfer Transaction shall be the higher of \$150 per week or the rate in effect prior to the acquisition (including any required contribution rate increases).

3.12 In the event that at least a 51% ownership interest in New JC is transferred, or at least 50% of the assets used in any covered operations of New JC are transferred or leased, and the acquirer/lessee (or sublessee) of such ownership interest or assets (as the case may be) participates in the Pension Fund, or is in the controlled group within the meaning of 29 U.S.C. § 1301(b)(1) (determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)) with any trade or business that participates in the Pension Fund (an “**Existing Employer Transaction**”), participants from the acquirer’s/lessee’s (or sublessee’s) existing operations (including all controlled group members of such acquirer/lessee (or sublessee)) may not be counted toward satisfying the Guaranteed CBUs.

3.13 In the event that, prior to the end of the Guarantee Period, New JC permanently ceases covered operations and/or permanently ceases to have an obligation to contribute to the Pension Fund for any reason other than a Pension Fund insolvency, termination or mass withdrawal, but including, for the avoidance of doubt, as a result of a decertification, disclaimer of interest, or change in bargaining representative (a “**Withdrawal**”), New JC shall pay the following to the Pension Fund: (a) if the Withdrawal occurs on or before June 30, 2022, an amount equal to double the amount of Additional Contributions; or (b) if the Withdrawal occurs after June 30, 2022, the amount of Additional Contributions (either (a) or (b), the “**Termination Fee**”). The amount owed in the preceding sentence shall be computed using the assumption that the actual CBUs owed for periods after the Withdrawal is zero. The Termination Fee shall include payment for the entire period of time between the Withdrawal and the end of the

Guarantee Period. Under no circumstances will New JC be entitled to a refund of any contributions or other amounts.

3.14 In the event of New JC's permanent cessation of covered operations and/or the permanent cessation of the obligation to contribute to the Pension Fund prior to the end of the Guarantee Period, New JC shall provide additional information and documents related to the cessation as reasonably requested by the Pension Fund. The Pension Fund shall calculate the amount of the Termination Fee (if any) and provide notice of the amount to New JC within 14 days of receipt of the notice from New JC. New JC shall then pay the Termination Fee in a lump sum payment which must be received by the Pension Fund within 14 days of New JC's receipt of the Pension Fund's notice. Any portion of the Termination Fee which New JC fails to remit when due shall be deemed to be delinquent contributions due under the terms of the Plan and 29 U.S.C. § 1145, and the Pension Fund shall be entitled to all remedies available under 29 U.S.C. § 1132(g)(2).

3.15 Neither an obligation to remit the Additional Contributions nor an obligation to remit the Termination Fee shall be considered when determining (a) whether New JC has permanently ceased to have an obligation to contribute under the terms of this Agreement or (b) whether a complete or partial withdrawal has occurred under 29 U.S.C. §§ 1383 and/or 1385. Further, the Termination Fee shall be paid in addition to any other amounts which New JC may owe under this Agreement, and, to the extent not inconsistent with this Agreement, the Plan, the Employee Retirement Income Security Act of 1974 (as amended) ("ERISA"), or otherwise.

3.16 In the event New JC sells all or substantially all assets that it acquired from Old JC in the Sale Transaction prior to the end of the Guarantee Period ("Future Asset Sale"), New JC shall be liable to the Pension Fund for, and shall pay on the closing date of the Future Asset Sale,

all unsatisfied contribution obligations due from New JC under the Modified CBA or any other CBA with respect to the period from the Sale Closing Date to the closing date of the Future Asset Sale, and all unpaid Special Contribution, all unpaid Additional Contributions, and the Termination Fee; provided, however, that New JC shall be relieved of any such obligations if the subsequent buyer in the Future Asset Sale is an unrelated third party reasonably acceptable to the Pension Fund and such subsequent buyer agrees to assume New JC's obligations under this Agreement on terms reasonably acceptable to the Pension Fund.

3.17 In the event that an Ownership Transaction, Asset Transfer Transaction, or Existing Employer Transaction occurs, New JC shall give the Pension Fund notice of such event within 14 days of the closing of the transaction. Such notice shall describe the transaction, indicate the effective date of the transaction, and identify all parties to the transaction. New JC agrees to provide all additional information and documents related to the transaction as reasonably requested by the Pension Fund.

Article 4 – Assessment of Withdrawal Liability for any New JC Withdrawal from the Hybrid Plan

4.1 If New JC incurs a withdrawal within the meaning of 29 U.S.C. §1383 or 29 U.S.C. §1385 from the Hybrid Plan at any time from or after the Sale Closing Date, the associated withdrawal liability (if any) shall be based solely and exclusively on the Alternative Method and based on New JC's contributions to the Hybrid Plan made from and after the Sale Closing Date as a New Employer described in Section 2.2(b)(1) of Appendix E of the Plan in accordance with Section 2.4 of Appendix E of the Plan, and in no event shall the Pension Fund take into account for any purpose any contribution history of Old JC (or any member of its controlled group within the meaning of 29 U.S.C. §1301(b)(1)) to the Pension Fund prior to the Sale Closing Date.

4.2 For purposes of calculating New JC's withdrawal liability (if any) upon any future withdrawal by New JC from the Hybrid Plan, the amount of the Special Contribution and Additional Contributions shall not be taken into account in determining: (a) the amount of New JC's withdrawal liability, (b) the annual payoff amount of such withdrawal liability, (c) New JC's CBU contribution rate or (d) New JC's annual number of CBUs; provided, that both the Additional Contributions that are owed by New JC for the Guarantee Period and the CBUs that are necessary to be added to meet the Guaranteed CBUs shall be included in any withdrawal liability actually incurred by New JC.

4.3 New JC and Old JC understand and agree that Old JC is not entitled to an abatement of its withdrawal liability (whether in the form of a reduction or a waiver) pursuant to 29 U.S.C. §§ 1386-1388. New JC and Old JC further understand and agree that neither is entitled to receive the exception to withdrawal liability provided in 29 U.S.C. § 1390.

4.4 Notwithstanding any other provision of this Agreement:

(a) In the event the asset purchase agreement in connection with any Asset Transfer Transaction complies with 29 U.S.C. §1384, then New JC shall be treated as an Old Employer under the terms of the Plan for purposes of any withdrawal liability assessment, absent the explicit consent of the Pension Fund, but any withdrawal liability assessment shall not include any contribution history of Old JC (or any member of its controlled group) to the Pension Fund prior to the Sale; and

(b) In the event that (i) New JC (or any member of New JC's controlled group, determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)), or (ii) any person, or group of persons together, that directly or indirectly, within the meaning of 26 C.F.R. § 1.414(c)-4, has an 80% or greater ownership interest in New JC, and

acting alone or with New JC (or any member of New JC's controlled group, determined pursuant to the objective tests under 26 C.F.R. §1.414(b) or §1.414(c)), acquires at least an 80% ownership interest in any trade or business (within the meaning of 29 U.S.C. § 1301(b)(1)) which participates in the Pension Fund ("**80% Ownership Transaction**"), such acquired trade or business must satisfy its withdrawal liability, if any, to the Pension Fund in full at or before the acquisition in an amount determined under ERISA as though the acquired trade or business completely withdrew from the Pension Fund immediately prior to the acquisition. The occurrence of an 80% Ownership Transaction without the payment of such withdrawal liability shall result in New JC being treated as an Old Employer under the terms of the Plan, but any withdrawal liability assessment shall not include any contribution history of Old JC (or any member of its controlled group) to the Pension Fund prior to the Sale.

Article 5 – Representations and Warranties

5.1 Old JC warrants and represents to the Pension Fund that the contribution history reported by Old JC to the Pension Fund does not understate the contributions or CBU's of Old JC from January 1, 2009, through and including December 31, 2018.

5.2 Old JC warrants and represents that from January 1, 2009, through and including the Sale Closing Date, there were no trades or businesses (other than Jack Cooper Transport Company, Inc. and Auto Handling Corporation) that were both under common control with Old JC within the meaning of 29 U.S.C. § 1301(b)(1) and the regulations promulgated thereunder, and obligated to contribute to the Pension Fund during any part of that period.

5.3 Old JC warrants and represents that all the documents produced to the Pension Fund were true and accurate at the time they were produced to the Pension Fund, as well as at the

Sale Closing Date, and Old JC understands and agrees that the Pension Fund reasonably relied upon such documents in evaluating this Agreement.

5.4 The Pension Fund warrants and represents that, based upon the actuarial assumptions and methods utilized by the Pension Fund's actuaries, New JC is not projected to have any withdrawal liability to the Pension Fund in the event New JC should withdraw from participation in the Hybrid Plan. If at any time hereafter the Pension Fund determines that New JC is projected to have withdrawal liability to the Pension Fund based on the actuarial assumptions and methods utilized by the Pension Fund's actuaries, the Pension Fund will provide written notice thereof to New JC within thirty days of the earlier of: (a) the Pension Fund receiving its annual actuarial valuation from its actuaries or (b) another actuarial report is provided to the Pension Fund's trustees indicating such liability.

Article 6 – Settlement and Release

6.1 In consideration of New JC's payment obligations with respect to (a) the Special Contribution as set forth in Article 2 and (b) contributions, Additional Contributions (if any) and the Termination Fee (if any) as set forth in Article 3, the Pension Fund and its trustees, by their duly authorized agent, do for themselves, their successors and assigns, hereby release New JC and any member of New JC's controlled group within the meaning of 29 U.S.C. § 1301(b)(1) (and any of New JC's direct or indirect investors, owners, shareholders, representatives, limited or general partners, directors, officers, employees, agents or affiliates, in their capacity as such), whether on a successor theory or otherwise, from withdrawal liability, or any other liability related to the Pension Fund, arising from Old JC's withdrawal from the Pension Fund in connection with the Restructuring, or otherwise with respect to any participation in the Pension Fund prior to the Sale Closing Date (including on account of events occurring after the Sale Closing Date, such as mass withdrawal, plan termination, or insolvency). As part of the release

provided in the foregoing sentence, the Pension Fund and its trustees, by their duly authorized agent, do for themselves, their successors and assigns, release, settle, cancel, and discharge any and all claims, demands, rights, and causes of action to collect the liabilities released in this Section 6.1 from the parties released in this Section 6.1. This release shall become effective immediately upon the Sale Closing Date.

6.2 In consideration of New JC's payment obligations with respect to (a) the Special Contribution as set forth in Article 2 and (b) contributions, Additional Contributions (if any) and the Termination Fee (if any) as set forth in Article 3, and the Initial Investor's support for the Restructuring, the Pension Fund and its trustees, by their duly authorized agent, do for themselves, their successors and assigns, hereby release the Initial Investor, and any of its direct or indirect investors, shareholders, owners, representatives, officers, employees, limited or general partners, directors, agents, and affiliates (the "**Initial Investor Affiliates**"), in their capacity as such, and any transferees of the Initial Investor or the Initial Investor Affiliates that do not otherwise participate in the Pension Fund (collectively, the "**Investor Released Parties**"), whether on a controlled group theory or otherwise, from withdrawal liability, contributions, Additional Contributions, Special Contributions, or the Termination Fee, in each case, relating to or arising out of New JC's or Old JC's participation in the Hybrid Plan or the Pension Fund, whether arising or attributable to periods before, on or after the Sale Closing Date. As part of the release provided in the foregoing sentence (but subject to the limitations and exceptions set forth in the remainder of this Section 6.2), the Pension Fund and its trustees, by their duly authorized agent, do for themselves, their successors and assigns, release, settle, cancel, and discharge any and all claims, demands, rights, and causes of action to collect the liabilities released in this Section 6.2 from the parties released in this Section 6.2. For the avoidance of doubt, this Section

6.2 shall not: (a) release an Investor Released Party from liabilities arising out of such Investor Released Party's actions that are unrelated to New JC's participation in the Hybrid Plan, including fraudulent transfer or similar non-ERISA-specific creditors' remedies under state or federal law, and (b) release New JC from its liabilities or contribution obligations under the Hybrid Plan described in this Agreement, including any of New JC's obligations to pay Special Contributions, Additional Contributions, or the Termination Fee. Further, the release described in this Section 6.2 shall only apply to a transferee of the Initial Investor or an Initial Investor Affiliate if: (i) the transferee is not T. Michael Riggs, any person related to him by blood, marriage, or adoption, any trust of which T. Michael Riggs or any such related person is a settlor, trustee, or beneficiary, or any trustee, settlor, or beneficiary of any such trust, or any entity in which T. Michael Riggs, any such related person, or any such trust, individually or collectively, have a twenty percent (20%) or greater ownership interest; (ii) the transferee is not a natural person listed by such person's name in the "Name" column of the Jack Cooper Investments, Inc. capitalization table attached hereto as **Exhibit B** (collectively, the "**Identified Individuals**"), or, to the knowledge of the Investor Released Party making such transfer, any person related to an Identified Individual by blood, marriage, or adoption, any trust of which an Identified Individual or any such related person is a settlor, trustee, or beneficiary, or any trustee, settlor, or beneficiary of any such trust; (iii) the transferee is not a trust listed in the "Name" column of Exhibit B or, to the knowledge of the Investor Released Party making such transfer, any trustee, settlor, or beneficiary of any such trust; and (iv) the transferee is not a non-trust entity (other than an Initial Investor Affiliate) listed in the "Name" column of Exhibit B. For the avoidance of doubt, no transfer described in the preceding sentence shall affect the release of the Initial

Investor, the Initial Investor Affiliates or the Investor Released Parties described in this Section 6.2

6.3 None of the Parties or their respective successors, agents or assigns shall take any action to challenge this Agreement, the effect of this Agreement or the ability of the Parties to enter into this Agreement. None of the Parties or their respective successors, agents or assigns shall take any action that could reasonably be expected to cause the Union, any Pension Fund participant or beneficiary, any governmental agency or any other person or entity to take any action, under applicable law, the terms of the Plan or Trust Agreement (or related agreements) or otherwise, to challenge this Agreement, the effect of this Agreement or the ability of the Parties to enter into this Agreement; provided, that, for the avoidance of doubt, this sentence shall in no way restrict the Parties or any of their respective employees, trustees, successors, agents, or assigns from taking any action required by law (including such person's fiduciary duties), or providing any information or documents requested by any governmental entity, organization, or department, including but not limited to the Department of Labor, nor shall it prevent the Pension Fund from providing any information or documents to the Pension Fund's Independent Special Counsel.

6.4 It is agreed and understood by the Parties that nothing in this Agreement, including Section 6.1 or Section 6.2 above, shall release New JC from any of its obligations to the Pension Fund provided for in this Agreement, including but not limited to New JC's obligation to make contributions to the Pension Fund pursuant to the terms of the Modified CBA. Except as otherwise provided in this Agreement, all payments and obligations of New JC under this Agreement shall be joint and several obligations of each trade or business in New JC's controlled group (within the meaning of 29 U.S.C. § 1301(b)(1) and the regulations promulgated

thereunder). For the avoidance of doubt, no Investor Released Party shall at any time be deemed a member of such controlled group.

6.5 All payments and obligations of Old JC under this Agreement shall be joint and several obligations of each trade or business in Old JC's controlled group (within the meaning of 29 U.S.C. § 1301(b)(1) and the regulations promulgated thereunder). For the avoidance of doubt, neither New JC nor any Investor Released Party shall at any time be deemed a member of such controlled group.

6.6 To the extent that Old JC negotiates relief with other multiemployer pension plans in which it participates in connection with the Restructuring on terms that are more favorable than the terms agreed to between the Pension Fund and Old JC, this Agreement shall be revised to include the more favorable terms. If New JC or the Initial Investor hereafter agree to pay contributions or withdrawal liability that Old JC owed for periods prior to the Sale Closing Date to any other multiemployer pension plan on terms more favorable than those provided to the Pension Fund, this Agreement shall be revised to include the more favorable terms.

Article 7 – Notices

7.1 All notices required under this Agreement shall be provided by electronic mail, with a copy by first class United States mail, and sent as follows:

Notices to the Pension Fund:

Brad R. Berliner
Deputy General Counsel
Central States Funds
8647 W. Higgins Rd.
Chicago, IL 60631
Email: bberliner@centralstatesfunds.org

Pete Priede
Senior Director of Employer Services, Pension, and Finance
Central States Funds
8647 W. Higgins Rd.
Chicago, IL 60631
Email: ppriede@centralstatesfunds.org

Notices to Old JC:

Jack Cooper Investments, Inc.
630 Kennesaw Due West Road
Kennesaw, GA 30152
Attn.: Theo Ciupitu
Email: tciupitu@jackcooper.com

with a copy to:

Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Attn: Brian S. Hermann
Kelley A. Cornish
John T. Weber
Email: bhermann@paulweiss.com
kcornish@paulweiss.com
jweber@paulweiss.com

Notices to New JC:

JC Buyer Company, Inc.
410 Park Avenue, 11th Floor
New York, New York 10022
Attention: Thomas Higbie
Stephen Blauner
Email address: thigbie@soluslp.com
sblauner@soluslp.com
complaine@soluslp.com

with a copy to:

Kirkland & Ellis LLP
300 North LaSalle
Chicago, Illinois 60654
Attention: Marc Kieselstein
Alexandra Schwarzman
E-mail address: mkieselstein@kirkland.com
alexandra.schwarzman@kirkland.com
and

Kirkland & Ellis LLP
601 Lexington Avenue
New York, New York 10022
Attention: Jonathan S. Henes
E-mail address: jhenes@kirkland.com

Notices shall be deemed received on the date they are sent in accordance with this paragraph. A party may change the person(s) to whom or the address to which notice must be given by giving notice of the change to the other party in accordance with this Section 7.1.

Article 8 –Jurisdiction and Venue

8.1 This Agreement is being entered into and performed within Cook County in the State of Illinois and shall be construed and interpreted in accordance with federal law and the laws of the State of Illinois without regard to Illinois's conflict of laws rules. Any and all actions brought that relate in any way to this Agreement shall be filed and litigated only in courts located in Cook County, Illinois, and all of the parties to this Agreement consent to personal jurisdiction in any federal or state court located in Cook County, Illinois. Notwithstanding the foregoing consent to Illinois jurisdiction, solely for the period prior to the Sale Closing Date, (a) each Party agrees that the Bankruptcy Court shall have exclusive jurisdiction of all matters arising out of or in connection with this Agreement, and (b) each of the Parties irrevocably and unconditionally submits to the personal jurisdiction of the Bankruptcy Court solely for purposes of any action, suit, proceedings or other contested matter arising out of or relating to this Agreement.

Article 9 – Certifications and Understandings of the Parties

9.1 The term “person” as used in this Agreement shall include not only individuals, but also entities including, without limitation, partnerships, corporations, trusts, estates, limited liability companies, limited liability partnerships, and joint ventures.

9.2 In the event of any conflict between the terms of the Plan, Trust Agreement, the Participation Agreement, any amendments subsequently adopted to any of them, or any other rules, regulations and policies presently in effect or subsequently adopted by the trustees of the Pension Fund or their duly authorized agent and this Agreement, the terms of this Agreement shall apply.

9.3 Subject to Section 1.2, the Parties understand and agree that nothing in this Agreement constitutes a representation or guarantee by the Pension Fund regarding the benefits that any participant or group of participants in the Pension Fund is receiving or shall receive in the future.

9.4 This Agreement has been drafted and edited by all Parties. Therefore, this Agreement shall not be construed against any Party on the basis that one or more of the Parties was the principal drafter of the Agreement.

9.5 Each of the Parties to this Agreement certifies that it has read the terms of this Agreement, that it has had the opportunity to discuss this Agreement with its attorneys, and that it understands the terms and effects of this Agreement.

9.6 Each person signing this Agreement represents that he or she has the capacity and the authority to execute this Agreement on behalf of the Party on whose behalf he or she signs this Agreement, that he or she also has the full power, right and authority to bind the Party on whose behalf he or she signs this Agreement, and that this Agreement constitutes the legal, valid and binding obligation of such Party. Other than Bankruptcy Court approval of this Agreement

in connection with the Restructuring and Sale Transaction, no permit, approval or consent of, or notification to any other person is necessary in connection with the execution, delivery and performance by the Pension Fund, Old JC or New JC of this Agreement. None of the execution, delivery or performance of this Agreement by the Pension Fund, Old JC or New JC will (with or without notice or passage of time or both) result in the breach or violation of any of the terms of the Pension Fund or any of its governing documents or instruments, the Modified CBA, or any other contract or other agreement or obligation of any kind or nature to which the Pension Fund, Old JC or New JC is party or subject.

9.7 Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement or the application of any such provision to any person or circumstance shall be held to be prohibited by, illegal or unenforceable under applicable law in any respect by a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or illegality or unenforceability, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

Article 10 – Entire Agreement, Changes, Counterparts

10.1 This Agreement represents the entire understanding between the Parties and cannot be changed or amended, except by a written agreement, signed by all of the Parties, and attached to this Agreement.

10.2 The Recitals set forth in paragraphs A through M are incorporated into, and made part of, this Agreement.

10.3 The date of this Agreement shall be deemed to be the date of the latest signature, and the Agreement shall be effective as of such date.

10.2 The Recitals set forth in paragraphs A through M are incorporated into, and made part of, this Agreement.

10.3 The date of this Agreement shall be deemed to be the date of the latest signature, and the Agreement shall be effective as of such date.

10.4 This Agreement may be executed in separate counterparts, which when taken together shall form and constitute the Parties' entire agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the indicated dates.

**CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND**

BY: 

DATE: 10-7-2019

JACK COOPER TRANSPORT COMPANY, INC.

BY: _____

DATE: _____

AUTO HANDLING CORPORATION

BY: _____

DATE: _____

JC BUYER COMPANY, INC.

BY: _____

DATE: _____

10.2 The Recitals set forth in paragraphs A through M are incorporated into, and made part of, this Agreement.

10.3 The date of this Agreement shall be deemed to be the date of the latest signature, and the Agreement shall be effective as of such date.

10.4 This Agreement may be executed in separate counterparts, which when taken together shall form and constitute the Parties' entire agreement.

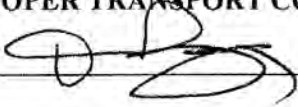
IN WITNESS WHEREOF, the Parties have executed this Agreement on the indicated dates.

**CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND**

BY: _____

DATE: _____

JACK COOPER TRANSPORT COMPANY, INC.

BY:  _____

DATE: _____

AUTO HANDLING CORPORATION

BY:  _____

DATE: _____

JC BUYER COMPANY, INC.

BY: _____

DATE: _____

10.2 The Recitals set forth in paragraphs A through M are incorporated into, and made part of, this Agreement.

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IN WITNESS WHEREOF, the Parties have executed this Agreement on the indicated dates.

**CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND**

BY: _____

DATE: _____

JACK COOPER TRANSPORT COMPANY, INC.

BY: _____

DATE: _____

AUTO HANDLING CORPORATION

BY: _____

DATE: _____

JC BUYER COMPANY, INC.

BY: Stephen J. Blann

DATE: 9/27/2019

Solely for Purposes of Sections 6.2 and 6.6 hereof:

SOLUS ALTERNATIVE ASSET MANAGEMENT LP

BY: 

DATE: 9/27/2019

Exhibit A

Participation Agreement



PARTICIPATION AGREEMENT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS
 PENSION FUND/HEALTH AND WELFARE FUND
 8647 WEST HIGGINS ROAD
 CHICAGO, ILLINOIS 60631-2803
 PHONE: (847) 518-9800

EMPLOYER NAME: JC BUYER COMPANY, INC.
ACCOUNT NUMBER: _____

THIS AGREEMENT sets forth the terms under which the Employer will participate in the Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") and/or the Central States, Southeast and Southwest Areas Health and Welfare Fund ("Health and Welfare Fund") in accordance with its collective bargaining agreement with the Union covering the following job classification(s): all classifications covered by the collective bargaining agreements under which the employer is required to contribute to the Pension Fund and/or Health and Welfare Fund
 and any other job classification covered by the collective bargaining agreement.

1. The Union and Employer agree to be bound by the Trust Agreement(s) of the Pension Fund and/or the Health and Welfare Fund and all amendments subsequently adopted as well as all rules and regulations presently in effect or subsequently adopted by the Trustees of the Fund(s) and accept the respective Employer and Employee Trustees and their successors.

2. The Employer shall contribute to the Pension Fund for each Covered Employee at the following rates:

Effective Date:	<u>10/10/2019</u>	Rate:	<u>\$150.00 / wk</u>
Effective Date:	_____	Rate:	_____
Effective Date:	_____	Rate:	_____
Effective Date:	_____	Rate:	_____
Effective Date:	_____	Rate:	_____

3. The Employer shall contribute to the Health and Welfare Fund for each Covered Employee at the following rates:

Effective Date:	_____	Rate:	_____	_____	_____
Effective Date:	_____	Rate:	_____	_____	_____
Effective Date:	_____	Rate:	_____	_____	_____
Effective Date:	_____	Rate:	_____	_____	_____
Effective Date:	_____	Rate:	_____	_____	_____

4. Contribution rate changes after the last Effective Date set forth in paragraphs 2 and 3 shall be determined by each new collective bargaining agreement and such rate changes shall be incorporated into this Agreement. The parties may execute an interim agreement establishing contribution rates during the periods when a new collective bargaining agreement is being negotiated. In the absence of an interim agreement, the contribution rate required to be paid after termination of a collective bargaining agreement and prior to either the execution of a new collective bargaining agreement or the termination of this Agreement, shall be the rates in effect on the last day of the terminated collective bargaining agreement. However, the Trustees reserve the right to reduce benefit levels if the contribution rate is or becomes less than the then published rate for the applicable benefit plan or class.

5. This Agreement and the obligation to pay contributions to the Fund(s) will continue after the termination of a collective bargaining agreement except no contributions shall be due during a strike unless the Union and the Employer mutually agree in writing otherwise. This Agreement and the Employer's obligation to pay contributions shall not terminate until a) the Trustees decide to terminate the participation of the Employer and provide written notice of their decision to the Employer specifying the date of termination of participation or b) the Employer is no longer obligated by a contract or statute to contribute to the Fund(s) and the Fund(s) have received a written notice directed to the Fund(s)' Contracts Department at the address specified above sent by certified mail with return receipt requested which describes the reason why the Employer is no longer obligated to contribute or c) the date the NLRB certifies the result of an election that terminates the Union's representative status or d) the date the Union's representative status terminates through a valid disclaimer of interest. In the event the Employer participates in both the Pension

Fund and the Health and Welfare Fund and the termination referred to in a) or b) relates to only one Fund, then this Agreement shall remain in effect with respect to the other Fund. In the event an NLRB election or disclaimer of interest referred to in c) or d) relates to only part of the bargaining unit, this Agreement shall remain in effect with respect to the remainder of the bargaining unit.

6. When a new collective bargaining agreement is signed or the Employer and the Union agree to change the collective bargaining agreement, the Employer shall promptly submit the entire agreement or modification to the Fund(s)' Contracts Department by certified mail (return receipt requested) at the address specified above. Any agreement or understanding which affects the Employer's contribution obligation which has not been submitted to the Fund(s) as required by this paragraph, shall not be binding on the Trustees and this Agreement and the written agreement(s) that has been submitted to the Fund(s) shall alone remain enforceable. The following agreements shall not be valid: a) an agreement that purports to retroactively eliminate or reduce the Employer's statutory or contractual duty to contribute to the Fund(s); b) an agreement that purports to prospectively reduce the contribution rate payable to the Pension Fund or c) an agreement that purports to prospectively eliminate the duty to contribute to the Pension Fund during the stated term of a collective bargaining agreement that has been accepted by the Pension Fund.

7. For purposes of this Agreement, the term "Covered Employee" shall mean any full-time or part-time employee covered by a collective bargaining agreement requiring contributions to the Fund(s) and includes casual employees (i.e. short term employees who work for uncertain or irregular duration) except a casual employee shall not be a Covered Employee with respect to the Health and Welfare Fund if the collective bargaining agreement explicitly excludes casual employees from participation in the Health and Welfare Fund. Covered Employee shall not include any person employed in a managerial or supervisory capacity or any person employed for the principal purpose of obtaining benefits from the Fund(s).

8. The Employer agrees to remit contributions on behalf of each Covered Employee for any period he/she receives, or is entitled to receive, compensation (regardless of whether the employment relationship is terminated), including show up time pay, overtime pay, holiday pay, disability or illness pay, layoff/severance pay, vacation pay or the payment of wages which are the result of any National Labor Relations Board proceeding, grievance/arbitration proceeding or other legal proceeding or settlement. If the collective bargaining agreement states that contributions shall not be due on newly hired Covered Employees for a specified waiting period, no contributions shall be due until the Covered Employee completes the specified waiting period. If required by the applicable collective bargaining agreement, contributions shall also be made to the Fund(s) on behalf of any Covered Employee who is not working due to illness or injury even if the Covered Employee is not entitled to compensation. The Employer shall pay any contributions that would have otherwise been paid on any Covered Employee who is a re-employed service member or former service member but for his or her absence during a period of uniformed service as defined at 32 C.F.R. §104.3.

9. On or before the 15th day of each month, the Employer must report to the Fund(s) any change in the Covered Employee workforce (including, but not limited to new hires, layoffs or terminations) which occurred during the prior month and must pay all contributions owed for the prior month. In the event of a delinquency, a) the Employer shall be obligated to pay interest on the monies due to the Fund(s) from the date when payment was due to the date when the payment is made, together with all expenses of collection incurred by the Fund(s), including, but not limited to, attorneys' fees and costs and b) at the option of the Trustees or their delegated representative, the payment of contributions that accrue after the Employer has become delinquent shall be accelerated so that the contributions owed for each calendar week (Sunday through Saturday) shall be due on the following Monday. If the Employer fails to report changes in the covered workforce on time, the Employer must pay the contributions billed by the Health and Welfare Fund regardless of actual terminations, leaves of absence, layoffs or other changes in the workforce. The Trustees reserve the right to terminate the participation of any Employer that fails to timely pay required contributions.

10. The Employer shall provide the Trustees with access to its payroll records and other pertinent records when requested by the Fund(s). If litigation is required to either obtain access to the Employer's records or to collect additional billings that result from the review of the records, all costs incurred by the Fund(s) in conducting the review shall be paid by the Employer and the Employer shall pay any attorneys' fees and costs incurred by the Fund(s).

11. The Trustees shall not be required to submit any dispute concerning the Employer's obligation to pay contributions to any grievance/arbitration procedure set forth in any collective bargaining agreement.

12. The Employer acknowledges that it is aware of the Fund(s)' adverse selection rule (including Special Bulletin 90-7) and agrees that while this Agreement remains in effect, it will not enter into any agreement or engage in any practice that violates the adverse selection rule.

13. This Agreement shall in all respects be construed according to the laws of the United States. In all actions taken by the Trustees to enforce the terms of this Agreement, including actions to collect delinquent contributions or to conduct audits, the Illinois ten year written contract statute of limitations shall apply. The Employer agrees that the statute of limitations shall not begin to accrue with respect to any unpaid contributions until such time as the Fund(s) receive actual written notice of the existence of the Employer's liability.

14. This Agreement may not be modified or terminated without the written consent of the Fund(s). To the extent there exists any conflict between any provisions of this Participation Agreement and any provisions of the collective bargaining agreement, this Participation Agreement shall control.

IN WITNESS WHEREOF, said Employer and Union have caused this Instrument to be executed by their duly authorized representatives, the day and year first above written.

JC Buyer Company, Inc.

Employer Name

Representative Signature

Printed Name and Title

Date

Complete Address of Employer

Telephone Number

Fax Number

Federal Employer Identification Number

If the Employer is signatory to a National or Group Contract, indicate the name of such Contract:

Is the Employer an itinerant construction company working on a project or on a seasonal basis? Yes _____ No _____

Local Union No. **Various**

Representative Signature

Printed Name and Title

Date

Exhibit B

Old JC Capitalization Table

SCHEDULE C – Form of Information Officer's Certificate

Court File No. CV-19-625200-00CL

**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 JACK COOPER VENTURES, INC., JACK COOPER
DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS
CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING
CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT
RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT
SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER
INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK
COOPER TRANSPORT CANADA INC., JACK COOPER CANADA GP 1 INC., JACK
COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP,
JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC. UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

INFORMATION OFFICER'S CERTIFICATE

RECITALS

A. Pursuant to the Supplemental Order (Foreign Main Proceeding) of the Honourable Justice Hainey of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated August 9, 2019, Alvarez & Marsal Canada Inc. was appointed as the Information Officer in these proceedings (the "**Information Officer**").

B. Pursuant to an Order of the Court dated October [18], 2019 (the "**Sale Recognition and Vesting Order**") the Court: (a) recognized the *Order (i) Approving the Sale of the Acquired Assets Free and Clear of Claims, Liens, Interests and Encumbrances; (ii) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; and (iii) Granting Related Relief* of the United States Bankruptcy Court for the Northern District of

Georgia made in the cases commenced by the Chapter 11 Debtors pursuant to Chapter 11 of the U.S. Bankruptcy Code (the "**Sale Order**") and (b) provided for the vesting in JC Buyer Company, Inc. (the "**Buyer**") or a Buyer Designee (as defined in the Asset Purchase Agreement dated as of August 22, 2010 by and among the Buyer, as buyer, and Jack Cooper Investments, Inc. and the other Chapter 11 Debtors, as sellers (as amended, restated, supplemented or modified from time to time, the "**Asset Purchase Agreement**")) of all of the Chapter 11 Debtors' right, title and interest in and to, *inter alia*, the Canadian Acquired Assets, effective upon the delivery by the Information Officer to the Buyer of a certificate confirming: (a) that the conditions to Closing (as defined in the Asset Purchase Agreement) as set out in article 9 and article 10 of the Asset Purchase Agreement have been satisfied or waived by the Chapter 11 Debtors and the Buyer, as applicable, and (b) the transactions contemplated by the Asset Purchase Agreement have been completed to the satisfaction of the Chapter 11 Debtors and the Buyer.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Recognition and Vesting Order.

THE INFORMATION OFFICER CERTIFIES that it has been advised by the Chapter 11 Debtors (or their counsel) and the Buyer (or its counsel) that:

1. The conditions to Closing as set out in article 9 and article 10 of the Asset Purchase Agreement have been satisfied or waived by the Chapter 11 Debtors and the Buyer, as applicable; and
2. Subject only to the delivery of this Certificate, the transactions contemplated by the Asset Purchase Agreement have been completed to the satisfaction of the Chapter 11 Debtors and the Buyer.
3. This Certificate was delivered by the Information Officer at _____ [TIME] on _____ [DATE].

**ALVAREZ & MARSAL CANADA INC., in
its capacity as Information Officer of the
Chapter 11 Debtors, and not in its personal
capacity**

Per: _____

Name:

Title:

SCHEDULE D – WINNIPEG REAL PROPERTY

737 Plinguet St, Winnipeg, Manitoba

Title Number 2703901/1

Lot 1 Plan 52374 WLTO

In Lot "F" of the Roman Catholic Mission Property.

(Land Titles Office for the Land Title District of Winnipeg)

SCHEDULE E – CLAIMS

None.

AND IN THE MATTER OF AND IN THE MATTER OF JACK COOPER VENTURES, INC., JACK COOPER DIVERSIFIED, LLC, JACK COOPER ENTERPRISES, INC., JACK COOPER HOLDINGS CORP., JACK COOPER TRANSPORT COMPANY, INC., AUTO HANDLING CORPORATION, CTEMS, LLC, JACK COOPER LOGISTICS, LLC, AUTO & BOAT RELOCATION SERVICES, LLC, AXIS LOGISTIC SERVICES, INC., JACK COOPER CT SERVICES, INC., JACK COOPER RAIL AND SHUTTLE, INC., JACK COOPER INVESTMENTS, INC., NORTH AMERICAN AUTO TRANSPORTATION CORP., JACK COOPER TRANSPORT CANADA, INC., JACK COOPER CANADA GP 1 INC., JACK COOPER CANADA GP 2 INC., JACK COOPER CANADA 1 LIMITED PARTNERSHIP, AND JACK COOPER CANADA 2 LIMITED PARTNERSHIP

APPLICATION OF JACK COOPER VENTURES, INC., UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Ontario
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

SALE RECOGNITION AND VESTING ORDER

OSLER, HOSKIN & HARCOURT, LLP

P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Marc Wasserman LSO# 44066M

Tel: 416.862.4908

mwasserman@osler.com

Shawn Irving LSO# 50035U

Tel: 416.862.4733

sirving@osler.com

Andrea Lockhart LSO# 55444K

Tel: 416.862.6829

alockhart@osler.com

Fax: 416.862.6666

Lawyers for the Applicant

Tab 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Digital Domain Media Group, Inc. (Re)*,
2012 BCSC 1567

Date: 20120925
Docket: S126501
Registry: Vancouver

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

**And in the Matter of certain proceedings taken in the United States Bankruptcy
Court for the District of Delaware with respect to the companies listed on
Schedule "A" hereto
(the "Debtors")**

**Application of Digital Domain Media Group, Inc. under Part IV of the
Companies' Creditors Arrangement Act
(*Cross-Border Insolvencies*)**

Petitioner

Corrected Judgment: Counsel appearance amended on the front page on
January 17, 2013

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Canadian Counsel for the Petitioner:

D. Grieve (via telephone)
D. Ward
K. Gerra

United States Counsel for the Petitioner:

D. Grassgreen(via telephone)
R. Feinstein (via telephone)
J. Rosell

Counsel for Respondent Galloping Horse
America, LLC:

K. Lenz

Counsel for Respondent Searchlight Capital
LP:

T. Jeffries

Counsel for Respondent Tenor Opportunity
Master Fund, Ltd. and others:

P. Rubin

Counsel for the Information Officer:

M. Buttery

Place and Date of Trial/Hearing:

Vancouver, B.C.
September 25, 2012

Place and Date of Judgment:

Vancouver, B.C.
September 25, 2012

I. BACKGROUND

[1] This is a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The proceedings with respect to the petitioner, Digital Domain Media Group, Inc. ("Digital Domain"), and other members of its corporate group began by way of Chapter 11 proceedings in the United States commencing September 11, 2012. At that time, Digital Domain and various other members of the corporate group filed petitions with the United States Bankruptcy Court for the District of Delaware.

[2] On September 12, 2012, the United States court granted various First Day Orders which included orders relating to a very quick sale of the assets. Included in those First Day Orders was one approving certain debtor-in-possession ("DIP") financing, and another appointing Digital Domain as a foreign representative for the purpose of bringing an application before this Court.

[3] On September 18, 2012, Digital Domain applied for various relief under the CCAA. On that day, I granted two orders: firstly, an order recognizing Digital Domain as a "foreign representative" and recognizing the Chapter 11 proceedings as a "foreign main proceeding" in accordance with Part IV of the CCAA; and secondly, an order granting various ancillary relief, including expanding the stay provisions and appointing Alvarez & Marsal Canada Inc. as the Information Officer in these proceedings: see *Digital Domain Media Group, Inc. (Re)*, 2012 BCSC 1565.

[4] Since September 18, 2012, the sale proceedings in the U.S. have continued to evolve very quickly, as was anticipated at the outset. Again, that sale was arranged on an urgent basis so as to bring some certainty and structure to the quite serious financial circumstances of Digital Domain and the other parties. The evidence before both the United States court and this Court suggested that if such a sale could not be concluded quickly in order to regularize the operations of the corporate group, then much of the enterprise value of the group could possibly disappear, to the detriment of all stakeholders.

[5] Returning to the United States proceedings, the Bid Procedure Order that had been granted by the United States court on September 12, and recognized by my order on September 18, was later confirmed on September 20. The bid procedures called for an auction to be held on September 21. As part of the sales process, the Bid Procedures Order approved a stalking-horse bid of approximately US\$15 million.

[6] A significant factor on this application is that on September 18, an Unsecured Creditors' Committee was appointed in the United States proceedings in accordance with the United States *Bankruptcy Code*. Part of the Committee's mandate was, of course, to review the background of this matter and attempt to understand the contention that there was a need for urgency in selling the assets. The Committee was also asked to provide its opinion on the proposed process by which a sale of the group's assets would be sought.

[7] Importantly, the Committee, presumably understanding the urgency of the situation, filed a document with the United States Bankruptcy Court confirming that it had completed certain due diligence and that it was fully supportive of the proposed sales process going forward.

[8] The auction was held in New York City on September 21, 2012. The results were wildly successful. There were a number of significant parties prior to that date who had expressed interest in purchasing the assets, and who had signed various non-disclosure agreements and had completed certain due diligence. In all, five bidders participated in the auction, including the stalking-horse bidder.

[9] The successful bidder at the auction was Galloping Horse America, LLC, whose bid was in the amount of US\$30.2 million. It is plain to see that the amount of the stalking-horse bid was exceeded, and that a sale to Galloping Horse will result in a substantially greater recovery for the stakeholders.

[10] As anticipated by the process put in place under the Chapter 11 proceedings, a motion was brought before Judge Shannon of the United States Bankruptcy Court on September 24, 2012 to approve the sale to Galloping Horse. Counsel has

provided me with a certified copy of that extensive order; suffice it to say that the order appears to be substantially in accordance with previous orders granted by the United States Bankruptcy Court. Of particular note is paragraph 40, where the United States Bankruptcy Court has requested that this Court recognize the sale approval order and give full force and effect to the terms of that order. I would also note paragraph five, which provides that the sale proceeds are to be held in trust in place of the assets being sold and are not to be distributed to the DIP lender or the senior secured creditors until after a “Challenge Period”. It is somewhat unclear as to who is to independently review the validity of the security of the secured creditors and possibly take up any “challenge”, although I expect that the Committee would likely be the entity to undertake that. I also expect that the Information Officer may take some role in ensuring that this is done, but I do not direct that the Information Officer take any action in that regard; it appears that others, including the Committee, will look at that issue.

[11] I am advised that the sale to Galloping Horse includes the assets of Digital Domain Productions (Vancouver) Ltd. (“Digital Vancouver”), which is the only Canadian company in this group, and which assets are located in this jurisdiction. I am advised that the Galloping Horse sale will provide certain benefits to Canadian stakeholders. In particular, there will be an assumption of various contracts. The Information Officer also advises that cure payments of Cdn\$1 million will be made to thirty of Digital Vancouver’s creditors. Various obligations in the amount of Cdn\$425,000 owed by Digital Vancouver to its employees are to be assumed by Galloping Horse. Approximately 220 Canadian jobs will be saved.

[12] Unfortunately, what is not addressed by reason of this sale, at least in the Canadian proceedings, is approximately Cdn\$245,000 of unsecured claims, together with approximately Cdn\$675,000 owed for HST. I am also advised that there may be certain equipment lease issues that have not yet been sorted out, given the speed with which these proceedings have taken place.

II. ISSUE

[13] This application is for an order recognizing and implementing in Canada the order of the United States Bankruptcy Court, as pronounced by Judge Shannon yesterday. The order sought also includes additional provisions with respect to vesting the Canadian assets in Galloping Horse in accordance with the asset purchase agreement dated September 24, 2012.

III. DISCUSSION

[14] The applicable statutory provision on this application is s. 49(1) of the CCAA, the same provision I considered on the earlier application. This provision provides that having recognized a foreign proceeding, I may make further orders as I consider appropriate if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors.

[15] It is well taken that this Court and other Canadian courts have recognized sale orders granted within United States Chapter 11 proceedings, particularly where those proceedings have been found to be foreign main proceedings. Counsel for Digital Domain has referred me to the leading authority in Canada with respect to sales of assets: *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). In that case, in assessing the reasonableness of a proposed sale of assets, the court considered various factors: whether the party conducting the sale had made sufficient efforts to get the best price and had not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers were obtained; and whether there had been any unfairness in the sales process.

[16] As I have already stated, the bid procedures were dictated by the exigent circumstances of the Digital Domain group. Nevertheless, it appears that many of the stakeholders, both in Canada and in the United States, have worked very hard to implement a process that, while expedited, fully canvassed the market for appropriate offers. Again, those bid procedures were approved in the Bid Procedures Order granted by Judge Shannon and were recognized by me earlier

this month. The Information Officer in its report to the court sets out the sales process; it concludes that the auction was conducted in a fair manner and that the sale and vesting order is appropriate under the circumstances. The evidence indicates, and I find, that the approved sales process which resulted in the Galloping Horse sale was in compliance with those orders.

[17] It remains a consideration as to whether recognition of the sale order is necessary for the protection of the Digital Domain group's property or the interests of a creditor or creditors. I would note that the net sale proceeds are to be held in trust pending a potential review of the security held by the DIP lender and the pre-petition secured creditor. The Information Officer also points out that it understands that the distribution of the net sale proceeds will be subject to further consideration within the Chapter 11 proceedings.

[18] It appears that if that security is valid, then the entirety of the sale proceeds will be required to repay both the DIP facility and some portion of the pre-petition debt. To that extent, unsecured creditors, both in Canada and in the United States, will find that there is no recovery for them. There is, of course, some recovery for those parties who will remain within the context of the business operations, to the extent that they are to be satisfied by Galloping Horse, and they continue to do business with the new entity.

[19] Nevertheless, Canadian creditors will be fully able to participate in the United States proceedings. Accordingly, they will not suffer any prejudice by reason of the sale process having been concluded in this manner.

IV. DISPOSITION

[20] Having considered all of these circumstances, I am satisfied that recognition of the sale order is appropriate. It appears to me, as I stated on the earlier application, that a coordinated approach is one that best serves the interests of all the stakeholders which would, of course, include the Canadian creditors. It appears

that the parties again have acted quickly to deal with the corporate group's property and assets, with great success.

"Fitzpatrick J."

SCHEDULE "A"
DEBTORS

Digital Domain Media Group, Inc.
Digital Domain
DDH Land Holdings, LLC
Digital Domain Institute, Inc.
Digital Domain Stereo Group, Inc.
DDH Land Holdings II, LLC
Digital Domain International, Inc.
Tradition Studios, Inc.
Digital Domain Tactical, Inc.
Digital Domain Productions, Inc.
Mothership Media, Inc.
D2 Software, Inc.
Digital Domain Productions (Vancouver) Ltd.
Tembo Productions, Inc.

Tab 5

CITATION: Massachusetts Elephant & Castle Group, Inc. (Re), 2011 ONSC 4201
COURT FILE NO.: CV-11-9279-00CL
DATE: 20110711

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE
UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF
MASSACHUSETTS EASTERN DIVISION WITH RESPECT TO THE
COMPANIES LISTED ON SCHEDULE "A" HERETO (THE "CHAPTER 11
DEBTORS")

UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT
ACT*, R.S.C. 1985, c. C-36, AS AMENDED

RE: MASSACHUSETTS ELEPHANT & CASTLE GROUP, INC., Applicant

BEFORE: MORAWETZ J.

COUNSEL: Kenneth D. Kraft, Sara-Ann Wilson, for the Applicant

Heather Meredith, for the GE Canada Equipment Financing GP

HEARD &

ENDORSED: July 4, 2011

REASONS: July 11, 2011

ENDORSEMENT

[1] Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("CCAA"). MECG seeks orders pursuant to sections 46 – 49 of the CCAA providing for:

(a) an Initial Recognition Order declaring that:

- (i) MECG is a foreign representative pursuant to s. 45 of the CCAA and is entitled to bring its application pursuant s. 46 of the CCAA;
- (ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the CCAA; and

- (iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

- (i) recognizing in Canada and enforcing certain orders of the U.S. Court (as defined below) made in the Chapter 11 Proceeding (as defined below);
- (ii) granting a super-priority charge over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and
- (iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

[2] On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division (the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. § 1101-1174 ("*U.S. Bankruptcy Code*").

[3] On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

[4] The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

[5] MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

[6] Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B. 16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

[7] In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

[8] MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a

going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

[9] The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 – 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

[10] The purpose of Part IV of the *CCAA* is set out in s. 44:

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

[11] Section 46(1) of the *CCAA* provides that "a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative."

[12] Section 47(1) of the *CCAA* provides that there are two requirements for an order recognizing a foreign proceeding:

(a) the proceeding is a foreign proceeding, and

(b) the applicant is a foreign representative in respect of that proceeding.

[13] Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.); *Re Magna Entertainment Corp.* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.); *Lear Canada (Re)* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.).

[14] Section 45(1) of the *CCAA* defines a foreign representative as:

a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to

- (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
- (b) act as a representative in respect of the foreign proceeding.

[15] By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

[16] In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

[17] Section 47(2) of the CCAA requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

[18] A "foreign main proceeding" is defined in s. 45(1) of the CCAA as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

[19] Part IV of the CCAA came into force in September 2009. Therefore, the experience of Canadian courts in determining the COMI has been limited.

[20] Section 45(2) of the CCAA provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

[21] In this case, the registered offices of Repechage and E&C Canada Inc. are in Ontario and the registered office of E&C Group Ltd. is in Nova Scotia. The Applicant, however, submits that the COMI of the Chapter 11 Debtors, including the Canadian Debtors, is in the United States and the recognition order should be granted on that basis.

[22] Therefore, the issue is whether there is sufficient evidence to rebut the s. 45(2) presumption that the COMI is the registered office of the debtor company.

[23] In this case, counsel to the Applicant submits that the Chapter 11 Debtors have their COMI in the United States for the following reasons:

- (a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;
- (b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;
- (c) all members of the Chapter 11 Debtors' management are located in Boston;
- (d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;

- (e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and
- (f) Repechage is also the parent company of a group of restaurants that operate under the “Piccadilly” brand which operates only in the U.S.

[24] Counsel also submits that the Chapter 11 Debtors operate a highly integrated business and each of the debtors, including the Canadian Debtors, are managed centrally from the United States. As such, counsel submits it is appropriate to recognize the Chapter 11 Proceeding as a foreign main proceeding.

[25] On the other hand, Mr. Dobbin’s declaration discloses that nearly one-half of the operating locations are in Canada, that approximately 43% of employees work in Canada, and that GE Canada Equipment Financing G.P. (“GE Canada”) is a substantial lender to MECG. GE Canada does not oppose this application.

[26] Counsel to the Applicant referenced *Re Angiotech Pharmaceuticals Limited*, 2011 CarswellBC 124 where the court listed a number of factors to consider in determining the COMI including:

- (a) the location where corporate decisions are made;
- (b) the location of employee administrations, including human resource functions;
- (c) the location of the debtor’s marketing and communication functions;
- (d) whether the enterprise is managed on a consolidated basis;
- (e) the extent of integration of an enterprise’s international operations;
- (f) the centre of an enterprise’s corporate, banking, strategic and management functions;
- (g) the existence of shared management within entities and in an organization;
- (h) the location where cash management and accounting functions are overseen;
- (i) the location where pricing decisions and new business development initiatives are created; and
- (j) the seat of an enterprise’s treasury management functions, including management of accounts receivable and accounts payable.

[27] It seems to me that, in considering the factors listed in *Re Angiotech*, the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, *i.e.* the centre of main interest, is to be interpreted.

[28] In certain circumstances, it could be that some of the factors listed above or other factors might be considered to be more important than others, but nevertheless, none is necessarily determinative; all of them could be considered, depending on the facts of the specific case.

[29] For example:

- (a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;
- (b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;
- (c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

[30] However, it seems to me, in interpreting COMI, the following factors are usually significant:

- (a) the location of the debtor's headquarters or head office functions or nerve centre;
- (b) the location of the debtor's management; and
- (c) the location which significant creditors recognize as being the centre of the company's operations.

[31] While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

[32] In this case, the location of the debtors' headquarters or head office functions or nerve centre is in Boston, Massachusetts and the location of the debtors' management is in Boston. Further, GE Canada, a significant creditor, does not oppose the relief sought. All of this leads me to conclude that, for the purposes of this application, each entity making up the Chapter 11 Debtors, including the Canadian Debtors, have their COMI in the United States.

[33] Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding, certain mandatory relief follows as set out in s. 48(1) of the *CCAA*:

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,
- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the

debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

[34] The relief provided for in s. 48 is contained in the Initial Recognition Order.

[35] In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. Section 49 provides:

49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

[36] In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

(a) the Foreign Representative Order;

(b) the U.S. Cash Collateral Order;

(c) the U.S. Prepetition Wages Order;

(d) the U.S. Prepetition Taxes Order;

- (e) the U.S. Utilities Order;
- (f) the U.S. Cash Management Order;
- (g) the U.S. Customer Obligations Order; and
- (h) the U.S. Joint Administration Order.

[37] In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of \$75,000 and other ancillary relief.

[38] In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

...

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

[39] Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the *CCAA* or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

[40] The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

MORAWETZ J.

Date: July 11, 2011

SCHEDULE “A”

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC
11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

Tab 6

CITATION: Caesars Entertainment Operating Company, Inc. (Re), 2015 ONSC 712
COURT FILE NO.: CV-15-10837
DATE: 2015-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF THE CAESARS ENTERTAINMENT
OPERATING COMPANY, INC. AND THE DEBTORS LISTED ON
SCHEDULE "A" (COLLECTIVELY, THE "CHAPTER 11 DEBTORS")

APPLICATION OF CAESARS ENTERTAINMENT WINDSOR LIMITED
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT
ACT*

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Katherine McEachern* and *Matthew Kanter*, for Caesars Entertainment Operating
Company, Inc. et al.

Robin B. Schwill, for the Ontario Lottery and Gaming Corporation

HEARD and ENDORSED: January 19, 2015

REASONS: January 30, 2015

ENDORSEMENT

INTRODUCTION AND FACTS

[1] On January 15, 2015, Caesars Entertainment Operating Company Inc. ("CEOC") and certain of its subsidiaries (collectively, the "Chapter 11 Debtors") commenced voluntary reorganization proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the Northern District of Illinois (the "Illinois Court") by each filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (the "Bankruptcy Code").

[2] Caesars Windsor Entertainment Limited ("CEWL" or the "Applicant"), an Ontario corporation, is an indirect subsidiary of CEOC. CEWL is a Chapter 11 Debtor.

[3] Pursuant to a written resolution (the "Foreign Representation Resolution") of its sole shareholder, Caesars World, Inc. ("Caesars World") CEWL has been authorized to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada, and has been authorized to commence this Application for

recognition of the Chapter 11 Proceeding as a foreign proceeding. CEOC has confirmed its authorization of CEWL to act as foreign representative on behalf of the Chapter 11 Debtors.

[4] CEWL manages Caesars Windsor Hotel and Casino in Windsor, Ontario (the “Windsor Casino”), for and on behalf of the Ontario Lottery and Gaming Corporation (“OLG”).

[5] In order to (a) ensure the protection of the Chapter 11 Debtors’ Canadian assets and (b) enable the Chapter 11 Debtors, including CEWL, to operate their businesses in the ordinary course during the Chapter 11 Proceeding, CEWL seeks the following orders pursuant to sections 44 and 49 of the *Companies’ Creditors Arrangement Act*, R.S.C., 1985 c. C-36 (the “CCAA”):

- a. an “Initial Recognition Order,” *inter alia*: (i) declaring that CEWL is a “foreign representative” pursuant to section 45 of the CCAA; (ii) declaring that the Chapter 11 Proceeding is recognized as a “foreign main proceeding” under the CCAA; and (iii) granting a stay of proceedings against the Chapter 11 Debtors; and
- b. a “Supplemental Order” pursuant to section 49 of the CCAA, *inter alia*: (i) recognizing in Canada and enforcing certain “first day” orders of the Illinois Court made in the Chapter 11 Proceeding (the “First Day Orders”); (ii) staying any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the business and property of the Chapter 11 Debtors and the directors and officers of the Chapter 11 Debtors; and (iii) restraining the right of any person or entity to, among other things, discontinue or terminate any supply of products or services to the Chapter 11 Debtors.

[6] CEWL submits that the requested orders are necessary and appropriate in the circumstances of this case.

[7] On January 12, 2015, a competing involuntary petition in respect of CEOC was filed in the United States Bankruptcy Court for the District of Delaware (the “Delaware Court”). By order of the Delaware Court, the Chapter 11 Proceeding in the Illinois Court has been stayed pending a determination of the proper venue for the Chapter 11 case of CEOC and its subsidiaries (the “Delaware Stay Order”). However, as more fully detailed below, the Delaware Stay Order has permitted the Illinois Court to enter the First Day Orders. CEWL seeks recognition of these First Day Orders in order to ensure stability and the status quo pending the outcome of the venue dispute, and will return to this Court to advise of the outcome of that dispute and to seek any further orders as may be advisable or appropriate in the circumstances.

[8] The Chapter 11 Debtors are part of a geographically diversified casino-entertainment group of companies (collectively, “Caesars”) headed by Caesars Entertainment Corporation (“CEC”), a U.S. publicly traded company that owns, operates or manages 50 casinos in five countries in three continents, with properties in the United States, Canada, the United Kingdom, South Africa, and Egypt. CEC is not a Chapter 11 Debtor.

[9] CEC is the majority shareholder of CEOC, a Chapter 11 Debtor. The remaining Chapter 11 Debtors, including CEWL, are direct and indirect subsidiaries of CEOC. The Chapter 11 Debtors are the primary operating units of the Caesars gaming enterprise.

[10] On January 12, 2015, certain petitioning creditors filed an involuntary petition against CEOC under Chapter 11 of the Bankruptcy Code (but not as against the other Chapter 11 Debtors, including CEWL). That involuntary petition has not been resolved.

[11] Meanwhile, the Chapter 11 Debtors commenced their own voluntary proceedings in the Illinois Court on January 15, 2015. Hearings were conducted in both the Delaware Court and the Illinois Court on January 15, 2015, which have culminated in the entering of the Delaware Stay Order, and the First Day Orders.

[12] Notwithstanding the stay, the Delaware Court has permitted CEOC to obtain the First Day Orders from the Illinois Court, which are currently in effect pending litigation over the appropriate venue for the Chapter 11 case of CEOC and its subsidiaries. As such, while any further steps in the Chapter 11 Proceeding in the Illinois Court beyond the First Day Orders are currently stayed, the Applicant submits it is necessary to obtain recognition of the First Day Orders in Canada pending further developments in the Delaware Court. CEWL will advise the Court of any further developments in respect of the venue litigation, and will seek such further orders as may be advisable in the circumstances.

[13] CEWL is the only one of the 173 Chapter 11 Debtors that is not incorporated in the United States. It is a wholly-owned indirect subsidiary of CEOC.

[14] The almost exclusive function of CEWL is to manage the Windsor Casino pursuant to an operating agreement dated as of December 14, 2006 (the "Operating Agreement") between Caesars Entertainment Windsor Holding, Inc. (now CEWL) and the Ontario Lottery and Gaming Corporation ("OLG").

[15] CEWL supplies the management services set out in the Operating Agreement to OLG, in consideration for an operating fee. CEWL does not have an ownership interest in the Windsor Casino.

[16] CEWL operates the Windsor Casino under Caesars' trademarks and branding. The trademarks have been licenced to OLG by Caesars World, a U.S.-based Chapter 11 Debtor and, in turn, sublicensed by OLG.

[17] CEWL's primary assets in Canada consist of (a) its rights under the Operating Agreement and (b) cash on deposit from time to time in its corporate bank accounts.

[18] Windsor Casino Limited ("WCL") is a wholly-owned subsidiary of CEWL. WCL employs the approximately 2,800 employees who work at the Windsor Casino. Certain of the WCL employees are unionized members of Unifor Local 444 (the "Union"). Neither CEWL nor WCL administers a defined benefit pension plan although WCL does administer a defined

contribution pension plan. WCL is not a Chapter 11 Debtor and as such is not a subject of this Application.

[19] CEWL intends to operate the Windsor Casino pursuant to the Operating Agreement in the normal course through the Chapter 11 Proceeding. It is not currently contemplated that the Chapter 11 Debtors will restructure any of the business or operations of CEWL or WCL, or compromise any of their obligations.

[20] The Record establishes that the Chapter 11 Debtors, including CEWL, are managed from the United States as an integrated group from a corporate, strategic, financial, and management perspective. In particular:

- a. pursuant the USD, CEWL's corporate decision-making (including with respect to the Operating Agreement and the Chapter 11 Proceeding) is done by its sole shareholder, Caesars World, a Florida corporation;
- b. the Chief Executive Officer and President of CEWL (who is resident in Windsor, Ontario), reports to the Chairman of the Board of CEWL (the "Chairman"). The Chairman, who is also an officer of CEOC, resides in the United States and works from the Caesars head office in Las Vegas, Nevada;
- c. certain centralized services critical to CEWL's functioning, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, and administration of the loyalty "Total Rewards" program for customers are administered and handled from the United States;
- d. the majority of the strategic marketing and communications decisions regarding the brand and loyalty programs are made, and related functions taken, on behalf of all Chapter 11 Debtors, including CEWL, in the United States;
- e. management fees earned by CEWL under the Operating Agreement may be paid by way of dividend from time to time to CEWL's U.S. corporate partners; and
- f. strategic and directional decisions for CEWL are ultimately made in the United States.

[21] CEWL is party to a unanimous shareholder declaration (the "USD") that grants CEWL's sole shareholder, Caesar's World, all the rights, powers and liabilities of the directors of CEWL. The Foreign Representation Resolution authorized CEWL to file as a Chapter 11 Debtor and to act as the foreign representative of all of the Chapter 11 Debtors for the purposes of recognizing the Chapter 11 Proceeding in Canada. By letter dated January 16, 2015, CEOC confirmed CEWL's authorization to act as foreign representative for the Chapter 11 Debtors.

ISSUES

[22] The issues on this Application are:

- a. Should this Court recognize the Chapter 11 Proceeding as a foreign main proceeding pursuant to sections 46 through 48 of the CCAA and grant the Initial Recognition Order sought by the Applicant?
- b. Should this Court grant the Supplemental Order sought by the Applicant under section 49 of the CCAA?

ANALYSIS

[23] Subsection 46(1) of the CCAA provides that a foreign representative may apply to the Court for recognition of a foreign proceeding in respect of which he or she is a foreign representative.

[24] CEWL has been authorized to act as foreign representative of the Chapter 11 Debtors pursuant to the Foreign Representative Resolution executed by CEWL's sole shareholder. CEOC, for itself and on behalf of its subsidiaries, has written to CEWL confirming its authorization to act as foreign representative of the Chapter 11 Debtors. It is CEWL's position that this authorization is sufficient for purposes of subsection 45(1) of the CCAA.

[25] There is no language in Part IV of the CCAA that requires a foreign representative to be appointed by order of the court in the foreign proceeding.

[26] I accept that for the purposes of this application that CEWL is a "foreign representative".

[27] In response to an application brought by a foreign representative under subsection 46(1) of the CCAA, subsection 47(1) of the CCAA provides that the Court shall grant an order recognizing the foreign proceeding if the proceeding is a foreign proceeding and the applicant is a foreign representative in respect of that proceeding.

[28] Canadian courts have consistently held that court proceedings under chapter 11 of the Bankruptcy Code constitute "foreign proceedings" for the purposes of the CCAA (see: *Re Digital Domain Media Group Inc.*, 2012 BCSC 1565 (B.C.S.C. [In Chambers]) at para. 15; and *Re Lightsquared LP*, 2012 ONSC 2994, 92 C.B.R. (5th) 321 (Ont. S.C.J. [Commercial List]) at para. 18). I am satisfied that the Chapter 11 Proceeding is a "foreign proceeding".

[29] CEWL submits that it is appropriate for this Court to recognize the Chapter 11 Proceeding as a foreign main proceeding.

[30] If the foreign proceeding is recognized as a foreign main proceeding, there is an automatic stay provided in section 48(1) of the CCAA against proceedings concerning the debtor's property, debts, liabilities or obligations and prohibitions against selling or disposing of property in Canada.

[31] Subsection 45(1) of the CCAA provides that a “foreign main proceeding” is a foreign proceeding in the jurisdiction of the debtor company’s centre of main interests (“COMI”).

[32] For the purposes of Part IV of the CCAA, in the absence of proof to the contrary, a debtor company’s registered office is deemed to be the COMI.

[33] In *Lightsquared*, the Court found that the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor’s COMI:

- a. the location is readily ascertainable by creditors;
- b. the location is one in which the debtor’s principal assets or operations are found; and
- c. the locations where the management of the debtor takes place.

(see: *Re Lightsquared*, *supra* at para. 25; and *Re Mt.Gox Co.*, 2014 ONSC 5811, 245 A.C.W.S. (3d) 280 (Ont. S.C.J. [Commercial List]) at para. 21)

[34] While CEWL is incorporated in Ontario and has its registered head office in Ontario, the Applicant submits that Ontario is not its centre of main interests.

[35] I am satisfied that the COMI for the Chapter 11 Debtors is the United States. In arriving at this decision, I have taken into account that CEWL is the only Chapter 11 Debtor that is not incorporated in a U.S. jurisdiction. All of the other 172 Chapter 11 Debtors have their head office or headquarters located in the United States. In addition:

- a. the Chapter 11 Debtors operate as an functionally integrated group from a corporate, strategic, financial and management perspective;
- b. pursuant to the USD, CEWL’s corporate decisions are made by its sole shareholder, Caesars World, a Florida corporation;
- c. CEWL’s Chief Executive Officer and President report to the Chairman, who resides in the United States and works from the Caesars head office in Las Vegas, Nevada;
- d. centralized services critical to CEWL’s operations, including the administration of the Caesars brand and intellectual property rights, services related to online hotel booking, the Windsor Casino website, and administration of the “Total Rewards” loyalty program are operated from the United States;
- e. strategic and directional decisions for CEWL are ultimately made in the United States.

[36] In the result, I am satisfied that the Chapter 11 Proceeding should be recognized as a “foreign main proceeding”.

[37] The relief requested in the Initial Recognition Order is granted.

[38] In the context of cross-border insolvencies, Canadian courts have consistently encouraged comity and cooperation between courts in various jurisdictions in order to enable enterprises to restructure on a cross-border basis (see: *Re Lear Canada* (2009), 55 C.B.R. (5th) 57, 2009 CarswellOnt 4232 (Ont. S.C.J. [Commercial List]) at paras. 11 and 17; and *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157, 2000 CarswellOnt 704 (Ont. S.C.J. [Commercial List]) at para. 9).

[39] Having reviewed the Record, I am satisfied, based on the facts in Mr. James Smith’s affidavit and for the reasons set out in the Applicant’s factum, that it is appropriate for the Court in this case to exercise its authority under sections 49(1) and 50 of the CCAA to grant the relief sought in the Supplemental Order, in order to maintain the status quo and protect the assets of the Chapter 11 Debtors, while permitting CEWL to continue operating its business as usual in Canada during the Chapter 11 Proceeding.

DISPOSITION

[40] In the result, the Application is granted. The Initial Recognition Order and the Supplemental Order have been signed, with the Supplemental Order having been modified to exclude a stay of actions against directors and officers of the Chapter 11 Debtors, as I consider such requested relief to be beyond the scope of appropriate relief in the Supplemental Order at this time.

RSJ G.B. Morawetz

Date: January 30, 2015

SCHEDULE "A"

LIST OF CHAPTER 11 DEBTORS

Legal Name	State of Formation
CZL Development Company, LLC	Delaware
Harrah's Iowa Arena Management, LLC	Delaware
PHW Manager, LLC	Nevada
190 Flamingo, LLC	Nevada
AJP Holdings, LLC	Delaware
AJP Parent, LLC	Delaware
B I Gaming Corporation	Nevada
Bally's Midwest Casino, Inc.	Delaware
Bally's Park Place, Inc.	New Jersey
Benco, Inc.	Nevada
Biloxi Hammond, LLC	Delaware
Biloxi Village Walk Development, LLC	Delaware
BL Development Corp.	Minnesota
Boardwalk Regency Corporation	New Jersey
Caesars Entertainment Canada Holding, Inc.	Nevada
Caesars Entertainment Finance Corp.	Nevada
Caesars Entertainment Golf, Inc.	Nevada
Caesars Entertainment Retail, Inc.	Nevada
Caesars India Sponsor Company, LLC	Nevada
Caesars Marketing Services Corporation (f/k/a Harrah's Marketing	Nevada

Services Corporation)	
Caesars New Jersey, Inc.	New Jersey
Caesars Palace Corporation	Delaware
Caesars Palace Realty Corporation	Nevada
Caesars Palace Sports Promotions, Inc.	Nevada
Caesars Riverboat Casino, LLC	Indiana
Caesars Trex, Inc.	Delaware
Caesars United Kingdom, Inc.	Nevada
Caesars World Marketing Corporation	New Jersey
Caesars World Merchandising, Inc.	Nevada
Caesars World, Inc.	Florida
California Clearing Corporation	California
Casino Computer Programming, Inc.	Indiana
Chester Facility Holding Company, LLC	Delaware
Consolidated Supplies, Services and Systems	Nevada
DCH Exchange, LLC	Nevada
DCH Lender, LLC	Nevada
Desert Palace, Inc.	Nevada
Durante Holdings, LLC	Nevada
East Beach Development Corporation	Mississippi
GCA Acquisition Subsidiary, Inc.	Minnesota
GNOC, Corp.	New Jersey
Grand Casinos of Biloxi, LLC (f/k/a Grand Casinos of Mississippi, Inc. - Biloxi)	Minnesota

Grand Casinos of Mississippi, LLC—Gulfport	Mississippi
Grand Casinos, Inc.	Minnesota
Grand Media Buying, Inc.	Minnesota
Harrah South Shore Corporation	California
Harrah's Arizona Corporation	Nevada
Harrah's Bossier City Investment Company, L.L.C.	Louisiana
Harrah's Bossier City Management Company, LLC	Nevada
Harrah's Chester Downs Investment Company, LLC	Delaware
Harrah's Chester Downs Management Company, LLC	Nevada
Harrah's Illinois Corporation	Nevada
Harrah's Interactive Investment Company	Nevada
Harrah's International Holding Company, Inc.	Delaware
Harrah's Investments, Inc. (f/k/a Harrah's Wheeling Corporation)	Nevada
Harrah's Management Company	Nevada
Harrah's MH Project, LLC	Delaware
Harrah's NC Casino Company, LLC	North Carolina
Harrah's North Kansas City LLC (f/k/a Harrah's North Kansas City Corporation)	Missouri
Harrah's Operating Company Memphis, LLC	Delaware
Harrah's Pittsburgh Management Company	Nevada
Harrah's Reno Holding Company, Inc.	Nevada
Harrah's Shreveport Investment Company, LLC	Nevada
Harrah's Shreveport Management Company, LLC	Nevada
Harrah's Shreveport/Bossier City Holding Company, LLC	Delaware

Harrah's Shreveport/Bossier City Investment Company, LLC	Delaware
Harrah's Southwest Michigan Casino Corporation	Nevada
Harrah's Travel, Inc.	Nevada
Harrah's West Warwick Gaming Company, LLC	Delaware
Harveys BR Management Company, Inc.	Nevada
Harveys C.C. Management Company, Inc.	Nevada
Harveys Iowa Management Company, Inc.	Nevada
Harveys Tahoe Management Company, Inc.	Nevada
H-BAY, LLC	Nevada
HBR Realty Company, Inc.	Nevada
HCAL, LLC	Nevada
HCR Services Company, Inc.	Nevada
HEI Holding Company One, Inc.	Nevada
HEI Holding Company Two, Inc.	Nevada
HHLV Management Company, LLC	Nevada
Hole in the Wall, LLC	Nevada
Horseshoe Entertainment	Louisiana
Horseshoe Gaming Holding, LLC	Delaware
Horseshoe GP, LLC	Nevada
Horseshoe Hammond, LLC	Indiana
Horseshoe Shreveport, L.L.C.	Louisiana
HTM Holding, Inc.	Nevada
Koval Holdings Company, LLC	Delaware

Koval Investment Company, LLC	Nevada
Las Vegas Golf Management, LLC	Nevada
Las Vegas Resort Development, Inc.	Nevada
Martial Development Corp.	New Jersey
Nevada Marketing, LLC	Nevada
New Gaming Capital Partnership	Nevada
Ocean Showboat, Inc.	New Jersey
Players Bluegrass Downs, Inc.	Kentucky
Players Development, Inc.	Nevada
Players Holding, LLC	Nevada
Players International, LLC	Nevada
Players LC, LLC	Nevada
Players Maryland Heights Nevada, LLC	Nevada
Players Resources, Inc.	Nevada
Players Riverboat II, LLC	Louisiana
Players Riverboat Management, LLC	Nevada
Players Riverboat, LLC	Nevada
Players Services, Inc.	New Jersey
Reno Crossroads LLC	Delaware
Reno Projects, Inc.	Nevada
Rio Development Company, Inc.	Nevada
Robinson Property Group Corp.	Mississippi
Roman Entertainment Corporation of Indiana	Indiana

Roman Holding Corporation of Indiana	Indiana
Showboat Atlantic City Mezz 1, LLC	Delaware
Showboat Atlantic City Mezz 2, LLC	Delaware
Showboat Atlantic City Mezz 3, LLC	Delaware
Showboat Atlantic City Mezz 4, LLC	Delaware
Showboat Atlantic City Mezz 5, LLC	Delaware
Showboat Atlantic City Mezz 6, LLC	Delaware
Showboat Atlantic City Mezz 7, LLC	Delaware
Showboat Atlantic City Mezz 8, LLC	Delaware
Showboat Atlantic City Mezz 9, LLC	Delaware
Showboat Atlantic City Operating Company, LLC	New Jersey
Showboat Atlantic City Propco, LLC	Delaware
Showboat Holding, Inc.	Nevada
Southern Illinois Riverboat/Casino Cruises, Inc.	Illinois
Tahoe Garage Propco, LLC	Delaware
TRB Flamingo, LLC	Nevada
Trigger Real Estate Corporation	Nevada
Tunica Roadhouse Corporation (f/k/a Sheraton Tunica Corporation)	Delaware
Village Walk Construction, LLC	Delaware
Winnick Holdings, LLC	Delaware
Winnick Parent, LLC	Delaware
3535 LV Corp. (f/k/a Harrah's Imperial Palace)	Nevada
Caesars License Company, LLC (f/k/a Harrah's License Company, LLC)	Nevada

FHR Corporation	Nevada
FHR Parent, LLC	Delaware
Flamingo-Laughlin Parent, LLC	Delaware
Flamingo-Laughlin, Inc. (f/k/a Flamingo Hilton-Laughlin, Inc.)	Nevada
Harrah's New Orleans Management Company	Nevada
LVH Corporation	Nevada
Parball Corporation	Nevada
Caesars Escrow Corporation (f/k/a Harrah's Escrow Corporation)	Delaware
Caesars Operating Escrow LLC (f/k/a Harrah's Operating Escrow LLC)	Delaware
Corner Investment Company Newco, LLC	Delaware
Harrah's Maryland Heights Operating Company	Nevada
BPP Providence Acquisition Company, LLC	Delaware
Caesars Air, LLC	Delaware
Caesars Baltimore Development Company, LLC	Delaware
Caesars Massachusetts Acquisition Company, LLC	Delaware
Caesars Massachusetts Development Company, LLC	Delaware
Caesars Massachusetts Investment Company, LLC	Delaware
Caesars Massachusetts Management Company, LLC	Delaware
CG Services, LLC	Delaware
Christian County Land Acquisition Company, LLC	Delaware
CZL Management Company, LLC	Delaware
HIE Holdings Topco, Inc.	Delaware
PH Employees Parent LLC	Delaware

PHW Investments, LLC	Delaware
Caesars Entertainment Operating Company, Inc. (f/k/a Harrah's Operating Company, Inc.)	Delaware
Caesars Entertainment Windsor Limited (f/k/a Caesars Entertainment Windsor Holding, Inc.)	Canada
Octavius Linq Holding Co., LLC	Delaware
Caesars Baltimore Acquisition Company, LLC	Delaware
Caesars Baltimore Management Company, LLC	Delaware
PHW Las Vegas, LLC	Nevada
3535 LV Parent, LLC	Delaware
Bally's Las Vegas Manager, LLC	Delaware
Cromwell Manager, LLC	Delaware
JCC Holding Company II Newco, LLC	Delaware
Laundry Parent, LLC	Delaware
LVH Parent, LLC	Delaware
Parball Parent, LLC	Delaware
The Quad Manager, LLC	Delaware
Des Plaines Development Limited Partnership	Delaware

Tab 7

CITATION: Hartford Computer Hardware, Inc. (Re), 2012 ONSC 964
COURT FILE NO.: CV-11-9514-00CL
DATE: 20120215

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C 36, AS AMENDED**

**APPLICATION OF HARTFORD COMPUTER HARDWARE, INC.
UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C 36, AS AMENDED**

**AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED
STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION WITH RESPECT TO**

**RE: HARTFORD COMPUTER HARDWARE, INC., NEXICORE SERVICES,
LLC, HARTFORD COMPUTER GROUP, INC. AND HARTFORD
COMPUTER GOVERNMENT, INC., (COLLECTIVELY, THE
“CHAPTER 11 DEBTORS”), Applicants**

BEFORE: MORAWETZ J.

COUNSEL: Kyla Mahar and John Porter, for the Chapter 11 Debtors

Adrienne Glen, for FTI Consulting Canada, Inc., Information Officer

Jane Dietrich, for Avnet Inc.

**HEARD &
ENDORSED: February 1, 2012**

**REASONS
RELEASED: February 15, 2012**

ENDORSEMENT

[1] Hartford Computer Hardware, Inc. (“Hartford”), on its own behalf and in its capacity as foreign representative of Chapter 11 Debtors (the “Foreign Representative”) brought a motion under s. 49 of the *Companies’ Creditors Arrangement Act* (the “CCAA”) for recognition and implementing in Canada the following Orders of the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the “U.S. Court”) made in the proceedings commenced by the Chapter 11 Debtors:

- (i) the Final Utilities Order;
 - (ii) the Bidding Procedures Order;
 - (iii) the Final DIP Facility Order.
- (collectively, the U.S. Orders”)

[2] On December 12, 2011, the Chapter 11 Debtors commenced the Chapter 11 proceeding. The following day, I made an order granting certain interim relief to the Chapter 11 Debtors, including a stay of proceedings. On December 15, 2011, the U.S. Court made an order authorizing Hartford to act as the Foreign Representative of the Chapter 11 Debtors. On December 21, 2011, I made two orders, an Initial Recognition Order and a Supplemental Order that, among other things:

- (i) declared the Chapter 11 proceedings to be a “foreign main proceeding” pursuant to Part IV of the *CCAA*;
- (ii) recognized Hartford as the Foreign Representative of the Chapter 11 Debtors;
- (iii) appointed FTI as Information Officer in these proceedings;
- (iv) granted a stay of proceedings;
- (v) recognized and made effective in Canada certain “First Day Orders” of the U.S. Court including an Interim Utilities Order and Interim DIP Facility Order.

[3] On January 26, 2012, the U.S. Court made the U.S. Orders.

[4] The Foreign Representative is of the view that recognition of the U.S. Orders is necessary for the protection of the Chapter 11 Debtors’ property and the interest of their creditors.

[5] The affidavit of Mr. Mittman and First Report of the Information Officer provide details with respect to the hearings in the U.S. Court on January 26, 2012 which resulted in the U. S. Court granting the U.S. Orders. The Utilities Order and the Bidding Procedures Order are relatively routine in nature and it is, in my view, appropriate to recognize and give effect to these orders.

[6] With respect to the Final DIP Facility Order, it is noted that paragraph 6 of this Order contains a partial “roll up” provision wherein all Cash Collateral in the possession or control of Chapter 11 Debtors on December 12, 2011 (the “Petition Date”) or coming into their possession after the Petition Date is deemed to have been remitted to the Pre-petition Secured Lender for application to and repayment of the Pre-petition revolving debt facility with a corresponding borrowing under the DIP Facility.

[7] In making the Final DIP Facility Order, the Information Officer reports that the U.S. Court found that good cause had been shown for entry of the Final DIP Facility Order, as the Chapter 11 Debtors’ ability to continue to use Cash Collateral was necessary to avoid immediate and irreparable harm to the Chapter 11 Debtors and their estates.

[8] The granting of the Final DIP Facility Order was supported by the Unsecured Creditors’ Committee. Certain objections were filed but the Order was granted after the U.S. Court heard the objections.

[9] The Information Officer reports that Canadian unsecured creditors will be treated no less favourably than U.S. unsecured creditors. Further, since a number of Canadian unsecured creditors are employees of the Chapter 11 Debtors, these creditors benefit from certain priority claims which they would not be entitled to under Canadian insolvency proceedings.

[10] The Information Officer and Chapter 11 Debtors recognize that in *CCAA* proceedings, a partial “roll up” provision would not be permissible as a result of s. 11.2 of the *CCAA*, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

[11] Section 49 of the *CCAA* provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company’s property or the interests of the creditor or creditors.

[12] It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the “foreign main proceeding”. The Final DIP Facility Order was granted after a hearing in the U.S. Court. Further, it appears from the affidavit of Mr. Mittman that, as of the end of December 2011, the Chapter 11 Debtors had borrowed \$1 million under the Interim DIP Facility. The Cash Collateral on hand as of the Petition Date was effectively spent in the Chapter 11 Debtors’ operations and replaced with advances under the Interim DIP Facility in December 2011 such that all cash in the Chapter 11 Debtors’ accounts as of the date of the Final DIP Facility Order were proceeds from the Interim DIP Facility.

[13] The Information Officer has reported that, in the circumstances, there will be no material prejudice to Canadian creditors if this court recognizes the Final DIP Facility, and that nothing is being done that is contrary to the applicable provisions of the *CCAA*. The Information Officer is of the view that recognition of the Final DIP Facility Order is appropriate in the circumstances.

[14] A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

[15] Based on the foregoing, I have concluded that recognition of the Final DIP Facility Order is necessary for the protection of the debtor company's property and for the interests of the creditors.

[16] In making this determination, I have also taken into account the provisions of s. 61(2) of the *CCAA* which is the public policy exception. This section reads: "Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy".

[17] The public policy exception has its origins in the UNCITRAL Model Law on Cross-Border Insolvency. Article 6 of the Model Law provides: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State". It is also important to note that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (paragraphs 86-89) makes specific reference to the fact that the public policy exceptions should be interpreted restrictively.

[18] I am in agreement with the commentary in the Guide to Enactment to the effect that s. 61(2) should be interpreted restrictively. The Final DIP Facility Order does not, in my view, raise any public policies issues.

[19] I am satisfied that it is appropriate to grant the requested relief. The motion is granted and an order has been signed in the form requested to give effect to the foregoing.

MORAWETZ J.

Date: February 15, 2012

Tab 8

Ontario Supreme Court
Babcock & Wilcox Canada Ltd.,
Date: 2000-02-25

In the Matter of Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985,
c. C-36, as amended

In the Matter of Babcock & Wilcox Canada Ltd.

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: February 25, 2000

Judgment: February 25, 2000

Docket: 00-CL-3667

Derrick Toy, for Babcock & Wilcox Canada Ltd.

Paul Macdonald, for Citibank North America Inc., Lenders under the Post-Petition Credit Agreement.

Farley J.:

[1] I have had the opportunity to reflect on this matter which involves an aspect of the recent amendments to the insolvency legislation of Canada, which amendments have not yet been otherwise dealt with as to their substance. The applicant, Babcock & Wilcox Canada Ltd. ("BW Canada"), a solvent company, has applied for an interim order under s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA"):

- (a) that the proceedings commenced by BW Canada's parent U.S. corporation and certain other U.S. related corporations (collectively "BWUS") for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with mass asbestos claims before the U.S. Bankruptcy Court be recognized as a "foreign proceeding" for the purposes of s. 18.6;
- (b) that BW Canada be declared a company which is entitled to avail itself of the provisions of s. 18.6;
- (c) that there be a stay against suits and enforcements until May 1, 2000 (or such later date as the Court may order) as to asbestos related proceedings against BW Canada, its property and its directors;

(d) that BW Canada be authorized to guarantee the obligations of its parent to the DIP Lender (debtor in possession lender) and grant security therefor in favour of the DIP Lender; and

(e) and for other ancillary relief.

[2] In Chapter 11 proceedings under the U.S. Bankruptcy Code, the U.S. Bankruptcy Court in New Orleans issued a temporary restraining order on February 22, 2000 wherein it was noted that BW Canada may be subject to actions in Canada similar to the U.S. asbestos claims. U.S. Bankruptcy Court Judge Brown's temporary restraining order was directed against certain named U.S. resident plaintiffs in the asbestos litigation:

...and towards all plaintiffs and potential plaintiffs in Other Derivative Actions, that they are hereby restrained further prosecuting Pending Actions or further prosecuting or commencing Other Derivative Actions against Non-Debtor Affiliates, until the Court decides whether to grant the Debtors' request for a preliminary injunction.

Judge Brown further requested the aid and assistance of the Canadian courts in carrying out the U.S. Bankruptcy Court's orders. The "Non-Debtor Affiliates" would include BW Canada.

[3] Under the 1994 amendments to the U.S. Bankruptcy Code, the concept of the establishment of a trust sufficient to meet the court determined liability for a mass torts situations was introduced. I am advised that after many years of successfully resolving the overwhelming majority of claims against it on an individual basis by settlement on terms BWUS considered reasonable, BWUS has determined, as a result of a spike in claims with escalating demands when it was expecting a decrease in claims, that it is appropriate to resort to the mass tort trust concept. Hence its application earlier this week to Judge Brown with a view to eventually working out a global process, including incorporating any Canadian claims. This would be done in conjunction with its joint pool of insurance which covers both BWUS and BW Canada. Chapter 11 proceedings do not require an applicant thereunder to be insolvent; thus BWUS was able to make an application with a view towards the 1994 amendments (including s. 524(g)). This subsection would permit the U.S. Bankruptcy Court on confirmation of a plan of reorganization under Chapter 11 with a view towards rehabilitation in the sense of avoiding insolvency in a mass torts situation to:

...enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claims or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust.

[4] In 1997, ss. 267-275 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA") and s. 18.6 of the CCAA were enacted to address the rising number of international insolvencies ("1997 Amendments"). The 1997 Amendments were introduced after a lengthy consultation process with the insolvency profession and others. Previous to the 1997 Amendments, Canadian courts essentially would rely on the evolving common law principles of comity which permitted the Canadian court to recognize and enforce in Canada the judicial acts of other jurisdictions.

[5] La Forest J in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), at p. 269 described the principle of comity as:

"Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws...

[6] In *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]), at pp. 302-3 I noted the following:

Allow me to start off by stating that I agree with the analysis of MacPherson J. in *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Gen. Div.) when in discussing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, 52 B.C.L.R. (2d) 160, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, he states at p.411:

The leading case dealing with the enforcement of "foreign" judgments is the decision of the Supreme Court of Canada in *Morguard Investments, supra*. The question in that case was whether, and the circumstances in which, the judgment of an Alberta court could be enforced in British Columbia. A unanimous court, speaking through La Forest J., held in favour of enforceability and, in so doing, discussed in some detail the doctrinal principles governing inter-jurisdictional

enforcement of orders. I think it fair to say that the overarching theme of La Forest J.'s reasons is the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems, including substantive laws and rules of procedure. He expressed this theme in these words, at p. 1095:

Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment *in rem*, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. *This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given has power over the litigants, the judgments of its courts should be respected.* (emphasis added in original)

Morguard Investments was, as stated earlier, a case dealing with the enforcement of a court order across provincial boundaries. However, the historical analysis in La Forest J.'s judgment, of both the United Kingdom and Canadian jurisprudence, and the doctrinal principles enunciated by the court are equally applicable, in my view, in a situation where the judgment has been rendered by a court in a foreign jurisdiction. This should not be an absolute rule - there will be some foreign court orders that should not be enforced in Ontario, perhaps because the substantive law in the foreign country is so different from Ontario's or perhaps because the legal process that generates the foreign order diverges radically from Ontario's process. (my emphasis added)

Certainly the substantive and procedural aspects of the U.S. Bankruptcy Code including its 1994 amendments are not so different and do not radically diverge from our system.

[7] After reviewing La Forest J.'s definition of comity, I went on to observe at p. 316:

As was discussed by J.G. Castel, *Canadian Conflicts of Laws*, 3rd ed. (Toronto: Butterworths, 1994) at p. 270, there is a presumption of validity attaching to a foreign judgment unless and until it is established to be invalid. It would seem that the same type of evidence would be required to impeach a foreign judgment as a domestic one: fraud practiced on the court or tribunal: see *Sun Alliance Insurance Co. v. Thompson* (1981), 56 N.S.R. (2d) 619, 117 A.P.R. 619 (T.D.), Sopinka, *supra*, at p. 992.

La Forest J. went on to observe in *Morguard* at pp. 269-70:

In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner.

...

Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

See also *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.), at p. 39.

[8] While *Morguard* was an interprovincial case, there is no doubt that the principles in that case are equally applicable to international matters in the view of MacPherson J. and myself in *Arrowmaster* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.), and *ATL* respectively. Indeed the analysis by La Forest J. was on an international plane. As a country whose well-being is so heavily founded on international trade and investment, Canada of necessity is very conscious of the desirability of invoking comity in appropriate cases.

[9] In the context of cross-border insolvencies, Canadian and U.S. Courts have made efforts to complement, coordinate and where appropriate accommodate the proceedings of the other. Examples of this would include *Olympia & York Developments Ltd., Ever fresh Beverages Inc.* and *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 48 C.C.L.I. (2d) 119 (B.C. S.C.). Other examples involve the situation where a multi-jurisdictional proceeding is specifically connected to one jurisdiction with that jurisdiction's court being allowed to exercise principal control over the insolvency process: see *Roberts v. Picture Butte Municipal Hospital* (1998), 23 C.P.C. (4th) 300 (Alta. Q.B.), at pp. 5-7 [[1998] A.J. No. 817];

Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.), at p. 4; *Tradewell Inc. v. American Sensors Electronics, Inc.*, 1997 WL 423075 (S.D.N.Y. 1997).

[10] In *Roberts*, Forsythe J. at pp. 5-7 noted that steps within the proceedings themselves are also subject to the dictates of comity in recognizing and enforcing a U.S. Bankruptcy Court stay in the *Dow Corning* litigation [*Taylor v. Dow Corning Australia Pty. Ltd.* (December 19, 1997), Doc. 8438/95 (Australia Vic. Sup. Ct.)] as to a debtor in Canada so as to promote greater efficiency, certainty and consistency in connection with the debtor's restructuring efforts. Foreign claimants were provided for in the U.S. corporation's plan. Forsyth J. stated:

Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination there would be multiple proceedings, inconsistent judgments and general uncertainty.

...I find that common sense dictates that these matters would be best dealt with by one court, and in the interest of promoting international comity it seems the forum for this case is in the U.S. Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding... (emphasis added)

[11] The CCAA as remedial legislation should be given a liberal interpretation to facilitate its objectives. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[12] David Tobin, the Director General, Corporate Governance Branch, Department of Industry in testifying before the Standing Committee on Industry regarding Bill C-5, An Act to amend the BIA, the CCAA and the Income Tax Act, stated at 1600:

Provisions in Bill C-5 attempt to actually codify, which has always been the practice in Canada. They include the Court recognition of foreign representatives; Court authority to

make orders to facilitate and coordinate international insolvencies; provisions that would make it clear that foreign representatives are allowed to commence proceedings in Canada, as per Canadian rules – however, they clarify that foreign stays of proceedings are not applicable but a foreign representative can apply to a court for a stay in Canada; and Canadian creditors and assets are protected by the bankruptcy and insolvency rules.

The philosophy of the practice in international matters relating to the CCAA is set forth in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.), at p. 167 where Blair J. stated:

The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts – sometimes substantive, sometimes procedural – between the jurisdictions. The Courts of the various jurisdictions should seek to cooperate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international cooperation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

Blair J. then proceeded to invoke inherent jurisdiction to implement the Protocol between the U.S. Bankruptcy Court and the Ontario Court. See also my endorsement of December 20, 1995, in *Everfresh Beverages Inc.* where I observed: “I would think that this Protocol demonstrates the ‘essence of comity’ between the Courts of Canada and the United States of America.” *Everfresh* was an example of the effective and efficient use of the Cross-Border Insolvency Concordat, adopted by the Council of the International Bar Association on May 31, 1996 (after being adopted by its Section on Business Law Council on September 17, 1995), which Concordat deals with, inter alia, principal administration of a debtor’s reorganization and ancillary jurisdiction. See also the UNCITRAL Model Law on Cross-Border Insolvency.

[13] Thus it seems to me that this application by BW Canada should be reviewed in light of (i) the doctrine of comity as analyzed in *Morguard*, *Arrowmaster* and *ATL*, *supra*, in regard to

its international aspects; (ii) inherent jurisdiction; (iii) the aspect of the liberal interpretation of the CCAA generally; and (iv) the assistance and codification of the 1997 Amendments.

“Foreign proceeding” is defined in s. 18.6(1) as:

In this section,

“foreign proceeding” means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;...

Certainly a U.S. Chapter 11 proceeding would fit this definition subject to the question of “debtor”. It is important to note that the definition of “foreign proceeding” in s. 18.6 of the CCAA contains no specific requirement that the debtor be insolvent. In contrast, the BIA defines a “debtor” in the context of a foreign proceeding (Part XIII of the BIA) as follows:

s. 267 In this Part,

“debtor” means an *insolvent person* who has property in Canada, a *bankrupt* who has property in Canada or a *person who has the status of a bankrupt* under foreign law in a foreign proceeding and has property in Canada;... (emphasis added)

I think it a fair observation that the BIA is a rather defined code which goes into extensive detail. This should be contrasted with the CCAA which is a very short general statute which has been utilized to give flexibility to meet what might be described as the peculiar and unusual situation circumstances. A general categorization (which of course is never completely accurate) is that the BIA may be seen as being used for more run of the mill cases whereas the CCAA may be seen as facilitating the more unique or complicated cases. Certainly the CCAA provides the flexibility to deal with the thornier questions. Thus I do not think it unusual that the drafters of the 1997 Amendments would have it in their minds that the provisions of the CCAA dealing with foreign proceedings should continue to reflect this broader and more flexible approach in keeping with the general provisions of the CCAA, in contrast with the corresponding provisions under the BIA. In particular, it would appear to me to be a reasonably plain reading interpretation of s. 18.6 that recourse may be had to s. 18.6 of the CCAA in the case of a solvent debtor. Thus I would conclude that the aspect of insolvency is not a condition precedent vis-a-vis the “debtor” in the foreign proceedings (here the Chapter 11 proceedings) for the proceedings in Louisiana to be a foreign proceeding

under the definition of s. 18.6. I therefore declare that those proceedings are to be recognized as a “foreign proceeding” for the purposes of s. 18.6 of the CCAA.

[14] It appears to me that my conclusion above is reinforced by an analysis of s. 18.6(2) which deals with concurrent filings by a debtor under the CCAA in Canada and corresponding bankruptcy or insolvency legislation in a foreign jurisdiction. This is not the situation here, but it would be applicable in the *Loewen* case. That subsection deals with the coordination of proceedings as to a “debtor company” initiated pursuant to the CCAA and the foreign legislation.

s. 18.6(2). The court may, in respect of a *debtor company*, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a coordination of proceedings under the Act with any foreign proceeding. (emphasis added)

[15] The definition of “debtor company” is found in the general definition section of the CCAA, namely s. 2 and that definition incorporates the concept of insolvency. Section 18.6(2) refers to a “debtor company” since only a “debtor company” can file under the CCAA to propose a compromise with its unsecured or secured creditors: ss. 3, 4 and 5 CCAA. See also s. 18.6(8) which deals with currency concessions “[w]here a compromise or arrangement is proposed in respect of a debtor company...”. I note that “debtor company” is not otherwise referred to in s. 18.6; however “debtor” is referred to in both definitions under s. 18.6(1).

[16] However, s. 18.6(4) provides a basis pursuant to which a company such as BW Canada, a solvent corporation, may seek judicial assistance and protection in connection with a foreign proceeding. Unlike s. 18.6(2), s. 18.6(4) does not contemplate a full filing under the CCAA. Rather s. 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding.

s. 18.6(4) Nothing in this section prevents the court, on the application of a foreign representative or *any other interested persons*, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act. (emphasis added)

BW Canada would fit within “any interested person” to bring the subject application to apply the principles of comity and cooperation. It would not appear to me that the relief requested is of a nature contrary to the provisions of the CCAA.

[17] Additionally there is s. 18.6(3) whereby once it has been established that there is a foreign proceeding within the meaning of s. 18.6(1) (as I have concluded there is), then this court is given broad powers and wide latitude, all of which is consistent with the general judicial analysis of the CCAA overall, to make any order it thinks appropriate in the circumstances.

s. 18.6(3) An order of the court under this Section may be made on such terms and conditions as the court considers appropriate in the circumstances.

This subsection reinforces the view expressed previously that the 1997 Amendments contemplated that it would be inappropriate to pigeonhole or otherwise constrain the interpretation of s. 18.6 since it would be not only impracticable but also impossible to contemplate the myriad of circumstances arising under a wide variety of foreign legislation which deal generally and essentially with bankruptcy and insolvency but not exclusively so. Thus, the Court was entrusted to exercise its discretion, but of course in a judicial manner.

[18] Even aside from that, I note that the Courts of this country have utilized inherent jurisdiction to fill in any gaps in the legislation and to promote the objectives of the CCAA. Where there is a gap which requires bridging, then the question to be considered is what will be the most practical common sense approach to establishing the connection between the parts of the legislation so as to reach a just and reasonable solution. See *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at pp. 93-4; *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C. C.A.), at p. 2; *Lehndorff General Partner Ltd.* at p. 30.

[19] The Chapter 11 proceedings are intended to resolve the mass asbestos related tort claims which seriously threaten the long term viability of BWUS and its subsidiaries including BW Canada. BW Canada is a significant participant in the overall Babcock & Wilcox international organization. From the record before me it appears reasonably clear that there is an interdependence between BWUS and BW Canada as to facilities and services. In addition there is the fundamental element of financial and business stability. This interdependence has

been increased by the financial assistance given by the BW Canada guarantee of BWUS' obligations.

[20] To date the overwhelming thrust of the asbestos related litigation has been focussed in the U.S. In contradistinction BW Canada has not in essence been involved in asbestos litigation to date. The 1994 amendments to the U.S. Bankruptcy Code have provided a specific regime which is designed to deal with the mass tort claims (which number in the hundreds of thousands of claims in the U.S.) which appear to be endemic in the U.S. litigation arena involving asbestos related claims as well as other types of mass torts. This Court's assistance however is being sought to stay asbestos related claims against BW Canada with a view to this stay facilitating an environment in which a global solution may be worked out within the context of the Chapter 11 proceedings trust.

[21] In my view, s. 18.6(3) and (4) permit BW Canada to apply to this Court for such a stay and other appropriate relief. Relying upon the existing law on the recognition of foreign insolvency orders and proceedings, the principles and practicalities discussed and illustrated in the Cross-Border Insolvency Concordat and the UNCITRAL Model Law on Cross-Border Insolvencies and inherent jurisdiction, all as discussed above, I would think that the following may be of assistance in advancing guidelines as to how s. 18.6 should be applied. I do not intend the factors listed below to be exclusive or exhaustive but merely an initial attempt to provide guidance:

- (a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
- (b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
- (c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
- (d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis

of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

(e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:

(i) the location of the debtor's principal operations, undertaking and assets;

(ii) the location of the debtor's stakeholders;

(iii) the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;

(iv) the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analyzed;

(v) such other factors as may be appropriate in the instant circumstances.

(f) Where one jurisdiction has an ancillary role,

(i) the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;

(ii) stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.

(g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

[22] Taking these factors into consideration, and with the determination that the Chapter 11 proceedings are a "foreign proceeding" within the meaning of s. 18.6 of the CCAA and that it is appropriate to declare that BW Canada is entitled to avail itself of the provisions of s. 18.6, I would also grant the following relief. There is to be a stay against suits and enforcement as

requested; the initial time period would appear reasonable in the circumstances to allow BWUS to return to the U.S. Bankruptcy Court. Assuming the injunctive relief is continued there, this will provide some additional time to more fully prepare an initial draft approach with respect to ongoing matters. It should also be recognized that if such future relief is not granted in the U.S. Bankruptcy Court, any interested person could avail themselves of the “comeback” clause in the draft order presented to me and which I find reasonable in the circumstances. It appears appropriate, in the circumstances that BW Canada guarantee BWUS’ obligations as aforesaid and to grant security in respect thereof, recognizing that same is permitted pursuant to the general corporate legislation affecting BW Canada, namely the *Business Corporations Act* (Ontario). I note that there is also a provision for an “Information Officer” who will give quarterly reports to this Court. Notices are to be published in the *Globe & Mail* (National Edition) and the *National Post*. In accordance with my suggestion at the hearing, the draft order notice has been revised to note that persons are alerted to the fact that they may become a participant in these Canadian proceedings and further that, if so, they may make representations as to pursuing their remedies regarding asbestos related claims in Canada as opposed to the U.S. As discussed above the draft order also includes an appropriate “comeback” clause. This Court (and I specifically) look forward to working in a cooperative judicial way with the U.S. Bankruptcy Court (and Judge Brown specifically).

[23] I am satisfied that it is appropriate in these circumstances to grant an order in the form of the revised draft (a copy of which is attached to these reasons for the easy reference of others who may be interested in this area of s. 18.6 of the CCAA).

[24] Order to issue accordingly.

Application granted.

Appendix

Court File No. 00-CL-3667

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE

FRIDAY, THE 25TH DAY OF

MR. JUSTICE FARLEY

FEBRUARY, 2000

IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT
ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

INITIAL ORDER

THIS MOTION made by the Applicant Babcock & Wilcox Canada Ltd. for an Order substantially in the form attached to the Application Record herein was heard this day, at 393 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the Affidavit of Victor J. Manica sworn February 23, 2000 (the "Manica Affidavit"), and on notice to the counsel appearing, and upon being advised that no other person who might be interested in these proceedings was served with the Notice of Application herein.

SERVICE

1. *THIS COURT ORDERS* that the time for service of the Notice of Application and the Affidavit in support of this Application be and it is hereby abridged such that the Application is properly returnable today, and, further, that any requirement for service of the Notice of Application and of the Application Record upon any interested party, other than the parties herein mentioned, is hereby dispensed with.

RECOGNITION OF THE U.S. PROCEEDINGS

2. *THIS COURT ORDERS AND DECLARES* that the proceedings commenced by the Applicant's United States corporate parent and certain other related corporations in the United States for protection under Chapter 11 of the U.S. Bankruptcy Code in connection with asbestos claims before the U.S. Bankruptcy Court (the "U.S. Proceedings") be and hereby is recognized as a "foreign proceeding" for purposes of

Section 18.6 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, (the "CCAA").

APPLICATION

3. *THIS COURT ORDERS AND DECLARES* that the Applicant is a company which is entitled to relief pursuant to s. 18.6 of the CCAA.

PROTECTION FROM ASBESTOS PROCEEDINGS

4. *THIS COURT ORDERS* that until and including May 1, 2000, or such later date as the Court may order (the "Stay Period"), no suit, action, enforcement process, extra-judicial proceeding or other proceeding relating to, arising out of or in any way connected to damages or loss suffered, directly or indirectly, from asbestos, asbestos contamination or asbestos related diseases ("Asbestos Proceedings") against or in respect of the Applicant, its directors or any properly of the Applicant, wheresoever located, and whether held by the Applicant in whole or in part, directly or indirectly, as principal or nominee, beneficially or otherwise shall be commenced, and any Asbestos Proceedings against or in respect of the Applicant, its directors or the Applicant's Property already commenced be and are hereby stayed and suspended.

5. *THIS COURT ORDERS* that during the Stay Period, the right of any person, firm, corporation, governmental authority or other entity to assert, enforce or exercise any right, option or remedy arising by law, by virtue of any agreement or by any other means, as a result of the making or filing of these proceedings, the U.S. Proceedings or any allegation made in these proceedings or the U.S. Proceedings be and is hereby restrained.

DIP FINANCING

6. *THIS COURT ORDERS* that the Applicant is hereby authorized and empowered to guarantee the obligations of its parent, The Babcock & Wilcox Company, to Citibank, N.A., as Administrative Agent, the Lenders, the Swing Loan Lender, and Issuing Banks (as those terms are defined in the Post-Petition Credit Agreement (the "Credit Agreement")) dated as of February 22, 2000 (collectively, the "DIP Lender"), and to grant security (the "DIP Lender's Security") for such guarantee substantially on the terms and conditions set forth in the Credit Agreement.

7. *THIS COURT ORDERS* that the obligations of the Applicant pursuant to the Credit Agreement, the DIP Lender's Security and all the documents delivered pursuant thereto constitute legal, valid and binding obligations of the Applicant enforceable against it in accordance with the terms thereof, and the payments made and security granted by the Applicant pursuant to such documents do not constitute fraudulent preferences, or other challengeable or reviewable transactions under any applicable law.

8. *THIS COURT ORDERS* that the DIP Lender's Security shall be deemed to be valid and effective notwithstanding any negative covenants, prohibitions or other similar provisions with respect to incurring debt or the creation of liens or security contained in any existing agreement between the Applicant and any lender and that, notwithstanding any provision to the contrary in such agreements,

(a) the execution, delivery, perfection or registration of the DIP Lender's Security shall not create or be deemed to constitute a breach by the Applicant of any agreement to which it is a party, and

(b) the DIP Lender shall have no liability to any person whatsoever as a result of any breach of any agreement caused by or resulting from the Applicant entering into the Credit Agreement, the DIP Lender's Security or other document delivered pursuant thereto.

REPORT AND EXTENSION OF STAY

9. As part of any application by the Applicant for an extension of the Stay Period:

(a) the Applicant shall appoint Victor J. Manica, or such other senior officer as it deems appropriate from time to time, as an information officer (the "Information Officer");

(b) the Information Officer shall deliver to the Court a report at least once every three months outlining the status of the U.S. Proceeding, the development of any process for dealing with asbestos claims and such other information as the Information Officer believes to be material (the "Information Reports"); and

(c) the Applicant and the Information Officer shall incur no liability or obligation as a result of the appointment of the Information Officer or the fulfilment of the duties of the Information Officer in carrying out the provisions of this Order and no action or other proceedings shall be commenced against the Applicant or Information Officer as a result of or relating in any way to the appointment of the Information Officer or the

fulfilment of the duties of the Information Officer, except with prior leave of this Court and upon further order securing the solicitor and his own client costs of the Information Officer and the Applicant in connection with any such action or proceeding.

SERVICE AND NOTICE

10. *THIS COURT ORDERS* that the Applicant shall, within fifteen (15) business days of the date of entry of this Order, publish a notice of this Order in substantially the form attached as Schedule “A” hereto on two separate days in the Globe & Mail (National Edition) and the National Post.

11. *THIS COURT ORDERS* that the Applicant be at liberty to serve this Order, any other orders in these proceedings, all other proceedings, notices and documents by prepaid ordinary mail, courier, personal delivery or electronic transmission to any interested party at their addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

MISCELLANEOUS

12. *THIS COURT ORDERS* that notwithstanding anything else contained herein, the Applicant may, by written consent of its counsel of record herein, agree to waive any of the protections provided to it herein.

13. *THIS COURT ORDERS* that the Applicant may, from time to time, apply to this Court for directions in the discharge of its powers and duties hereunder or in respect of the proper execution of this Order.

14. *THIS COURT ORDERS* that, notwithstanding any other provision of this Order, any interested person may apply to this Court to vary or rescind this order or seek other relief upon 10 days’ notice to the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

15. *THIS COURT ORDERS AND REQUESTS* the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada (including the assistance of any court in Canada pursuant to Section 17 of the CCAA) and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any

province and any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Schedule "A"

NOTICE

RE: IN THE MATTER OF S. 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Superior Court of Justice of Ontario made February 25, 2000. The corporate parent of Babcock & Wilcox Canada Ltd. and certain other affiliated corporations in the United States have filed for protection in the United States under Chapter 11 of the Bankruptcy Code to seek, as the result of recent, sharp increases in the cost of settling asbestos claims which have seriously threatened the Babcock & Wilcox Enterprise's long term health, protection from mass asbestos claims to which they are or may become subject. Babcock & Wilcox Canada Ltd. itself has not filed under Chapter 11 but has sought and obtained an interim order under Section 18.6 of the CCAA affording it a stay against asbestos claims in Canada. Further application may be made to the Court by Babcock & Wilcox Canada Ltd. to ensure fair and equal access for Canadians with asbestos claims against Babcock & Wilcox Canada Ltd. to the process established in the United States. Representations may also be made by parties who would prefer to pursue their remedies in Canada.

Persons who wish to be a party to the Canadian proceedings or to receive a copy of the order or any further information should contact counsel for Babcock & Wilcox Canada Ltd., Derrick C. Tay at Meighen Demers (Telephone (416) 340-6032 and Fax (416) 977-5239).

DATED this day of, 2000 at Toronto, Canada

IN THE MATTER OF S. 18.6 of THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. AND IN THE MATTER OF BABCOCK & WILCOX CANADA LTD.

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST PROCEEDINGS

INITIAL ORDER

MEIGHEN DEMERS
Barristers & Solicitors
Suite 1100, Box 11
Merrill Lynch Canada Tower
Sun Life Centre
200 King Street West
Toronto, Ontario M5H 3T4

DERRICK C. TAY ORESTES PASPARAKIS
Tel: (416) 340-6000
Fax:(416)977-5239
Solicitors for the Applicant

Tab 9

2001 CarswellOnt 1830
Ontario Superior Court of Justice [Commercial List]

Matlack Inc., Re

2001 CarswellOnt 1830, [2001] O.J. No. 6121, [2001] O.T.C. 382, 26 C.B.R. (4th) 45

**In the Matter of the Companies' Creditors Arrangement
Act, R.S.C. 1985, c. C-36, Section 18.6 as Amended**

In the Matter of an Application of Matlack, Inc. and the Other Parties Set Out in Schedule
"A" Ancillary to Proceedings Under Chapter 11 of the United States Bankruptcy Code

Matlack, Inc. and the Other Parties Set Out in Schedule "A", Applicant

Farley J.

Heard: April 19, 2001
Judgment: April 19, 2001
Docket: 01-CL-4109

Counsel: *E. Bruce Leonard, Shahana Kar*, for Applicant, Matlack Inc.

Subject: Insolvency; International; Corporate and Commercial

Table of Authorities

Cases considered by Farley J.:

Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Ont. Gen. Div.) — considered
ATL Industries Inc. v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]) — considered
Babcock & Wilcox Canada Ltd., Re (2000), 5 B.L.R. (3d) 75, 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) — considered
Borden & Elliot v. Winston Industries Inc. (November 1, 1983), Doc. 352/83 (Ont. H.C.) — considered
Grace Canada Inc., Re (April 4, 2001), Farley J. (Ont. S.C.)
GST Telecommunications Inc., Re (May 18, 2000), Ground J. (Ont. S.C.) — considered
Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée*) 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée*) 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc*) [1993] 4 S.C.R. 289, (sub nom. *Hunt v. T&N plc*) 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée*) 161 N.R. 81 (S.C.C.) — applied
Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40, 1996 CarswellOnt 4988, [1996] O.J. No. 5094 (Ont. Gen. Div.) — considered
Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — considered
Roberts v. Picture Butte Municipal Hospital (1998), 64 Alta. L.R. (3d) 218, 23 C.P.C. (4th) 300, 227 A.R. 308, [1999] 4 W.W.R. 443, 1998 CarswellAlta 646, [1998] A.J. No. 817 (Alta. Q.B.) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — considered

s. 18.6 [en. 1997, c. 12, s. 125] — pursuant to

s. 18.6(1) "foreign proceeding" [en. 1997, c. 12, s. 125] — considered

s. 18.6(4) [en. 1997, c. 12, s. 125] — considered

s. 18.6(5) [en. 1997, c. 12, s. 125] — considered

APPLICATION by foreign bankrupt for recognition of proceedings commenced pursuant to Chapter 11 of United States *Bankruptcy Code* to be recognized as "foreign proceeding" for purpose of *Companies' Creditors Arrangement Act*, for stay of proceedings commenced by creditor and for ancillary relief.

Endorsement. Farley J.:

1 This was an application pursuant to [section 18.6 of the *Companies' Creditors Arrangement Act* \("CCAA"\)](#) for recognition of the proceedings commenced by the applicants in the U.S. Bankruptcy Court for the District of Delaware for relief under Chapter 11 of the United States Bankruptcy Code be recognized as a "foreign proceeding" for the purposes of the [CCAA](#) and to have this Court issue a stay of proceedings compatible with the Chapter 11 stay and for ancillary relief. That Order is granted with the usual comeback clause and subject to its expiry being May 11, 2001 unless otherwise extended.

2 The one applicant Matlack, Inc. ("Matlack") is a Pennsylvania corporation which is in the business of transporting chemical products throughout the United States, Mexico and Canada. It has developed a substantial Canadian business over the past 20 years and it currently operates a large leased facility in Ontario from which its Canadian licensed fleet services customers throughout Ontario and Quebec. Matlack's Canadian operations are fully integrated into Matlack's North American enterprise from both an operational and financial standpoint.

3 On March 29, 2001, Matlack and its affiliated applicants filed for relief under Chapter 11 and obtained relief precluding creditors subject to the U.S. Bankruptcy Court from commencing or continuing proceedings against the applicants. It is in the interests of all creditors and stakeholders of Matlack that its reorganization proceed in a coordinated and integrated fashion. The objective of such coordination is to ensure that creditors are treated as equitably and fairly as possible, *wherever they are located*. Harmonization of proceedings in the U.S. and in Canada will create the most stable conditions under which a successful reorganization can be achieved and will allow for judicial supervision of all of Matlack's assets and enterprise throughout the two jurisdictions. I note that a Canadian creditor of Matlack has recently seized some of Matlack's assets and intends to sell same in satisfaction of Matlack's obligations to it. It would seem to me that in the context of the proceedings, such a seizure would be of a preferential nature and thus unfair and prejudicial to the interests of Matlack's creditors generally.

4 Canadian courts have consistently recognized and applied the principles of comity. See *Morguard Investments Ltd. v. DeSavoye* (1990), 76 D.L.R. (4th) 256; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Ont. Gen. Div.); *ATL Industries Inc. v. Han Eol Ind. Co.* (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div. [Commercial List]); *Re Babcock & Wilcox Canada Ltd.* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), at pp. 160-2.

5 In an increasingly commercially integrated world, countries cannot live in isolation and refuse to recognize foreign judgments and orders. The Court's recognition of a foreign proceeding should depend on whether there is a real and substantial connection between the matter and the jurisdiction. The determination of whether a sufficient connection exists between a jurisdiction and a matter should be based on considerations of order, predictability and fairness rather than on a mechanical analysis of connections between the matter and the jurisdiction. See *Morguard supra*; *Hunt v. T & N plc* (1993), 109 D.L.R. (4th) 16 (S.C.C.).

6 I concur with what Forsyth J. stated in *Roberts v. Picture Butte Municipal Hospital* (1998), [1999] 4 W.W.R. 443, 64 Alta. L.R. (3d) 218, [1998] A.J. No. 817 (Alta. Q.B.), at pp. 5-7 (A.J.):

Comity and cooperation are increasingly important in the bankruptcy context. *As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty.*

...I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is the U.S. Bankruptcy Court. Thus, in either case, whether there has been attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiff's attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding... (emphasis added)

7 Based on principles of comity, where appropriate this Court has the jurisdiction to stay proceedings commenced against a party that has filed for bankruptcy protection in the U.S. An Ontario Court can accept the jurisdiction of a U.S. Bankruptcy Court over moveable property in Ontario of an American company which has become subject to a Chapter 11 order. See *Roberts, supra*; *Borden & Elliot v. Winston Industries Inc.* (November 1, 1983), Doc. 352/83 (Ont. H.C.).

8 Where a cross-border insolvency proceeding is most closely connected to one jurisdiction, it is appropriate for the Court in that jurisdiction to exercise principal control over the insolvency process in light of the principles of comity and in order to avoid a multiplicity of proceedings. See *Microbiz Corp. v. Classic Software Systems Inc.* (1996), [1996] O.J. No. 5094 (Ont. Gen. Div.).

9 Section 18.6(1) of the CCAA provides the following definition:

"foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

The U.S. Bankruptcy Code's Chapter 11 proceedings would be such a foreign proceeding.

10 As I indicated in *Babcock, supra*, at p. 166: "Section 18.6(4) may be utilized to deal with situations where, notwithstanding that a full filing is not being made under the CCAA, ancillary relief is required in connection with a foreign proceeding". Accordingly, it is appropriate for Matlack to be granted ancillary relief in recognizing the Chapter 11 proceedings and in enforcing the stay of proceedings resulting therefrom. In addition this Court can also grant relief pursuant to section 18.6(5). A stay in Canada would promote a stable atmosphere with a view to the reorganization of Matlack and its affiliates while allowing creditors, wherever situate, to be treated as equitably as possible. The stay would also assist with respect to claimants in Canada attempting to seize assets so as to get a leg up on the other creditors. See *Babcock, supra*, at pp. 165-6. Aside from the *Babcock* case, see also *Re GST Telecommunications Inc.* (May 18, 2000), Ground J. and *Re Grace Canada Inc.* (April 4, 2001), Farley J.

11 It would also seem to me that the relief requested is appropriate and in accordance with the principles set down in the Transnational Insolvency Project of the American Law Institute ("ALI"). This Project involved jurists, practitioners and academics from the NAFTA countries — the U.S., Mexico and Canada — and was completed as to the Restatement of the Law in 2000 after six years of analysis.¹ As a disclaimer, I should note that it was my privilege to tag along on this Project with the other participants who are recognized as outstanding in their fields.

12 The Project continues with the development of implementation and practical aids. Most recently this consists of the *Guidelines Applicable to Court-to-Court Communications on Cross-Border Cases*. I understand that Judge Mary Walrath is handling the Chapter 11 case. It will be my pleasure to work in coordination with her on this cross-border proceeding. To assist further with the handling of these matters, I would approve the proposed Protocol from the Canadian side, including what I understand may be the first opportunity to incorporate the *Communication Guidelines*, such to be effective if, as and when Judge Walrath is satisfied with same from the U.S. side.

13 A copy of the ALI Guidelines and the Matlack Protocol are annexed to these reasons for the benefit of other counsel involved in anything similar.

14 Order to issue accordingly.

Application granted.

The American Law Institute

TRANSNATIONAL INSOLVENCY PROJECT

PRINCIPLES OF COOPERATION IN TRANSNATIONAL INSOLVENCY CASES AMONG THE MEMBERS OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Submitted by the Council to the Members of The American Law Institute for Discussion at the Seventy-Seventh Annual Meeting on May 15, 16, 17, and 18, 2000

The Executive Office

THE AMERICAN LAW INSTITUTE

4025 Chestnut Street

Philadelphia, Pa. 19104-3099

Amended — February 12, 2001

Appendix 2

Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases

Introduction:

One of the most essential elements of cooperation in cross-border cases is communication among the administering authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises.

These Guidelines are intended to enhance coordination and harmonization of insolvency proceedings that involve more than one country through communications among the jurisdictions involved. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair. Thus, communication among courts in cross-border cases is both more important and more sensitive than in domestic cases. These Guidelines encourage such communications while channeling them through transparent procedures. The Guidelines are meant to permit rapid cooperation in a developing insolvency case while ensuring due process to all concerned.

The Guidelines at this time contemplate application only between Canada and the United States, because of the very different rules governing communications with Principles of Cooperation courts and among courts in Mexico. Nonetheless, a Mexican Court might choose to adopt some or all of these Guidelines for communications by a *sindico* with foreign administrators or courts.

A Court intending to employ the Guidelines — in whole or part, with or without modifications — should adopt them formally before applying them. A Court may wish to make its adoption of the Guidelines contingent upon, or temporary until, their adoption by other courts concerned in the matter. The adopting Court may want to make adoption or continuance conditional upon adoption of the Guidelines by the other Court in a substantially similar form, to ensure that judges, counsel, and parties are not subject to different standards of conduct.

The Guidelines should be adopted following such notice to the parties and counsel as would be given under local procedures with regard to any important procedural decision under similar circumstances. If communication with other courts is urgently needed, the local procedures, including notice requirements, that are used in urgent or emergency situations should be employed,

including, if appropriate, an initial period of effectiveness, followed by further consideration of the Guidelines at a later time. Questions about the parties entitled to such notice (for example, all parties or representative parties or representative counsel) and the nature of the court's consideration of any objections (for example, with or without a hearing) are governed by the [Rules of Procedure](#) in each jurisdiction and are not addressed in the Guidelines.

The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction. However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended.

Guideline 1

Except in circumstances of urgency, prior to a communication with another Court, the Court should be satisfied that such a communication is consistent with all applicable [Rules of Procedure](#) in its country. Where a Court intends to apply these Guidelines (in whole or in part and with or without modifications), the Guidelines to be employed should, wherever possible, be formally adopted before they are applied. Coordination of Guidelines between courts is desirable and officials of both courts may communicate in accordance with Guideline 8(d) with regard to the application and implementation of the Guidelines.

Guideline 2

A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction.

Guideline 3

A Court may communicate with an Insolvency Administrator in another jurisdiction or an authorized Representative of the Court in that jurisdiction in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other jurisdiction.

Guideline 4

A Court may permit a duly authorized Insolvency Administrator to communicate with a foreign Court directly, subject to the approval of the foreign Court, or through an Insolvency Administrator in the other jurisdiction or through an authorized Representative of the foreign Court on such terms as the Court considers appropriate.

Guideline 5

A Court may receive communications from a foreign Court or from an authorized Representative of the foreign Court or from a foreign Insolvency Administrator and should respond directly if the communication is from a foreign Court (subject to Guideline 7 in the case of two-way communications) and may respond directly or through an authorized Representative of the Court or through a duly authorized Insolvency Administrator if the communication is from a foreign Insolvency Administrator, subject to local rules concerning ex parte communications.

Guideline 6

Communications from a Court to another Court may take place by or through the Court:

- (a) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the other Court and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(b) Directing counsel or a foreign or domestic Insolvency Administrator to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the Court to the other Court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the Court considers appropriate;

(c) Participating in two-way communications with the other Court by telephone or video conference call or other electronic means in which case Guideline 7 shall apply.

Guideline 7

In the event of communications between the Courts in accordance with Guidelines 2 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two Courts:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the [Rules of Procedure](#) applicable in each Court;

(b) The communication between the Courts should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of both Courts, should be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of either Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Courts may consider appropriate.

(d) The time and place for communications between the Courts should be to the satisfaction of both Courts. Personnel other than Judges in each Court may communicate fully with each other to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by either of the Courts.

Guideline 8

In the event of communications between the Court and an authorized Representative of the foreign Court or a foreign Insolvency Administrator in accordance with Guidelines 3 and 5 by means of telephone or video conference call or other electronic means, unless otherwise directed by the Court:

(a) Counsel for all affected parties should be entitled to participate in person during the communication and advance notice of the communication should be given to all parties in accordance with the [Rules of Procedure](#) applicable in each Court;

(b) The communication should be recorded and may be transcribed. A written transcript may be prepared from a recording of the communication which, with the approval of the Court, can be treated as an official transcript of the communication;

(c) Copies of any recording of the communication, of any transcript of the communication prepared pursuant to any Direction of the Court, and of any official transcript prepared from a recording should be filed as part of the record in the proceedings and made available to the other Court and to counsel for all parties in both Courts subject to such Directions as to confidentiality as the Court may consider appropriate;

(d) The time and place for the communication should be to the satisfaction of the Court. Personnel of the Court other than Judges may communicate fully with the authorized Representative of the foreign Court or the foreign Insolvency Administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the Court.

Guideline 9

A Court may conduct a joint hearing with another Court. In connection with any such joint hearing, the following should apply, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

- (a) Each Court should be able to simultaneously hear the proceedings in the other Court.
- (b) Evidentiary or written materials filed or to be filed in one Court should, in accordance with the Directions of that Court, be transmitted to the other Court to made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other Court or its public availability in an electronic system should not subject the party filing the material in one Court to the jurisdiction of the other Court.
- (c) Submissions or applications by the representative or any party should be made only to the Court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other Court to make submission to it.
- (d) Subject to Guideline 7(b), the Court should be entitled to communicate with the other Court in advance of a joint hearing, with or without counsel being present, to establish Guidelines for the orderly making of submissions and rendering of decisions by the Courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing.
- (e) Subject to Guideline 7(b), the Court, subsequent to the joint hearing, should be entitled to communicate with the other Court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both Courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

Guideline 10

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the other jurisdiction without the need for further proof of exemplification thereof.

Guideline 11

The Court should, except upon proper objection on valid grounds and then only to the extent of such objection, accept that Orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such Orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the Court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such Orders.

Guideline 12

The Court may coordinate proceedings before it with proceedings in another jurisdiction by establishing a Service List which may include parties that are entitled to receive notice of proceedings before the Court in the other jurisdiction ("Non-Resident Parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the Court may be ordered to also be provided to or served on the Non-Resident Parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the Court in accordance with the procedures applicable in the Court.

Guideline 13

The Court may issue an Order or issue Directions permitting the foreign Insolvency Administrator or a representative of creditors in the proceedings in the other jurisdiction or an authorized Representative of the Court in the other jurisdiction to appear and be heard by the Court without thereby becoming subject to the jurisdiction of the Court.

Guideline 14

The Court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the Court, not apply to applications or motions brought by such parties before the other Court or that relief be granted to permit such parties to bring such applications or motions before the other Court on such terms and conditions as it considers appropriate. Court-to-Court communications in accordance with Guidelines 6 and 7 hereof may take place if an application of motion brought before the Court affects or might affect issues or proceedings in the Court in the other jurisdiction.

Guideline 15

A Court may communicate with a Court in another jurisdiction or with an authorized Representative of such Court in the manner prescribed by these Guidelines for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the other Court wherever there is commonality among the issues and/or the parties in the proceedings. The Court should, absent compelling reasons to the contrary, so communicate with the Court in the other jurisdiction where the interests of justice so require.

Guideline 16

Directions issued by the Court under these Guidelines are subject to such amendments, modifications, and extensions as may be considered appropriate by the Court for the purposes described above and to reflect the changes and developments from time to time in the proceedings before it and before the other Court. Any Directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both Courts. If either Court intends to supplement, change, or abrogate Directions issued under these Guidelines in the absence of joint approval by both Courts, the Court should give the other Courts involved reasonable notice of its intention to do so.

Guideline 17

Arrangements contemplated under these Guidelines do not constitute a compromise or waiver by the Court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the Court or before the other Court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the Orders made by the Court or the other Court.

— UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re: MATLACK SYSTEMS, INC., *et al.*, Debtors

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, *RSC 1985, c. C-36, SECTION 18.6 AS AMENDED*

IN THE MATTER OF AN APPLICATION OF MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" ANCILLARY TO PROCEEDINGS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

MATLACK, INC. AND THE OTHER PARTIES SET OUT IN SCHEDULE "A" Applicant

Chapter 11

Case No. 01-01114 (MFW)

Jointly Administered

CROSS-BORDER INSOLVENCY PROTOCOL

RE MATLACK, INC. AND AFFILIATES

This Cross-Border Insolvency Protocol (the "Protocol") shall govern the conduct of all parties in interest in a proceeding brought by Matlack, Inc. and certain other parties in the Ontario Superior Court of Justice and a proceeding brought by Matlack Systems, Inc. and certain other parties in the United States Bankruptcy Court for the District of Delaware as Case No. 01-01114.

A. Background

Matlack Systems, Inc., a Delaware corporation ("MSI"), is the parent company of a multinational transportation business that operates, through its various affiliates, in the United States, Canada and Mexico.

MSI and certain of its affiliates (collectively, the "Matlack Companies") have commenced reorganization cases (collectively, the "U.S. Cases") under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court"). The Matlack Companies are continuing in possession of their respective properties and are operating and managing their businesses, as debtors in possession, pursuant to sections 1107 and 1108 of the U.S. Bankruptcy Code. An Official Committee of Unsecured Creditors has been appointed in the U.S. Cases (the "Creditor's Committee").

One of the Matlack Companies, Matlack, Inc. (for ease of reference, "Matlack Canada"), a United States affiliate of MSI, has assets and carries on business in Canada. The Matlack Companies have commenced proceedings (collectively, the "Canadian Case") under [section 18.6 of the Companies' Creditors Arrangement Act](#) (the "CCAA") in the Ontario Superior Court of Justice (the "Canadian Court"). The Matlack Companies have sought an Order of the Canadian Court (as initially made under the CCAA and as subsequently amended or modified, the "CCAA Order") under which (a) the U.S. Cases have been determined to be "foreign proceedings" for the purposes of [section 18.6 of the CCAA](#); and (b) a stay was granted against actions, enforcements, extra-judicial proceedings or other proceeding until and including August 15, 2001 against the Matlack Companies and their property.

The Matlack Companies are parties to both the Canadian Case and the U.S. Cases. For convenience, the U.S. Cases and the Canadian Case are referred to herein collectively as the "Insolvency Proceedings" and the U.S. Bankruptcy Court and the Canadian Court are referred to herein collectively as the "Courts".

B. Purpose and Goals

While the Insolvency Proceedings are pending in the United States and Canada for the Matlack Companies, the implementation of basic administrative procedures is necessary to coordinate certain activities in the Insolvency Proceedings, to protect the rights of parties thereto, the creditors of the Matlack Companies and to ensure the maintenance of the Courts' independent jurisdiction and comity. Accordingly, this Protocol has been developed to promote the following mutually desirable goals and objectives in both the U.S. Cases and the Canadian Case:

- harmonize and coordinate activities in the Insolvency Proceedings before the U.S. Court and the Canadian Court;
- promote the orderly and efficient administration of the Insolvency Proceedings to, among other things, maximize the efficiency of the Insolvency Proceedings, reduce the costs associated therewith and avoid duplication of effort;
- honor the independence and integrity of the Courts and other courts and tribunals of the United States and Canada;
- promote international cooperation and respect for comity among the Courts, the parties to the Insolvency Proceedings and the creditors of the Matlack Companies and other parties interested in or affected by the Insolvency Proceedings;
- facilitate the fair, open and efficient administration of the Insolvency Proceedings for the benefit of all of the Debtors, creditors and other interested parties, wherever located; and

- implement a framework of general principles to address basic administrative issues arising out of the cross-border nature of the Insolvency Proceedings.

C. Comity and Independence of the Courts

The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing this Protocol, neither the U.S. Court, the Canadian Court, the Matlack Companies nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.

The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.

In accordance with the principles of comity and independence established in Paragraph 6 and 7 above, nothing contained herein shall be construed to:

- increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada, including the ability of any such court or tribunal to provide appropriate relief under applicable law on an *ex parte* or "limited notice" basis;
- require the Matlack Companies or any Creditor's Committee or Estate Representatives to take any action or refrain from taking, any action that would result in a breach of any duty imposed on them by any applicable law;
- authorize any action that requires the specific approval of one or both of the Courts under the U.S. Bankruptcy Code or the CCAA after appropriate notice and a hearing (except to the extent that such action is specifically described in this Protocol); or
- preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.

The Matlack Companies, the Creditor's Committee, the Estate Representatives and their respective employees, members, agents and professionals shall respect and comply with the duties imposed upon them by the U.S. Bankruptcy Code, the CCAA, the CCAA Order and any other applicable laws.

D. Cooperation

To assist in the efficient administration of the Insolvency Proceedings, the Matlack Companies, the Creditor's Committee and the Estate Representatives shall (a) cooperate with each other in connection with actions taken in both the U.S. Bankruptcy Court and the Canadian Court, and (b) take any other appropriate steps to coordinate the administration of the U.S. Cases and the Canadian Case for the benefit of the Matlack Companies' respective estates and stakeholders.

To harmonize and coordinate the administration of the Insolvency Proceedings, the U.S. Bankruptcy Court and the Canadian Court each shall use its best efforts to coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible. The U.S. Bankruptcy Court and the Canadian Court may communicate with one another in accordance with the Guidelines for Court-to-Court Communication in Cross-Border Cases developed by the American Law Institute and attached as Schedule "1" to this Protocol with respect to any matter relating to the Insolvency Proceedings and may conduct joint hearings with respect to any matter relating to the conduct, administration, determination or disposition of any aspect of the U.S. Cases and the Canadian Case, in circumstances where both Courts consider such joint hearings to be necessary or advisable and, in particular, to facilitate or coordinate with the proper and efficient conduct of the U.S. Cases and the Canadian Case.

Notwithstanding the terms of paragraph 11 above, this Protocol recognizes that the U.S. Bankruptcy Court and the Canadian Court are independent Courts and, accordingly, although the Courts will seek to cooperate and coordinate with each other in good faith, each of the Courts shall at all times exercise its independent jurisdiction and authority with respect to (a) matters presented to such Court and (b) the conduct of the parties appearing in such matters.

E. Retention and Compensation of Professionals

Except as provided in paragraph 16 below, any estate representatives appointed in the U.S. Cases, including any examiners or trustees appointed in accordance with section 1104 of the U.S. Bankruptcy Code and any Canadian professionals retained by the Estate Representatives (collectively, the "Estate Representatives"), shall be subject to the exclusive jurisdiction of the U.S. Court with respect to (a) the Estate Representatives' tenure in office; (b) the retention and compensation of the Estate Representatives; (c) the Estate Representatives' liability, if any, to any person or entity, including the Matlack Companies and any third parties, in connection with the U.S. Case; and (d) the hearing and determination of any other matters relating to the Estate Representatives arising in the U.S. Cases under the U.S. Bankruptcy Code or other applicable laws of the United States. The Estate Representatives and their U.S. counsel and other U.S. professionals shall not be required to seek approval of their retention in the Canadian Court. Additionally, the Estate Representatives and their U.S. counsel and other U.S. professionals (a) shall be compensated for their services in accordance with the U.S. Bankruptcy Code and other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their compensation in the Canadian Court.

Any Canadian professionals retained by or with the approval of the Matlack Companies for purposes of the Canadian Case, including Canadian professionals retained by the Creditor's Committee (collectively, the "Canadian Professionals"), shall be subject to the exclusive jurisdiction of the Canadian Court. Accordingly, the Canadian Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in Canada, and (b) shall not be required to seek approval of their retention or compensation in the U.S. Court.

Any United States professionals retained by the Matlack Companies and any United States professionals retained by the Creditor's Committee (collectively, the "U.S. Professionals") shall be subject to the exclusive jurisdiction of the U.S. Bankruptcy Court. Accordingly, the U.S. Professionals (a) shall be subject to the procedures and standards for retention and compensation applicable in the U.S. Bankruptcy Court under the U.S. Bankruptcy Code and any other applicable laws of the United States or orders of the U.S. Bankruptcy Court, and (b) shall not be required to seek approval of their retention or compensation in the Canadian Court.

F. Rights to Appear and Be Heard

The Matlack Companies, their creditors and other interested parties in the Insolvency Proceedings, including the Creditor's Committee and the U.S. Trustee, shall have the right and standing to (a) appear and be heard in either the U.S. Court or the Canadian Court in the Insolvency Proceedings to the same extent as creditors and other interested parties domiciled in the forum country, subject to any local rules or regulations generally applicable to all parties appearing in the forum, and (b) file notices of appearance or other processes with the Clerk of the U.S. Bankruptcy Court or the Canadian Court in the Insolvency Proceedings; *provided, however*, that any appearance or filing may subject a creditor or an interested party to the jurisdiction of the Court in which the appearance or filing occurs; provided further, that appearance by the Creditor's Committee in the Canadian Case shall not form a basis for personal jurisdiction in Canada over the members of the Creditor's Committee. Notwithstanding the foregoing, and in accordance with paragraph 13 above, the Canadian Court shall have jurisdiction over the Estate Representatives and the U.S. Trustee with respect to the particular matters as to which the Estate Representatives or the U.S. Trustee appear before the Canadian Court.

G. Notice

Notice of any motion, application or other pleading or paper filed in one or both of the Insolvency Proceedings and notice of any related hearings or other proceedings mandated by applicable law in connection with the Insolvency Proceedings, or this

Protocol shall be given by appropriate means (including, where circumstances warrant, by courier, telecopier or other electronic forms of communication) to the following: (a) all creditors, including the Creditor's Committee, and other interested parties in accordance with the practice of the jurisdiction where the papers are filed or the proceedings are to occur; and (b) to the extent not otherwise entitled to receive notice under clause (a) above, the U.S. Trustee, the Office of the United States Trustee, and such other parties as may be designated by either of the Courts from time to time.

H. Joint Recognition of Stays of Proceedings Under the U.S. Bankruptcy Code and the CCAA

In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 18.6 of the CCAA and the CCAA Order (the "Canadian Stay") on the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the U.S. Bankruptcy Court shall extend and enforce the Canadian Stay in the United States (to the same extent such stay of proceedings and actions is applicable in Canada) to prevent adverse actions against the assets, rights and holdings of the Matlack Companies. In implementing the terms of this paragraph, the U.S. Bankruptcy Court may consult with the Canadian Court regarding (a) the interpretation and application of the Canadian Stay and any orders of the Canadian Court modifying or granting relief from the Canadian Stay, and (b) the enforcement in the United States of the Canadian Stay.

In recognition of the importance of the stay of proceedings and actions against the Matlack Companies and their assets under section 362 of the U.S. Bankruptcy Code (the "U.S. Stay") to the successful completion of the Insolvency Proceedings for the benefit of the Matlack Companies and their respective estates and stakeholders, to the extent necessary and appropriate, the Canadian Court shall extend and enforce the U.S. Stay in Canada (to the same extent such stay of proceedings and action is applicable in the United States) to prevent adverse actions against the assets, rights and holdings, of the Matlack Companies in Canada. In implementing the terms of this paragraph, the Canadian Court may consult with the U.S. Court regarding (a) the interpretation and application of the U.S. Stay and any order of the U.S. Court modifying or granting relief from the U.S. Stay, and (b) the enforcement in Canada of the U.S. Stay.

Nothing contained herein shall affect or limit the Matlack Companies' or other parties' rights to assert the applicability or non-applicability of the U.S. Stay or the Canadian Stay to any particular proceeding, property, asset, activity or other matter, wherever pending or located.

I. Effectiveness and Modification of Protocol

This Protocol shall become effective only upon its approval by both the U.S. Court and the Canadian Court.

This Protocol may not be supplemented, modified, terminated or replaced in any manner except by the U.S. Court and the Canadian Court. Notice of any legal proceeding to supplement, modify, terminate or replace this Protocol shall be given in accordance with paragraph 17 above.

J. Procedure for Resolving Disputes Under the Protocol

Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Court, the Canadian Court or both Courts upon notice, in accordance with paragraph 17 above. Where an issue is addressed to only one Court, in rendering a determination in any such dispute, such Court: (a) shall consult with the other Court; and (b) may, in its sole and exclusive discretion, either (i) render a binding decision after such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to the other Court or (iii) seek a joint hearing of both Courts. Notwithstanding the foregoing, each Court in making a determination shall have regard to the independence, comity or inherent jurisdiction of the other Court established under existing law.

K. Preservation of Rights

Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the powers, rights, claims and defences of the Matlack Companies and their estates, the Creditor's Committee, the U.S. Trustee or any of the creditors of the Matlack Companies under applicable law, including the U.S. Bankruptcy Code and the [CCAA](#).

L. Guidelines

The Protocol shall adopt by reference the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the "Guidelines") developed by The American Law Institute for the Transnational Insolvency Project, a copy of which are attached hereto as Schedule "I". In the case of any conflict between the terms of this Protocol and the terms of the Guidelines, the terms of this Protocol shall govern.

Footnotes

- 1 A copy of this material may be obtained from the Executive Office, The American Law Institute, 4025 Chestnut Street, Philadelphia, PA, USA 19104-3099.

Tab 10

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE

)

WEDNESDAY THE 25TH

)

MR. JUSTICE NEWBOULD

)

DAY OF JANUARY, 2017

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC.,
MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE
GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES
CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS,
INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF
THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

ORDER

THIS MOTION, made by Modular Space Corporation ("MSC"), in its capacity as the foreign representative (the "Foreign Representative") of the Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for an Order substantially in the form enclosed in the Motion Record was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of David Orlofsky sworn January 20, 2017 and the exhibits thereto (the "Orlofsky Affidavit"), the first report of Alvarez & Marsal Canada Inc. ("A&M") in its capacity as the Court-appointed information officer (the "Information Officer") dated January 20, 2017 (the "First Report"), and on hearing the submissions of counsel for the

Debtors, counsel for the Information Officer, counsel for Bank of America, N.A., as Administrative Agent for the lenders under the Debtors' Post-Petition Credit Agreement (collectively, the "**DIP Lender**"), counsel for the Ad Hoc Group of Noteholders and such other counsel as may be present, and upon reading the affidavit of service of Evita Ferreira sworn January 20, 2017, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF A&M'S ACTIVITIES AND REPORTS

2. **THIS COURT ORDERS** that the Preliminary Report dated December 24, 2016 (the "**Preliminary Report**") and the activities of A&M in its capacity as the proposed Information Officer, as described in the Preliminary Report, be and are hereby approved.

3. **THIS COURT ORDERS** that the First Report and the activities of A&M in its capacity as the Information Officer, as described in the First Report, be and are hereby approved.

RECOGNITION OF FOREIGN ORDERS

4. **THIS COURT ORDERS** that the following orders (the "**Second Day Orders**") of the United States Bankruptcy Court for the District of Delaware made in the insolvency proceedings of the Debtors under Chapter 11 of Title 11 of the United States Code are hereby recognized and

given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

- a. a final order (i) authorizing the Debtors to obtain post-petition financing (the **"DIP Financing"**); (ii) granting liens and super-priority administrative expense claims to the DIP Lenders; (iii) authorizing use of the DIP Financing proceeds to pay certain outstanding US pre-filing obligations; (iv) providing adequate protection to certain of the Debtors' pre-filing credit parties; (v) modifying the automatic stay as necessary to give effect to the DIP Financing order (the **"Final DIP Order"**);
- b. an order authorizing the Debtors' assumption of and performance under the restructuring support agreement dated as of December 20, 2016 (the **"RSA Order"**);
- c. an order approving the Debtors' entry into and performance under a stock purchase and backstop agreement dated as of December 28, 2016 and authorizing them to pay certain fees and expenses in connection with that agreement (the **"SPBA Order"**);
- d. a final order authorizing the Debtors to pay pre-Petition wages, compensation and employee benefits (the **"Final Wages Order"**);
- e. a final order: (i) authorizing, but not directing, the Debtors to maintain their existing bank accounts; (ii) authorizing the continued use of existing cash management systems; (iii) authorizing continued use of existing business forms; (iv) authorizing the continuation of (and administrative expense priority status of) intercompany transactions; and (iv) extending the time for the Debtors'

compliance under section 345(b) of the United States Bankruptcy Code to February 28, 2017 (the “**Final Cash Management Order**”);

- f. a final order with respect to utility providers: (i) approving the Debtors’ form of adequate assurance of payment; (ii) establishing procedures to resolve objections by utility companies; and (iii) restraining utility companies from discontinuing, alternating or refusing service (the “**Final Utilities Order**”);
- g. a final order establishing notification procedures and approving restrictions on certain transfers of or claims for worthlessness with respect to equity securities (the “**Final NOL Order**”); and
- h. an order authorizing the Debtors to employ and pay professionals utilized in the ordinary course of business, *nunc pro tunc*, to December 21, 2016 and waiving certain information requirements (the “**OCP Order**”).

provided, however, that in the event of any conflict between the terms of the Second Day Orders and the Orders of this Court made in these proceedings, the Orders of this Court shall govern with respect to the Property (as defined in the Supplemental Order (Foreign Main Proceeding) of this Court made in these proceedings on December 27, 2016) in Canada. Copies of the Second Day Orders are attached as Exhibits D to K of the Orlofsky Affidavit.

GENERAL

5. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals,

regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative, the Debtors, the Information Officer, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order.

6. **THIS COURT ORDERS** that each of the Foreign Representative, the Debtors and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JAN 25 2017

PER / PAR:



IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF MODULAR SPACE INTERMEDIATE HOLDINGS, INC., MODULAR SPACE CORPORATION, RESUN MODSPACE, INC., MODSPACE GOVERNMENT FINANCIAL SERVICES, INC., MODSPACE FINANCIAL SERVICES CANADA, LTD., RESUN CHIPPEWA, LLC AND MODULAR SPACE HOLDINGS, INC. (THE "DEBTORS")

APPLICATION OF MODULAR SPACE CORPORATION UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDINGS COMMENCED AT TORONTO

ORDER

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide St. W.
Toronto, ON M5H 4E3

ROGER JAIPARGAS / LSUC # 43275C

Tel: 416-367-6266
Email: rjaipargas@blg.com

EVITA FERREIRA / LSUC # 69967K

Tel: 416-367-6708
Email: eferreira@blg.com

Lawyers for Modular Space Holdings, Inc., Modular
Space Intermediate Holdings, Inc., Modular Space
Corporation, Resun ModSpace, Inc., ModSpace
Government Financial Services, Inc., ModSpace
Financial Services Canada, Ltd. and
Resun Chippewa, LLC

Tab 11

Citation: Re Xerium Technologies Inc., 2010 ONSC 3974
Court File No. 10-8652-00CL
Date: 20100928

**SUPERIOR COURT OF JUSTICE
ONTARIO
(Commercial List)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

**XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN
REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC.,
STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER
ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC,
XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED,
XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM
GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A.
(collectively, the "Chapter 11 Debtors")**

Applicants

BEFORE: C. CAMPBELL J.

COUNSEL: *Derrick Tay, Randy Sutton* for the Applicants

HEARD: May 14, 2010

ENDORSEMENT

[1] The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

[2] Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

[3] On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

[4] On various dates in April 2010, Judge Kevin J. Carey of the U.S. Bankruptcy Court made certain orders in respect of the Chapter 11 Debtors' ongoing business operations.

[5] On May 12, 2010, Judge Carey confirmed the Chapter 11 Debtors' amended Joint Prepackaged Plan of Reorganization dated March 30, 2010 as supplemented (the "Plan")¹ pursuant to the U.S. Bankruptcy Code (the "U.S. Confirmation Order.")

[6] Xerium sought in this motion to have certain orders made by the U.S. Bankruptcy Court in April 2010, the U.S Confirmation Order and the Plan recognized and given effect to in Canada.

[7] The Applicant together with its direct and indirect subsidiaries (collectively, the "Company") are a leading global manufacturer and supplier of products used in the production of paper products.

[8] Both Xerium, a Delaware limited liability company, Xerium Canada Inc. ("Xerium Canada"), a Canadian company, together with other entities forming part of the Chapter 11 Debtors are parties to an Amended and Restated Credit and Guarantee Agreement dated as of May 30, 2008 as borrowers, with various financial institutions and other persons as lenders. The Credit Facility is governed by the laws of the State of New York.

[9] Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and its difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

[10] The Plan was developed between the Applicant, its direct and indirect subsidiaries together with the Administrative Agent and the Secured Lender Ad Hoc Working Group.

[11] Pursuant to the Plan, on March 2, 2010, the Chapter 11 Debtors commenced the solicitation of votes on the Plan and delivered copies of the Plan, the Disclosure Statement and the appropriate ballots to all holders of claims as of February 23, 2010 in the classes entitled to vote on the Plan.

[12] The Disclosure Statement established 4:00 p.m. (prevailing Eastern time) on March 22, 2010 as the deadline for the receipt of ballots to accept or reject the Plan, subject to the Chapter 11 Debtors' right to extend the solicitation period. The Chapter 11 Debtors exercised their right

¹ Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

to extend the solicitation period to 6:00 p.m. (prevailing Eastern time) on March 26, 2010. The Plan was overwhelmingly accepted by the two classes of creditors entitled to vote on the Plan.

[13] On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

[14] Various orders were made by the U.S. Bankruptcy Court in April 2010, which orders were recognized by this Court.

[15] On May 12, 2010, at the Combined Hearing, the U.S. Bankruptcy Court confirmed the Plan, and made a number of findings, *inter alia*, regarding the content of the Plan and the procedures underlying its consideration and approval by interested parties. These included the appropriateness of notice, the content of the Disclosure Statement, the voting process, all of which were found to meet the requirements of the U.S. Bankruptcy Code and fairly considered the interests of those affected.

[16] The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

[17] Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.\$640 million to a notional value of approximately U.S.\$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. \$80 million Exit Facility.

[18] The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than \$41.5 million in value.

[19] Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

[20] The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

[21] I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

[22] On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

- (a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;
- (b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;
- (c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;
- (d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;
- (e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;
- (g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and
- (h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

[23] I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

[24] Section 44 identifies the purpose of Part IV of the CCAA. It states

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

[25] I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

[26] In *Re Babcock & Wilcox Canada Ltd.*, 18 C.B.R. (4th) 157 at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

[27] The applicable factors from *Re Babcock and Wilcox* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum:

- (a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;
- (b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;
- (c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;
- (d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;
- (e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;
- (f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

[28] Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

- (a) it is made in good faith;
- (b) it does not breach any applicable law;
- (c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and
- (d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

[29] In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

[30] The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

[31] The requested Order is to issue in the form signed.

C. CAMPBELL J.

Released:

Tab 12

**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 ARMSTRONG FLOORING,
INC., AFI LICENSING LLC, ARMSTRONG FLOORING
LATIN AMERICA, INC. AND ARMSTRONG FLOORING
CANADA LTD. (THE "DEBTORS")**

**APPLICATION OF ARMSTRONG FLOORING CANADA LTD. UNDER SECTION 46
OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED**

**AFFIDAVIT OF DALTON EDGECOMB
(Termination and Discharge)
(Sworn September 26, 2022)**

**I, DALTON EDGECOMB, of the City of Estero in the State of Florida, MAKE OATH
AND SAY as follows:**

1. I am an RTS Senior Managing Director with Riveron Management Services, LLC ("RMS"), the financial advisor to Armstrong Flooring, Inc. ("AFI"), a company with its head office located at 1770 Hempstead Road, Lancaster, Pennsylvania and its affiliated companies which are the Debtors (as defined below) in these proceedings, and as such have personal knowledge of the matters deposed to in this Affidavit, or where I do not possess such personal knowledge, I have stated the source of my information, and in all such cases I believe that both the information and the resulting statement to be true.

2. On June 8, 2022, the United States Bankruptcy Court for the District of Delaware (the "US Court") entered an Order (i) authorizing the employment and retention of Riveron Management Services, LLC effective *nunc pro tunc*, to the petition date, (ii) approving the terms

of Riveron Management Services LLC's employment and retention, (iii) designated Dalton Edgecomb as Chief Transformation Officer effective, *nunc pro tunc*, to the petition date, and (iv) granting related relief (the "**Chief Transformation Officer Order**"). Paragraph 3 of the Chief Transformation Officer Order provides that the Debtors are authorized, pursuant to the provisions of the United States Bankruptcy Code (the "**US Code**"), to designate myself as the Chief Transformation Officer. Attached hereto and marked as **Exhibit "A"** is a true copy of the Chief Transformation Officer Order.

Introduction

3. On May 8, 2022 (the "**Filing Date**"), AFI, AFI Licensing LLC, Armstrong Flooring Latin America, Inc. and Armstrong Flooring Canada Ltd. (collectively, the "**Debtors**" or the "**AFI Group**") filed voluntary petitions for relief pursuant to Chapter 11 of Title 11 ("**Chapter 11**") of the US Code (collectively, the "**Petitions**" and each a "**Petition**") with the US Court. Attached hereto and marked as **Exhibit "B"** is a true copy of the filed Petitions. The Debtors requested that the Petitions be jointly administered for procedural purposes only.

4. As part of the first day motions (the "**First Day Motions**") that were heard by the US Court on May 11, 2022, which hearing was continued on May 13, 2022 and May 17, 2022, the US Court made several orders (collectively, the "**First Day Orders**"), including an order appointing Armstrong Flooring Canada Ltd. as the foreign representative of the AFI Group.

5. In support of the Petitions, the Declaration of Michel S. Vermette, the President and Chief Executive Officer of AFI, was filed with the US Court (the "**First Day Declaration**"). The First Day Declaration sets out in greater detail, among other things, the history of the AFI Group and the challenges that led to the Chapter 11 proceedings before the US Court commenced by the Petitions (the "**US Proceedings**"). Attached hereto and marked as **Exhibit "C"** is a true copy of the First Day Declaration.

6. On June 1, 2022, the Affidavit of Michel S. Vermette (the "**Vermette Affidavit**") was sworn in connection with an application brought by Armstrong Canada Flooring Ltd. ("**Armstrong Flooring Canada**" or the "**Foreign Representative**") for an Initial Recognition Order and a Supplemental Order, pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), and the within proceedings under Part IV

of the CCAA, the “**Part IV CCAA Proceedings**”). The Vermette Affidavit sets out in greater detail the background on this matter and provides a summary of the various First Day Orders. Attached hereto and marked as **Exhibit “D”** is a true copy of the Vermette Affidavit (without exhibits).

7. On June 8, 2022, the Ontario Superior Court of Justice (Commercial List) (the “**Canadian Court**”) made the Initial Recognition Order (the “**Initial Recognition Order**”) and the Supplemental Order (the “**Supplemental Order**”, and together with the Initial Recognition Order, the “**Recognition Orders**”), which, among other things, declared Armstrong Flooring Canada a “foreign representative” pursuant to section 45 of the CCAA of the Debtors in respect of the US Proceedings, recognized the US Proceedings as a “foreign main proceeding” pursuant to section 45 of the CCAA, and recognized the First Day Orders. Attached hereto and marked as **Exhibit “E”** are true copies of the Recognition Orders and the Endorsement made by Mr. Justice Cavanagh on June 8, 2022.

8. The Supplemental Order, among other things, appointed Grant Thornton Limited (“**Grant Thornton**”) as the Information Officer (the “**Information Officer**”) of the Debtors, with the powers and duties set out in the Supplemental Order.

9. The Part IV CCAA Proceedings were brought with a view to creating a stay of proceedings in Canada, so that the Debtors could pursue a restructuring, subject to Orders entered by the US Court, with corresponding Recognition Orders being sought from the Canadian Court, in order to facilitate a cross-border restructuring and ensure consistency in the administration of the US Proceedings and the Part IV CCAA Proceedings for the benefit of the creditors and stakeholders of the Debtors.

10. This Affidavit is made in support of a motion by the Foreign Representative in the within Part IV CCAA Proceedings for Orders granting certain relief, including, *inter alia*:

- (a) abridging and validating the time for service of the Notice of Motion and the Motion Record and directing that any further service of the Notice of Motion and Motion Record be dispensed with such that this motion is properly returnable on September 28, 2022;

- (b) effective upon the filing of the Information Officer's Certificate (as defined below), recognizing and enforcing in Canada an order of the US Court dated July 13, 2022, *inter alia*, (i) approving the sale of certain of the Debtors' assets free and clear of all liens, claims, encumbrances and other interests, (ii) approving the assumption and assignment of certain executory contracts and unexpired leases related thereto, and (iii) granting related relief (the "**US Sale Order**");
- (c) approving a settlement agreement between Armstrong Flooring Canada and the US Debtors, in accordance with the terms of the Settlement Agreement dated September 23, 2022 (the "**Settlement Agreement**") between Armstrong Flooring Canada and Armstrong Flooring, Inc., AFI Licensing LLC and Armstrong Flooring Latin America, Inc. (collectively, the "**US Debtors**");
- (d) declaring that Grant Thornton in its capacity as Court-appointed Information Officer shall, upon the satisfaction of the terms and conditions of the Settlement Agreement, file an Information Officer's certificate (the "**Information Officer's Certificate**") with the Court and deliver a copy to the service list by email;
- (e) declaring that Element Fleet Management Inc. is not a secured creditor of Armstrong Flooring Canada;
- (f) directing the registrar of personal property security in Ontario to fully discharge and delete the registration made by Element Fleet Management Inc. pursuant to the provisions of the *Personal Property Security Act* (Ontario), R.S.O. 1990, c. P.10 (the "**PPSA**") on March 27, 2017 as File Number 725951925, bearing Registration Number 20170327 1402 1462 3216, from the personal property registry;
- (g) approving the Pre-Filing Report of Grant Thornton as the proposed information officer, dated June 6, 2022 and the appendices thereto (the "**Pre-Filing Report**") and the activities of the proposed information officer described therein;
- (h) approving the First Report of the Information Officer dated September 23, 2022 and the appendices thereto (the "**First Report**") and the activities of the Information Officer described therein;

- (i) approving the fees and disbursements of the Information Officer for the period from May 9, 2022 to September 21, 2022, and approving the estimated fees and disbursements of the Information Officer up to its date of discharge, as described in the affidavit of Jonathan Krieger, sworn September 22, 2022 (the “**Krieger Affidavit**”);
- (j) approving the fees and disbursements of Lax O’Sullivan Lisus Gottlieb LLP (“**LOLG**”), legal counsel to the Information Officer, for the period from May 1, 2022 to August 31, 2022, and approving the estimated fees and disbursements of LOLG for services to be provided to the Information Officer up to its date of discharge, as described in the affidavit of Andrew Winton, sworn September 22, 2022 (the “**Winton Affidavit**”);
- (k) amending paragraph 19 of the Supplemental Order to read as follows:

THIS COURT ORDERS that the Information Officer, counsel to the Information officer and Borden Ladner Gervais LLP (“**BLG**”) shall be entitled to the benefit of and are hereby granted a charge (the “**Administration Charge**”) on the Property in Canada, which charge shall not exceed an aggregate amount of \$600,000, as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 21 and 23 hereof.

- (l) authorizing the payment of the fees and disbursements of BLG, by any of Armstrong Flooring Canada, or Grant Thornton, from the assets of Armstrong Flooring Canada;
- (m) authorizing, the Information Officer to file an assignment in bankruptcy on behalf of Armstrong Flooring Canada under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”);
- (n) authorizing Grant Thornton to act as trustee in bankruptcy on behalf of Armstrong Flooring Canada;

- (o) effective upon the filing of the discharge certificate (the “**Discharge Certificate**”) by the Information Officer with this Court, certifying that the Information Officer has attended to certain remaining matters, as described in the First Report:
- i. terminating the stay of proceedings, as provided for in the Initial Recognition Order and the Supplemental Order, and terminating these proceedings commenced under Part IV of the CCAA;
 - ii. terminating, discharging and releasing the Administration Charge, as defined in and created by the Supplemental Order;
 - iii. discharging Grant Thornton in its capacity as Information Officer; and
 - iv. releasing Grant Thornton in its capacity as Information Officer from any and all liability that it now has or may hereafter have in any way arising out of the acts or omissions of the Information Officer, while acting in its capacity as Information Officer in the CCAA proceedings, save and except for liability arising from any gross negligence or wilful misconduct on its part.

11. Since the granting of the Recognition Orders on June 8, 2022 by the Canadian Court, the Debtors, through their Canadian counsel, BLG, together with the Information Officer and LOLG, attended at Court on September 12, 2022, to provide the Canadian Court with an update with respect to recent developments on various matters and to seek the Canadian Court’s assistance in scheduling a motion for a hearing before the Canadian Court. Attached hereto and marked as **Exhibit “F”** is a true copy of the Endorsement of Mr. Justice Cavanagh, which, among other things, provides for the scheduling of a hearing of the next motion in the within Part IV CCAA Proceedings before the Canadian Court on September 28, 2022 at 9:30 am.

Asset Sale Process

12. On May 26, 2022, the Debtors filed a motion with the US Court seeking an Order from the US Court authorizing and approving procedures to facilitate the sale of its North American, Australian and Chinese assets (“**Bidding Procedures Order**”). On May 31, 2022, the US Court

entered the Bidding Procedures Order. The details with regard to the sale process pursued in the US Proceedings (the “**Sale Process**”) are more particularly described in the First Report.

13. On July 13, 2022, the US Court entered the US Sale Order approving the sale of the North American assets (the “**Transferred Assets**”) to AHF LLC and Gordon Brothers Commercial & Industrial LLC (the “**AHF/GB Consortium**”) pursuant to the Asset Purchase Agreement dated July 10, 2022 (the “**APA**”) among the Debtors, as sellers, and the AHF/GB Consortium, as purchasers, wherein the purchase price was in the amount of \$107 million US, plus adjustments to valuations on account of accounts receivable, inventory and hold backs as set out in the APA.

14. In granting the US Sale Order, the US Court determined that the entry into the APA and the consummation of the Sale Transaction constitute sound exercises of business judgment, and such acts are in the best interests of the Debtors, their estates and creditors, and all parties in interest. The US Court was satisfied that (i) the Debtors conducted a robust marketing process to sell the Transferred Assets, (ii) the Sale Process as approved by the US Court pursuant to the Bidding Procedures Order were designed to yield the highest or otherwise best bids for the Transferred Assets, (iii) the APA and the Sale Transaction present the best opportunity to realize the highest value for the Transferred Assets, (iv) there is risk of deterioration of the value of the Transferred Assets if the Sale Transaction is not consummated promptly, and the APA and the Sale Transaction provide greater value to the Debtors’ estates than would be provided by any other presently available alternative.

15. The US Court was further satisfied that the Debtors had determined, in a valid and sound exercise of their business judgment, and in accordance with the Sale Process and the Bidding Procedures Order, that the highest and best qualified bid for the Transferred Assets is that of the AHF/GB Consortium and that the APA would provide a greater recovery for the Debtors’ estates than would be provided by any other available alternative.

16. The transaction in respect of the sale of the North American assets to the AHF/GB Consortium closed on July 22, 2022 (the “**Sale Transaction**”).

17. The sale to the AHF/GB Consortium essentially included all of the accounts receivable of Armstrong Flooring Canada, but did not include the cash, pre-pays, or other assets of Armstrong Flooring Canada, as shown on Armstrong Flooring Canada's balance sheet. As at the date of the closing of the Sale Transaction, the book value of the accounts receivable for Armstrong Flooring Canada were approximately \$4.7 million CDN.

18. In the Vermette Affidavit, the assets of Armstrong Flooring Canada were summarized as follows:

- (a) a series of bank accounts standing to the credit of Armstrong Flooring Canada, both in Canadian and US dollars;
- (b) accounts receivable in the amount of \$3.2 million CDN; and
- (c) inventory in the amount of approximately \$103,000 CDN.

As of the closing of the Sale Transaction, the inventory had been sold in the normal course of business, leaving the main assets which consisted of the Canadian and US dollar bank accounts and the accounts receivable. As of the date of this Affidavit, the cash in the Canadian and US bank accounts for Armstrong Flooring Canada include the following:

- (a) \$1,989,021.49 CDN; and
- (b) \$7,542.36 U.S.

19. Following the closing of the Sale Transaction on July 22, 2022, Canadian counsel to the Debtors, the Information Officer and LOLG, were advised of the Sale Transaction and the subsequent closing thereof. Over the last few weeks, discussions have taken place as between the Canadian and US advisors to the Debtors, the Information Officer and LOLG in terms of seeking a Recognition Order from the Canadian Court in respect of the US Sale Order in order to effect an orderly transfer of the Canadian accounts receivable to the AHF/GB Consortium. In connection therewith, Armstrong Flooring Canada and the US Debtors have entered into a settlement agreement dated September 23, 2022 (the "**Settlement Agreement**") which memorializes the basis upon which the Foreign Representative would bring a motion to the Canadian Court in the within Part IV CCAA Proceedings to seek a Recognition Order in respect of the US Sale Order in exchange for, among other things, (i) a payment to Armstrong Flooring Canada in the amount of \$500,000 US from the proceeds of sale arising from the Sale

Transaction, and (ii) a withdrawal, release and discharge of an inter-company claim held by AFI against Armstrong Flooring Canada in the net amount of \$15,088,504 CDN as at July 31, 2022 (the “**Inter-Company Debt**”), in the proposed bankruptcy proceedings of Armstrong Flooring Canada pursuant to the BIA, which will be discussed in greater detail in the balance of this Affidavit. Attached hereto and marked as **Exhibit “G”** is a true copy of the Settlement Agreement.

20. The Foreign Representative, in consultation with the Information Officer, is of the view that the Settlement Agreement reflects a fair outcome for the stakeholders of Armstrong Flooring Canada, as part of the request for a Recognition Order in respect of the US Sale Order. I understand that the Information Officer has indicated that it supports the Canadian Court’s approval of the Settlement Agreement, which will be detailed in the First Report of the Information Officer.

21. The Foreign Representative also seeks recognition of the US Sale Order from the Canadian Court to ensure that the Sale Transaction can be consummated, which the US Court has determined to be a transaction that was negotiated and undertaken by the parties thereto at arm’s length, in good faith and in compliance with all applicable Orders of the US Court, and which will support the maximization of the value of the Debtors’ estates for the benefit of the stakeholders and an expeditious and orderly emergence from the US Proceedings. I understand that the Information Officer has indicated that it supports the Canadian Court’s recognition of the US Sale Order and the inclusion of Armstrong Flooring Canada’s accounts receivable in the Sale Transaction, provided that sufficient and fair value be allocated to Canada as contemplated and memorialized in the Settlement Agreement, and as further detailed in the First Report of the Information Officer.

Current Status of Armstrong Flooring Canada

22. As noted at Paragraph 75 of the Vermette Affidavit, at the time of the commencement of the Part IV CCAA Proceedings, Armstrong Flooring Canada employed only four Canadian employees, who were sales representatives. On or about July 22, 2022, Armstrong Flooring Canada terminated each of the four Canadian employees. As a result, there are no active business operations of Armstrong Flooring Canada.

23. The assets of Armstrong Flooring Canada, as of the date of this Affidavit, are described above. The liabilities of Armstrong Flooring Canada include outstanding accounts payable totalling approximately \$674,003 USD as at September 2, 2022, as well as the above-referenced Inter-Company Debt owing to AFI in the net amount of \$15,088,504 CDN as at July 31, 2022. In addition, the Canadian Pension Plan (as defined in the Vermette Affidavit) has a solvency deficiency of approximately \$2,843,700 CDN as at July 31, 2022.

24. As noted in paragraph 73 of the Vermette Affidavit, Armstrong Flooring Canada is a British Columbia company. Attached hereto and marked as **Exhibit “H”** is a true copy of the British Columbia Corporate Registry search for Armstrong Flooring Canada obtained from the British Columbia Registry on May 9, 2022, which was also attached as Exhibit “R” of the Vermette Affidavit. At the time that this corporate search was obtained from the British Columbia Corporate Registry, Armstrong Flooring Canada’s sole director and officer was Christopher S. Parisi, a resident of Downingtown, Pennsylvania.

25. In light of the closing of the Sale Transaction on July 22, 2022, Mr. Parisi, who was formerly the General Counsel of AFI, in addition to being the sole officer and director of Armstrong Flooring Canada, resigned as the officer and director of Armstrong Flooring Canada, effective August 31, 2022, and is no longer with AFI. Attached hereto and marked here to as **Exhibit “I”** is a copy of Mr. Parisi’s resignation from Armstrong Flooring Canada. Attached hereto and marked as **Exhibit “J”** is the filed Notice Change of Director, together with the certified copy of the Notice of Articles, obtained from the British Columbia Registry Services on September 9, 2022.

Element Fleet Management Inc.

26. As noted in paragraphs 118 and 119 of the Vermette Affidavit, BLG conducted a search as against Armstrong Flooring Canada pursuant to the Ontario PPSA, with a file currency of April 11, 2022. The result of the Ontario PPSA search as against Armstrong Flooring Canada was attached to Exhibit “U” to the Vermette Affidavit and is attached hereto and marked as **Exhibit “K”** to this Affidavit. The Ontario PPSA search as against Armstrong Flooring Canada disclosed one registration in favour of Element Fleet Management Inc. (“**Element**”), as a secured party (the “**Element PPSA Registration**”).

27. As referenced at paragraph 119 of the Vermette Affidavit, BLG also conducted a search of the Personal Property Registry of British Columbia as against Armstrong Flooring Canada, which disclosed no registrations under the *Personal Property Security Act* (British Columbia) (the “**BC PPSA**”) as against Armstrong Flooring, which search report was attached as Exhibit “V” to the Vermette Affidavit and is attached hereto and marked as **Exhibit “L”**.

28. Based upon the reviews conducted on the records of Armstrong Flooring Canada, there does not appear to be any documentation evidencing any obligations owing to Element on account of the Element PPSA Registration. Accordingly, BLG wrote to Element by letter dated August 17, 2022 (the “**Element Letter**”), requesting that Element file a discharge in respect of the Element PPSA Registration by no later than August 30, 2022. I am advised by Mr. Roger Jaipargas and do verily believe that BLG received no response to the Element Letter. Attached hereto and marked as **Exhibit “M”** is a true copy of the Element Letter. Further, I understand that Element was duly served with the materials in connection with the application brought by the Foreign Representative for the Recognition Orders on June 8, 2022 and did not serve any responding materials or appear at the hearing of the application, or otherwise provide any response thereto.

29. In light of the fact that the records of Armstrong Flooring Canada do not contain any indication that Element is currently a secured creditor of Armstrong Flooring Canada, and the fact that Element has failed to respond to the reasonable request made by BLG in the Element Letter or any other communications to date, Armstrong Flooring Canada is seeking certain relief pursuant to the provisions of the Ontario PPSA, including sections 56 and 67, with respect to the Element PPSA Registration. To the best of my knowledge, Armstrong Flooring Canada does not currently have any secured creditors, save and except for the Administration Charge, as defined and created in the Supplemental Order.

Expansion of the Administration Charge

30. The Supplemental Order provides for the sole Court-ordered charge in the within Part IV CCAA Proceedings, which is the Administration Charge. The Administration Charge provided for in the Supplemental Order is for the benefit of the Information Officer and LOLG, to the maximum amount of \$300,000 CDN.

31. BLG has represented the Foreign Representative, together with the other Chapter 11 Debtors, throughout these Part IV CCAA Proceedings, with a view to maximizing realizations for the benefit of the stakeholders of the Debtors, and in particular, the stakeholders of Armstrong Flooring Canada. While BLG has been paid some of its fees throughout the course of these Part IV CCAA Proceedings, a number of its accounts remain outstanding. Given the proposed bankruptcy of Armstrong Flooring Canada (which will be discussed in further detail below), I believe that it is appropriate for the Administration Charge to be expanded, both in terms of beneficiary of the Administration Charge, to include BLG, and the quantum of same, to \$600,000 CDN.

32. The Debtors could not have advanced the Part IV CCAA Proceedings, which has led to assets becoming available for creditors of Armstrong Flooring Canada, without the assistance of BLG, including in connection with the proposed settlement as detailed above. I understand that the Information Officer supports the relief sought in connection with the expansion of the Administration Charge to include BLG.

Proposed Bankruptcy of Armstrong Flooring Canada

33. On June 16, 2022, the US Court entered an Order establishing bar dates and related procedures for filing proofs of claim in the Chapter 11 Proceedings (the “**US Claims Bar Order**”). The US Claims Bar Order purports to call for claims to be filed against all of the Chapter 11 Debtors, on or prior to August 5, 2022 at 5pm eastern time (the “**General Bar Date**”). Attached hereto and marked as **Exhibit “N”** is a true copy of the US Claims Bar Order.

34. At this time, given the status of Armstrong Flooring Canada, the proposed settlement, as memorialized in the Settlement Agreement, and the funds that will be available for creditors of Armstrong Flooring Canada, the Foreign Representative is seeking an Order authorizing Grant Thornton, in its capacity as Information Officer in the Part IV CCAA Proceedings, to file an assignment in bankruptcy for Armstrong Flooring Canada, at which time the Part IV CCAA Proceedings would be terminated.

35. I am advised by Mr. Jaipargas and do verily believe, that the BIA provides for a ready-made claims process and scheme of distribution for creditors of Armstrong Flooring Canada.

36. I understand that Grant Thornton is a licensed insolvency trustee, for the purposes of the BIA, and that Grant Thornton is prepared to act as trustee in bankruptcy for Armstrong Flooring Canada, should the Canadian Court grant the relief sought by the Foreign Representative in respect of the motion returnable on September 28, 2022.

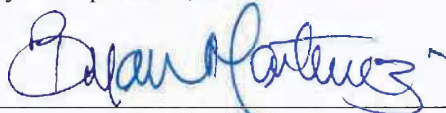
37. I believe that Grant Thornton is the appropriate party to act as the trustee in bankruptcy of Armstrong Flooring Canada, given its familiarity with Armstrong Flooring Canada, having acted as Information Officer in the current Part IV CCAA Proceedings.

38. I am advised by Mr. Jaipargas and do verily believe that upon the bankruptcy of Armstrong Flooring Canada, all of the assets of Armstrong Flooring Canada will vest with the Grant Thornton as trustee in bankruptcy of Armstrong Flooring Canada. I further understand from Mr. Jaipargas that creditors will have an opportunity to file a proof of claim and to receive a dividend from the bankruptcy of Armstrong Flooring Canada, subject to the trustee in bankruptcy's ability to review and potentially disallow claims, in the contemplated bankruptcy of Armstrong Flooring Canada.

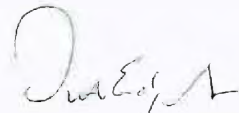
39. The proposed bankruptcy of Armstrong Flooring Canada is the most cost efficient manner to wind up the current Part IV CCAA Proceedings and will eliminate the need for further attendances before the Canadian Court, which will inevitably conserve on professional costs.

40. This Affidavit is sworn in support of a motion brought by the Foreign Representative for the relief set out in paragraph 10 of this Affidavit and for no other or improper purpose.

SWORN BEFORE ME at the Town of)
Westport in the State of Connecticut, this 26th)
day of September, 2022)



A Notary Public in and for the State of)
Connecticut)



DALTON EDGEComb

Bryan Martinez
Notary Public
Connecticut

My Commission Exp. June 30, 2026

Tab 13

CITATION: Nortel Networks Corporation (Re), 2010 ONSC 1708
COURT FILE NO.: 09-CL-7950
DATE: 20100326

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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 NORTEL NETWORKS CORPORATION, NORTEL
NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION,
NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL
NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants

Lyndon Barnes and Adam Hirsh, for the Nortel Directors

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for
Ernst & Young Inc., Monitor

Arthur O. Jacques, for the Nortel Canada Current Employees

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF)

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability
Employees

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in
its capacity as Administrator of the Pension Benefit Guarantee Fund

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee
of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada

Pamela Huff, for the Northern Trust Company, Canada

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration)

Sorin Gabriel Radulescu, In Person

Guy Martin, In Person, on behalf of Marie Josee Perrault

Peter Burns, In Person

Stan and Barbara Arnelien, In Person

HEARD: MARCH 3, 4, 5, 2010

ENDORSEMENT

INTRODUCTION

[1] On January 14, 2009, Nortel Networks Corporation (“NNC”), Nortel Networks Limited (“NNL”), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the “Applicants”) were granted a stay of proceedings pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”) and Ernst & Young Inc. was appointed as Monitor.

[2] The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

- (i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the “Pension Plans”); and
- (ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel’s Health and Welfare Trust (the “HWT”).

[3] Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability (“Former and LTD Employees”) and active employees (“HWT Payments”) and have continued all current service contributions and special payments to the Pension Plans (“Pension Payments”).

[4] Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel’s insolvency and the significant reduction in the size of Nortel’s operations, the unfortunate reality

is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

[5] The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

[6] The essential terms of the Settlement Agreement are as follows:

- (a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;
- (b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go basis;
- (c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of \$2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of \$379,837 per month;
- (d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;
- (e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;
- (f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;
- (g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

- (h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;
- (i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis;¹
- (j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors (“Clause H.1”); and
- (k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* (“BIA”) that “changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability” of that amendment to the claims ceded in this Agreement (“Clause H.2”).

[7] The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

[8] The Applicants’ motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

[9] The Official Committee of Unsecured Creditors of Nortel Networks Inc. (“UCC”), the informal Nortel Noteholder Group (the “Noteholders”), and a group of 37 LTD Employees (the “Opposing LTD Employees”) oppose the Settlement Agreement.

[10] The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

[11] The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

¹ On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d’obtenir des directives et la requête visant à accélérer la procédure de demande d’autorisation d’appel sont rejetées. La demande d’autorisation d’appel est rejetée; aucune ordonnance n’est rendue concernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

THE FACTS

A. Status of Nortel's Restructuring

[12] Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

[13] In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

[14] Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

[15] Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

[16] Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

[17] On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

[18] Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

[19] On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

[20] As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

[21] In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the “Letter Agreement”).

[22] The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement (“Settlement Approval Order”). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT

The Applicants

[23] The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

- (a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;
- (b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;
- (c) prevents disruption in the transition of benefits for current employees;
- (d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;
- (e) assists with the commitment and retention of remaining employees essential to complete the Applicants’ restructuring; and
- (f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

[24] Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and

such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

[25] The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

[26] In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

[27] Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the spirit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

[28] Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

[29] In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

[30] Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

[31] The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] O.J. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

[32] The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

[33] The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

[34] The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

[35] The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

[36] Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

[37] Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that this is the best agreement they could have negotiated.

[38] Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well as the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

[39] In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and

wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

[40] The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

[41] The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

[42] The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

[43] The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

[44] Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

[45] The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a \$100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

[46] The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a \$37 million shortfall in the HWT that they should be able to pursue.

[47] Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

[48] Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

[49] Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

[50] A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

[51] The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

[52] Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

[53] The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

[54] The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

[55] Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of \$57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

[56] The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

[57] The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

[58] Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

LAW AND ANALYSIS

A. Representation and Notice Were Proper

[59] It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008, supra* at para 32.

[60] The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

[61] In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

[62] Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

[63] I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.*, [2009] O.J. No. 2529 at para 16. I am satisfied that this objective has been achieved.

[64] The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

[65] I am satisfied that the notice process was properly implemented by the Monitor.

[66] I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

[67] The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel*, [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalf*, *supra*, at paras. 44 and 61.

[68] Three sources for the court's authority to approve pre-plan agreements have been recognized:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel*, [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe*, *supra* at para. 44.

[69] In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008*, *supra* at para. 34.

[70] In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

[71] I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.*, [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross*, *supra*; *Air Canada*, *supra*; *Grace 2008*, *supra*, and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

[72] Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

[73] A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

[74] The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

[75] There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

[76] There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

[77] Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

[78] The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

[79] In *Grace 2008, supra*, and *Grace 2010, supra*, I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

[80] In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

[81] The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and

reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

[82] Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

[83] The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

[84] The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a “settlement” in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

[85] This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

[86] The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

[87] The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

[88] Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

[89] The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

[90] It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

[91] One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

[92] The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

[93] It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

[94] I do not consider Clause H.2 to be fair and reasonable in the circumstances.

[95] In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

[96] Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

- (i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;
- (ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and
- (iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

[97] The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

[98] With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

[99] Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

DISPOSITION

[100] I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

[101] I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

[102] In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

[103] In *Grace 2008, supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992) 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

[104] Accordingly, the motion is dismissed.

[105] In view of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

[106] Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

MORAWETZ J.

Date: March 26, 2010

Tab 14

CITATION: Fraser Papers Inc. (Re), 2012 ONSC 4882
COURT FILE NO.: CV-09-8241-00CL
DATE: 20120918

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. c-36, AS AMENDED

AND:

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC./PAPIERS FRASER INC. AND FPS CANADA INC., Applicants

BEFORE: MORAWETZ J.

COUNSEL: D. J. Miller and J. T. Porter, for the Applicants in the CCAA Proceedings and for the Former Directors in the Quebec Class Action

D. Wray, J. Kugler and K. Duranleau, for the Quebec Class Action Plaintiffs

A. Merskey and V. Sinha, for AON Conseil Inc. c.o.b. as AON Hewitt

HEARD: JUNE 29, 2012

ENDORSEMENT

INTRODUCTION

[1] This motion was brought by Mr. Paul E. Gagné and Mr. Samuel J. B. Pollock (the “Defendant Directors”), former directors of Fraser Papers Inc. (“Fraser Papers”), for certain relief relating to a class action commenced in the Superior Court of Quebec – Class Action Division, Court File No. 500-06-000598274 (the “Class Action Claim”) by Rene Emond, Jean-Guy Provost and Geinette Borneau-Parent (collectively, the “Class Action Plaintiffs”) against, *inter alia*, the Defendant Directors.

[2] The Defendant Directors seek declarations that:

- (i) the Class Action Plaintiffs in the Class Action Claim constitute Current and Former CEP Members as such term is defined in the order issued in these proceedings dated September 17, 2009 (the “CEP Representation Order”) and, as such, and in that capacity, are subject to the jurisdiction of this court;

- (ii) the Class Action Plaintiffs and all other Current and Former CEP Members who are or were at any time beneficiaries, participants, surviving spouses or dependants under the Quebec Hourly Plan (defined below) were represented by the Communications, Energy and Paperworkers Union of Canada (“CEP”) with respect to any claims in any way related to Fraser Papers, including but not limited to, in connection with the Quebec Hourly Plan;
- (iii) pursuant to the CEP Representation Order and the order in these proceedings dated April 6, 2010 (the “April Sale Order”), CEP was authorized to and did:
 - (a) negotiate and compromise any claims that existed or that arose at law or equity in connection with any issue or matter relating to any recovery, compromise of rights or entitlements of the Current and Former CEP Members, including but not limited to any claims in connection with the Quebec Hourly Plan;
 - (b) execute an agreement dated February 24, 2010 (the “Global Agreement”) releasing the Defendant Directors from all claims relating to all facts and circumstances existing as at that date, whether known or unknown; and
 - (c) execute a further release in favour of the Defendant Directors dated April 7, 2010 (the “Contractual Release”) releasing them from all claims relating to all facts and circumstances existing as at February 24, 2010, whether known or unknown;
- (iv) section 5.1(2) of the *Companies’ Creditors Arrangement Act* (“CCAA”) does not affect the contractual releases of the Defendant Directors contained in the Global Agreement or the Contractual Release executed by the CEP on behalf of the Current and Former CEP Members;
- (v) any claims that could have been asserted by the Current and Former CEP Members, whether in respect of the Quebec Hourly Plan or otherwise, have been fully and irrevocably released pursuant to the Global Agreement and the Contractual Release;
- (vi) the contractual releases of the Defendant Directors contained in the Global Agreement and the Contractual Releases are unlimited, and do not exclude claims of any type, whether based on contract, allegations of misrepresentation, wrongful or oppressive conduct, or otherwise.

FACTS AND ISSUES

[3] Fraser Papers and certain of its Canadian and U.S. affiliates filed for protection pursuant to the CCAA (the “CCAA Proceeding”) on June 18, 2009.

[4] Fraser Papers was the plan sponsor for four defined benefit pension plans registered in Canada; two of which were registered in Quebec and two of which were registered in New Brunswick.

[5] One of the Quebec plans provides benefits to hourly (unionized) employees and former employees at the company's mill in Thurso, Quebec (the "Quebec Hourly Plan"), while the other Quebec plan was for salaried (non-unionized) employees and retirees.

[6] On September 17, 2009, CEP brought a motion seeking to represent its current members and to represent former members of bargaining units represented by CEP including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by Fraser Papers (the "Current and Former CEP Members").

[7] On September 17, 2009, the court issued an order confirming CEP's representation of all Current and Former CEP Members (the "CEP Representation Order"). CEP was expressly authorized under the CEP Representation Order to compromise any and all claims that existed or might arise at law or equity in connection with any issue or matter relating to any recovery, compromise of rights or entitlements of the Current and Former CEP Members.

[8] With the exception of 24 retirees of the International Brotherhood of Electrical Workers' Union, who were represented by Davies Ward Phillips & Vineberg pursuant to a separate representation order also dated September 17, 2009, all beneficiaries of the Quebec Hourly Plan were Current and Former CEP Members represented by CEP pursuant to the CEP Representation Order.

[9] No party made an election to opt out of representation by CEP under the CEP Representation Order.

[10] The three representative plaintiffs in the Quebec Class Action were Current and Former CEP Members as defined by the CEP Representation Order and were represented by CEP in that capacity.

[11] Pursuant to the CEP Representation Order, CEP:

- (i) executed the Global Agreement containing a release in favour of Fraser Papers' directors and officers;
- (ii) consented to court orders approving the Global Agreement and the releases contained therein by orders dated February 24, 2010 and March 22, 2010;
- (iii) executed a further contractual release in favour of Fraser Papers' directors and officers dated April 7, 2010 (the "Contractual Release"); and
- (iv) consented to other releases in favour of Fraser Papers' directors and officers contained in the April Sale Order. Such releases are referred to collectively as the "CEP Releases".

[12] The release contained in the Global Agreement, which was annexed to the court orders of Pepall J. (as she then was) dated February 24, 2010 and March 22, 2010, provides as follows:

[20] Each of: (i) the applicant's directors and officers; and (ii) Brookfield Asset Management and its directors and officers shall be released from all claims relating to all facts and circumstances in respect of the applicant's existing as at this time (whether known or unknown) and the completion of the APA.

[13] The language of the Contractual Release reads:

5. The union hereby irrevocably, fully and finally releases each of FP's directors and officers from all claims relating to all facts and circumstances in respect of FP existing as at February 24, 2010 (whether known or unknown) and the completion of the APA.

[14] Mr. Glen McMillan, former Chief Financial Officer of Fraser Papers, deposed that, in reliance upon the releases granted by CEP, transactions were undertaken by the Applicants and other parties which provided significant value to all unsecured creditors, including all beneficiaries under the Quebec Hourly Plan, that would not have otherwise been possible. Further, Mr. McMillan states that the unqualified release in favour of Fraser Papers' directors was a fundamental term of an agreement that permitted the Applicants' largest business operations to be sold and value to be available for distribution to unsecured creditors including the Quebec Hourly Plan.

[15] The Applicants take the position that the cause of action asserted in the Class Action Claim flows from the deficit under the Quebec Hourly Plan and the corresponding reduction of benefits to beneficiaries under the Quebec Hourly Plan.

[16] The Applicants also take the position that the CCAA Proceeding included a claims process, pursuant to which all claims against the Applicants and their directors and officers were to be filed and that the process provided for the exclusive forum in which any and all claims that could be asserted by any person (defined in the Claims Order to include legal representatives) against the Applicants and their directors or officers must be filed. The Applicants further contend that this claims process allowed the Applicants, their directors and officers, the Monitor, the court and all other stakeholders to identify the universe of potential claims.

[17] A claim was filed against Fraser Papers and accepted in the CCAA Proceeding for the entire amount of the deficit under the Quebec Hourly Plan, and distributions have been made to the Quebec Hourly Plan based on the claim for the entire deficit.

[18] CEP did not file a proof of claim against the Defendant Directors at any time during the CCAA Proceeding.

[19] The issue in the Class Action Claim with respect to the Defendant Directors is described as: Did the persons who are directly responsible for establishing, applying and monitoring the investment policy of the pension plan of the unionized workers of Fraser Papers Inc., Thurso

Pulp Mill, commit an offence making them liable for the losses of benefits and reductions in the rights of the participants and beneficiaries.

[20] From the standpoint of the Class Action Plaintiffs, this motion raises the following issues:

- (i) whether this court has the jurisdiction to deal with and determine the present motion; and
- (ii) if so, whether the claims pleaded in the Class Action have been released.

[21] For the following reasons, I am of the opinion that this court has the jurisdiction to deal with and determine this motion. I am also of the opinion that the claims pleaded in the Class Action Claim have been released.

JURISDICTION

[22] The Class Action Plaintiffs take the position that the Class Action Claim has been properly filed with the court in Quebec and that the position advanced by the Applicants on this motion ought to have been brought before the court in Quebec.

[23] Counsel submits that, while the amended CCAA plan was sanctioned by this court, this does not grant “exclusive jurisdiction” upon this court to issue orders relating to litigation commenced in another jurisdiction. Further, even if the amended CCAA plan does grant “exclusive jurisdiction” to this court, the exclusivity of that jurisdiction is limited to the amended CCAA plan itself and does not extend to all of the issues raised by the Defendant Directors on this motion.

[24] In my view, a complete answer to this argument is provided by the Applicants at paragraphs 24-26 of their factum.

[25] Simply put, the amended CCAA plan, which has been sanctioned by this court, stipulates that any issue relating to the effect of the amended CCAA plan is subject to the exclusive jurisdiction of this court.

[26] Further, sections 11 and 17 of the CCAA provide this court with the authorization to grant the relief requested by the Defendant Directors and to make any order that it considers appropriate in the circumstances.

[27] Each of the orders made by this court, including the CEP Representation Order, the Claims Order, the orders approving the Global Agreement, the April Sales Order and the Sanction Order have legal force and effect in Quebec, by operation of law. It is the scope of these orders which has been called into question in the Class Action Claim. In my view, it is beyond question, that this motion directly involves issues relating to the effect of the amended CCAA plan.

[28] The CCAA provides for and these orders requested the aid and assistance of the courts of other jurisdictions in recognizing and enforcing the terms of such orders. (See CCAA section 16.) I am satisfied that this court has the jurisdiction to deal with this motion.

RELEASES

[29] With respect to the second issue, namely, whether the claims pleaded in the Class Action Claim have been released, the Class Action Plaintiffs take the position that section 2(f)(iii) of the Claims Procedure Orders called for claims to be filed against the Applicants and/or directors and, as such, the Claims Procedure did not call for creditors to file claims against directors acting in a capacity other than that of director or officer of the Applicants. Further, the Claims Procedure Order, they submit, cannot bar claims that cannot be compromised pursuant section 5.1(2) of the CCAA or claims that were unknown at the claims bar date.

[30] The Class Action Plaintiffs point out that the Defendant Directors are former directors of the Applicants. They are, however, named as defendants in the Quebec Class Action both in their capacity as directors of the Applicants and in their capacity as members of the Applicants' management pension committee with delegated authority to oversee the funding, investment management and administration of the Quebec Hourly Plan pursuant to section 152 of the *Quebec Supplemental Pension Plan's Act* (the "SPPA") and the applicable instrument of delegation.

[31] The Class Action Plaintiffs allege that, pursuant to their delegated authority, the Defendant Directors, as administrators of the Quebec Hourly Plan, were required to exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances and, pursuant to their delegated authority, the Defendant Directors were required to report to the Quebec Hourly Plan Pension Committee in writing any situation in the normal course that might adversely affect the financial interests of the pension fund and that requires correction.

[32] It is also contended that the claims in the Class Action Claim were not known or discovered until in or around the termination of the CCAA Proceeding.

[33] The Class Action Claim seeks damages against the Defendant Directors personally in the amount of \$11.7 million.

[34] Counsel to the Class Action Plaintiffs submits that the Contractual Release contains a number of limitations. First, they contend that the Contractual Release does not extend to extinguish claims against the Defendant Directors acting in the capacity of delegates of the Quebec Hourly Plan Pension Committee. Counsel submits that directors may wear "two hats" – one in the role of employer and the other as administrator of a pension plan and there is a clear legal distinction between the conduct of the Defendant Directors' qua corporation, where they have an obligation to act in the best interests of the Applicants, and the Defendant Directors qua delegate of the Quebec Hourly Pension Plan Committee, where they have an obligation to act with prudence, care and in the best interests of the Quebec Hourly Plan.

[35] Counsel submits that the releases, both contractual and statutory, should be interpreted in light of the dual roles carried out by the Defendant Directors and that releases in favour of directors qua corporation will not release the conduct of directors qua delegates of the Quebec Hourly Plan Pension Committee. The Class Action Claim consists of, *inter alia*, claims against the Defendant Directors qua delegates of the pension committee – claims, counsel submits, are not released pursuant to the Contractual Release. Counsel references *Morneau Sobecco Limited v. AON Consulting Inc.*, 2008 ONSC 196, paras. 31-37 and *Indalex Limited (Re)*, 2011 ONCA 265 at para. 129.

[36] Counsel also submits that, with the exception of fraud or gross negligence, the Contractual Release expressly releases the releasees, which include, the Defendant Directors, from claims arising out of any decrease in the New Brunswick Hourly Plan (“NB Hourly Plan”) but no similar release exists with respect to any decrease in the value of the Quebec Hourly Plan. Counsel submits that the absence of a release in respect of any decrease in the value of the Quebec Hourly Plan reflects the parties’ intention not to release such conduct.

[37] Counsel to the Class Action Plaintiffs also submits that the context in which the Contractual Release was negotiated confirms the limitations to the release described above. The Contractual Release was negotiated in the context of satisfying the conditions precedent to the specialty papers transaction and was not negotiated in the context of the sale of the Thurso facility. As such, the releases granted should therefore be considered and interpreted in this context.

[38] Counsel to the Class Action Plaintiffs also submits that the CCAA court orders do not release the claims against the Defendant Directors in the Class Action Claim.

[39] Counsel submits that the release contained in the April Sale Order has a number of limitations and that claims against the Applicants’ directors and officers for fraud and gross negligence are expressly carved out of the release. The claims against the Defendant Directors set out in the Quebec Class Action include claims of a fraudulent misrepresentation and gross negligence and, thus, counsel contends these claims are not extinguished by the release contained in the April Sale Order.

[40] Further, counsel submits that the release in respect of claims against the Defendant Directors relating to their actions as or on behalf of the administrator or sponsors of the pension plans does not include a release of claims in respect of the Quebec Hourly Plan. Counsel submits that the definition of “pension plans” contained in the April Sale Order is limited to the Applicants’ pension plans registered in New Brunswick and therefore does not include a release in respect of conduct as or on behalf of the administrator or sponsors of the Quebec Hourly Plan.

[41] Counsel also raises the issue of the sanction order granted on February 11, 2011 which approves and sanctions the amended CCAA plan dated January 27, 2011. The sanction order includes a broad release in favour of the Defendant Directors which release was opposed by the CEP during the sanction hearing.

[42] Counsel to the Class Action Plaintiffs contends that the broad release in favour of the Defendant Directors was expressly limited by application of s. 5.1 (2) of the CCAA.

[43] Section 5.1 of the CCAA provides as follows:

5.1 (1) Claims against directors – compromise – a compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) Exception – a provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[44] Counsel submits that the Class Action Claim includes claims that relate to contractual rights of creditors, including claims related to the Defendant Directors' breach of the delegation instrument that delegated to them authority and responsibility to administer and manage the Quebec Hourly Plan. The Class Action Claim also includes claims of misrepresentation and claims of wrongful conduct against the Defendant Directors in respect of their administration and management of the pension fund. It also alleges that the Defendant Directors acted with gross negligence, as well as made fraudulent and negligent misrepresentations to the pension committee. Oppressive conduct is also alleged and counsel submits that the claims fall within the statutory carve out in section 5.1(2) of the CCAA and therefore are not released by the sanction order.

[45] In my view, the position put forth by the Class Action Plaintiffs has no merit.

[46] The CCAA Proceeding included a comprehensive claims process, pursuant to which all claims against the Applicants and their directors and officers were to be filed.

[47] The definition of "claim" is set out at paragraph 2(f)(iii) of the Claims Procedure Order. It reads as follows:

"Claim" means:

- (i) a restructuring claim;
- (ii) a secured claim; and/or

- (iii) the rights of any person whatsoever, including any secured creditor, against one or more the applicants and/or directors, whether or not asserted and however acquired, in connection with any indebtedness, liability or obligation of any kind of one or more of the applicants and/or directors in existence on the claim date, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, direct or indirect, by guarantee, surety, insurance deductible or otherwise, and whether or not such claim or right arises out of a contract that is executor or anticipatory in nature or any other claims that would have the claims provable in bankruptcy had the applicable applicant become bankrupt on a claim date; provided however, that in all cases “claim” shall not include an excluded claim.

[48] It seems to me that the definition of claim was drafted in very broad terms. The claims process in place in this proceeding was such that it would allow the Applicants, their directors and officers, the Monitor, the court and all other stakeholders to identify the universe of potential claims.

[49] As pointed out by Mr. McMillan in his affidavit at paragraphs 33, 52 and 58, a claim was filed against Fraser Papers and accepted in the CCAA Proceeding for the entire amount of the deficit under the Quebec Hourly Plan, and distributions have been made to the Quebec Hourly Plan based on the claim for the entire deficit.

[50] Further, as noted by Mr. McMillan, CEP chose not to file a proof of claim against the Defendant Directors at any time during the CCAA Proceeding on behalf of the Current and Former CEP Members.

[51] I am in agreement with the submission put forth by counsel to the Applicants to the effect that nothing in the CCAA:

- (i) limits the ability of the party to grant contractual releases to another party;
- (ii) limits the ability of the court to authorize the execution of releases by a representative party on behalf of others;
- (iii) limits the ability of the court to grant releases to any party on a motion brought within the CCAA proceedings (other than an order sanctioning a plan in the case of directors), particularly where such order is made on consent of the releasors; or
- (iv) limits the ability of the court to approve releases granted by one party to another.

[52] Simply put, a contractual settlement and a release that is binding on the signatories to the contract can be negotiated at any time in a CCAA proceeding.

[53] Further, I accept the submission of counsel to the Applicants that unlike releases in favour of directors contained in a plan of arrangement that are subject to section 5.1 of the CCAA, no such restrictions exist with respect to contractual releases granted by a party at any stage of the proceeding.

[54] The CCAA court has the jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA proceeding and prior to any plan of arrangement being presented. See *Nortel Networks Corporation (Re)*, 2010 63 C.B.R. (5th) 44, *Nortel Networks Corporation (Re)*, 2010 66 C.B.R. (5th) 77 (leave to appeal denied at 2010 CarswellOnt 3752, leave to appeal to the Supreme Court of Canada dismissed (33491) and *Grace Canada Inc. (Re)* (2008), 50 C.B.R. (5th) 25.

[55] I accept the submission of counsel to the Applicants that the Contractual Release extends to all claims relating to all facts and circumstances in respect of Fraser Papers existing at the date of the release, whether known or unknown. The deficit under the Quebec Hourly Plan existed at the time the CCAA Proceeding was commenced which was clearly prior to the execution of the Contractual Release. Further, it was the subject of a proof of claim that had been filed against Fraser Paper. Even if all of the facts giving rise to the deficit under the Quebec Hourly Plan were not known at the time the Contractual Release was executed, it seems to me that the terms of the Release specifically and clearly provide it would be effective to release such claims.

[56] In my view, a plain reading of the Contractual Release leads to the inescapable conclusion that the Contractual Release covers all activities for which the Class Action Plaintiffs have asserted that the Defendant Directors are liable. Even assuming that the allegations in the Class Action Claim amount to claims for gross negligence or breach of fiduciary duty, it seems to me that the language of the Contractual Release is sufficiently broad to include such claims. The Contractual Release is in favour of Fraser Papers' directors and officers. It is not restricted in the manner suggested by the Class Action Plaintiffs.

[57] The purpose of a full and final release is to provide finality to a party, once and for all, from any liability or obligation to another party arising out of particular circumstances.

[58] In my view, it is clear that the Defendant Directors have been fully and irrevocably released in respect of the claims asserted in the Class Action Claim pursuant to the Contractual Release.

[59] Furthermore, I am also of the view that the Class Action Claim is barred on the grounds that the subject matter of the Class Action Claim has been released and extinguished in the Applicants' CCAA Proceeding.

[60] As counsel to the Applicants points out, since claims in respect of pension, termination, severance, retirement payments and other benefit claims can be central issues in a CCAA Proceeding, where the interests of former employees are at stake, the court may make an order appointing representative counsel that is empowered to negotiate on behalf of its constituents. See *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 3028 (S.C.J.). As noted in *Nortel, supra*, representation orders provide a social benefit by assisting former employees and

providing them with a reliable resource for information about the process. The appointment of representative counsel also benefits the streamlining and introducing efficiency to the process for all parties involved in a CCAA proceeding.

[61] The CEP Representation Order made in these proceedings is binding on the Class Action Plaintiffs. CEP was clearly authorized to negotiate a compromise of beneficiaries claims or rights on behalf of the Current and Former CEP members. At no time did any individual opt out of the CEP Representation Order.

[62] The time to assert any claim against the Defendant Directors was during the Claims Process established by court order. As noted above, no claims were filed against the Defendant Directors at any time during the CCAA proceedings in respect of the Quebec Hourly Plan.

[63] The amended CCAA Plan that received creditor approval was sanctioned by the court. The Class Action Plaintiffs are bound by the terms of the amended CCAA Plan in the sanction order, in addition to the CEP releases.

[64] As noted by counsel to the Applicants, in the reasons supporting the granting of the sanction order over CEP's objections, Pepall J. (as she then was) referred to the prior releases that had been granted by or consented to by CEP, which were broader than the releases under the amended CCAA Plan. It seems to me, that the issues giving rise to the Class Action Claim were identified early in the proceedings and were the subject of considerable negotiation. These negotiations led to agreements pursuant to which consideration was paid to certain creditor groups. In exchange, comprehensive releases were executed. It culminated in a court-sanctioned plan, which again, contains release language which, in my view, was clearly intended to finalize the matters at issue on this motion.

[65] The Quebec Hourly Plan and, therefore, its beneficiaries including all Current and Former CEP members, have received their *pro rata* share of the distributions under the amended CCAA Plan. In my view, any and all claims of any nature and kind that could be asserted against the Defendant Directors have been released pursuant to the CEP releases.

[66] Clearly in the negotiation process that culminated in the execution of the Global Agreement and the Contractual Release, it was open to CEP to limit or restrict the scope of the release provisions, so as to preserve the claim that they now wish to prosecute. CEP did not do so. In fact, language that would limit or restrict the release in the manner suggested by the Class Action Plaintiffs at [35] above is conspicuously absent. Likewise, there is no court order that would lead to a conclusion that the court-approved releases were limited in the manner suggested by the Class Action Plaintiffs.

[67] I am of the view that any claim that could be asserted be asserted by the Current and Former CEP Members, whether in respect of the Quebec Hourly Plan or otherwise, has been released.

DISPOSITION

[68] The motion of the Defendant Directors is granted and an order shall issue to this effect. In addition, costs are awarded in favour of the Defendant Directors. If the parties are unable to agree on quantum, written submissions, to a maximum of four pages, may be submitted within 21 days.

[69] It is noted that AON Conseil Inc. c.o.b. as AON Hewitt ("AON") filed a factum and was present at the hearing. Issues relating to AON have not been determined on this motion and the parties have reserved their rights as to whether AON is entitled to similar relief.

Morawetz J.

Date: September 18, 2012

Tab 15

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Great Basin Gold Ltd. (Re)*,
2012 BCSC 1773

Date: 20121120
Docket: S126583
Registry: Vancouver

**In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36**

and

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

and

In the Matter of Great Basin Gold Ltd.

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for Petitioner:

P.J. Reardon
J. Cockbill

Counsel for Certain Unaffiliated Holders of
the Petitioner's Senior Unsecured
Convertible Debentures (the "Noteholders"):

J.R. Sandrelli
C. Cheuk
(via teleconferencing) R. Jacobs

Counsel for Credit Suisse, AG:

P. Rubin
(via teleconferencing) K. McEachern

Counsel for Monitor, KPMG Inc.:

J.I. McLean, Q.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.
November 20, 2012

Place and Date of Judgment:

Vancouver, B.C.
November 20, 2012

[1] **THE COURT:** Much of the history of this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceeding is outlined in my earlier reasons: *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[2] Broadly speaking, there were substantial issues joined between the principal combatants, Credit Suisse and the Ad Hoc Group, as defined in those reasons. Those issues principally related to the approval of the DIP loan facility that I had earlier granted in favour of Credit Suisse. The Ad Hoc Group disputed the granting of that DIP facility and launched an appeal of my October 1 order. I also understand that certain proceedings were commenced in the United States by the Ad Hoc Group towards a challenge of the granting of the guarantee and security by the U.S. companies of the group.

[3] Following the issuance of those reasons on October 1, 2012, Credit Suisse and the Ad Hoc Group arrived at a tentative settlement of the issues arising between them. On October 16, 2012, I granted an order authorizing the petitioner to enter into this settlement agreement. The order also provided that the petitioner and the trustee under the trust indenture, Computershare Trust Company of Canada, were authorized to enter into such agreements as are required by the terms of the settlement. The members of the Ad Hoc Group are participants under the trust indenture.

[4] An important aspect of the settlement negotiated by the Ad Hoc Group for the benefit of the entire debentureholders group is a guarantee from the U.S. holding company, Great Basin Gold Inc. ("GBGI"), and also certain subordinate security issued by GBGI in relation to that guarantee. From the debentureholder group's perspective, this settlement results in a substantial improvement of their current position. As with most settlement agreements, in return for these benefits, the debentureholder group must give up certain things. The agreements also provide that the debentureholder group will not proceed with certain challenges asserted to date, that being principally relating to the Credit Suisse guarantee and security that was approved by my earlier orders. The debentureholder group must also abandon

the appeal proceedings and the U.S. proceedings which are referred to above. Finally, the debentureholder group must also agree to abandon the criminal interest rate issue, and other challenges to such matters as the KERP and the appointment of CIBC World Markets as the financial advisor.

[5] Understandably, Credit Suisse requires that any settlement be approved by the entire debentureholders group and they also require an opinion from a lawyer to the effect that the documentation to evidence the settlement, including an intercreditor agreement, is binding upon the entire debentureholder group.

[6] The significance of the settlement is that it buys peace between Credit Suisse and the Ad Hoc Group. At the present time, the Credit Suisse DIP facility is in default and further funding under the DIP facility is in limbo pending a finalization of the settlement. Accordingly, the finalization of the settlement is of tremendous significance in this case such that it will allow a continuation of the DIP financing to be advanced to the GBG Group who is desperately in need of these funds.

[7] The difficulty that arises in terms of finalizing the settlement relates to how the parties can ensure that the entire debentureholder group will be bound by the settlement. The trust indenture does provide for the calling of meetings to consider resolutions by the debentureholder group. However, counsel for the Ad Hoc Group candidly points out that the full extent of what is intended to be agreed to by the debentureholder group under the settlement may not be within the specific terms of resolutions contemplated by the trust debenture.

[8] In any event, I note that with respect to some matters at least, the trust indenture does provide for a meeting process by which a meeting may be held and written resolutions would be voted upon. I am also advised that those matters would require a special resolution, or in other words, a two-thirds majority.

[9] It is of some significance on this application that the Ad Hoc Group, together with another debentureholder who is also in support of this application, hold in excess of a two-thirds majority from among the overall debentureholder group.

[10] I am advised that it is not possible in the circumstances to even call a meeting that the debentureholders under the trust indenture given the exigencies of the situation in relation to the need for funding. Nevertheless, there has been some effort to engage the trustee under the trust indenture, Computershare. There have been ongoing discussions between the Ad Hoc Group and Computershare in that the trustee has been kept apprised of the settlement negotiations and the terms of the tentative settlement. I am advised that Computershare is fully supportive of the settlement and has no difficulty, subject to these issues relating to process, in proceeding with these transactions.

[11] There have also been efforts to engage other debentureholders who are not represented by the Ad Hoc Group and the other debentureholder who supports the application. Following my earlier order on October 16, Computershare forwarded to the debentureholders copies of certain pleadings relating to this transaction which reference the terms of the proposed settlement. I am also advised by counsel for the Ad Hoc Group that their offices have fielded a number of calls from these other debentureholders. So it cannot be said that the other debentureholders are entirely in the dark in terms of what has been tentatively agreed to by the Ad Hoc Group and what is intended to be accomplished through the settlement agreement.

[12] The issue in the first instance is whether I have the jurisdiction to provide the relief granted. The relief sought is not only an approval of the settlement agreement, but also an order authorizing the trustee, Computershare, to execute the various documents related to the settlement agreement such that these documents will be legal, valid and binding obligations of the trustee and all debentureholders.

[13] The applicable statutory authority is s. 11 of the CCAA which endows the court with a wide statutory discretion to grant such orders as are “appropriate in the circumstances”:

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.

[14] As discussed by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, the CCAA is a remedial statute and the court has “broad and flexible authority” to facilitate the reorganization of the debtor towards achieving the objectives of the CCAA, including avoiding the social and economic losses arising from restructuring proceedings: paras. 15-19. The exercise of the court’s discretion was further discussed by the Court at paras. 59-72. In particular, the Court stated:

[70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] The last paragraph of the above quote makes the point that the chances of achieving a successful restructuring proceeding increase where the parties can agree on certain issues. Settlement agreements between the parties in these types of proceedings are very much encouraged where resolutions take place in the boardroom, as opposed to the courtroom. There is every reason to encourage such settlements, with approval and implementation subject to appropriate judicial oversight.

[16] There is ample authority to the effect that s. 11 of the CCAA provides the court with jurisdiction to approve settlements even before the presentation of a plan of arrangement: *Calpine Canada Energy Ltd., (Re)*, 2007 ABCA 266 at para. 26, *Nortel Networks Corp., (Re)*, 2010 ONSC 1709 at para. 71.

[17] In *Nortel Networks*, Mr. Justice Morawetz sets out the test to be applied in approving a settlement agreement:

[73] A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

[18] I have no difficulty in concluding that the settlement agreement between Credit Suisse, the Ad Hoc Group and the petitioner group is fair and reasonable in the circumstances. The crux of the issue here is whether it is fair and reasonable to those debentureholders who have not yet participated in this process and have not perhaps fully appreciated the import of the agreement, particularly as it relates to the benefits to be achieved by the debentureholder group and the rights that the group will be giving up as a result of the transactions.

[19] I would emphasize again this settlement has arisen by extensive negotiations as between Credit Suisse and the Ad Hoc Group. While those negotiations have taken place on the part of the Ad Hoc Group towards its own interests, inevitably the gains will accrue to the debentureholder group as a whole. Having considered the terms of the overall settlement agreement, I would be astounded if any debentureholders who were fully aware of those matters were to take a contrary position towards opposing the settlement agreement. Again, it is of significance that as a result of this settlement, funding under the DIP facility will continue, which will be a benefit to all stakeholders.

[20] Nevertheless, I agree that fairness and reasonableness dictate in these proceedings that those other debentureholders have some input. The process already undertaken by the Ad Hoc Group has addressed that matter to a certain extent. What is proposed is that a more fullsome notice of the settlement agreement be given to the debentureholder group as a whole.

[21] Firstly, it is proposed that there be a press release which will include reference to not only the pleadings but the specific settlement documents which are

posted on the Monitor's website. In addition, the press release will refer to counsel for the Ad Hoc Group, in Canada, the U.S. and South Africa, who are available to respond to any enquiries from debentureholders regarding the settlement agreement. Secondly, Computershare is to request that CDS send a notice to the debentureholders of the order sought today (called the "Settlement Implementation Order"). That notice will, as will the press release, highlight to the debentureholders that the deadline for any debentureholder to apply to vary, rescind or otherwise object to the Settlement Implementation Order will be within 21 days of the date of the Order. If there is no objection with that 21-day period, the settlement agreement will be fully effective and will constitute legal, valid and binding obligations of Computershare and all of the debentureholders and the consequences of not applying to challenge this Order will also be brought specifically to the attention of those persons reading the press release and the notice.

[22] The Monitor had earlier indicated its support of the settlement agreement in accordance with the Third Report which was considered on the earlier application. Counsel for the Monitor has again confirmed its support of the settlement agreement and the process by which notice is to be given to the other debentureholders outlined above. Not surprisingly, the GBG Group is also in support.

[23] I am satisfied that this process is appropriate and will give any other debentureholder sufficient time to challenge the Order if they wish. Again, I would emphasize that it is a critical aspect of this restructuring that this settlement be put in place as soon as possible so that the funding for the restructuring can proceed. It has already been stalled to some extent and no doubt to the detriment of the stakeholders as a whole. It is time to put an end to this prejudice delay and move the restructuring forward. Accordingly, the order sought is granted.

"Fitzpatrick J."

Tab 16

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONSC 1078

COURT FILE NO.: CV-12-9667-00CL

CV-11-431153-00CP

DATE: 20130320

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

RE: 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 SINO-FOREST CORPORATION, Applicant

AND RE: THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT AND ROBERT WONG, Plaintiffs

AND:

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (FORMERLY KNOWN AS BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA) IN., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LUNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC AND MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (SUCCESSOR BY MERGER TO BANC OF AMERICA SECURITIES LLC), Defendants

BEFORE: MORAWETZ J.

COUNSEL: Kenneth Rosenberg, Max Starnino, A. Dimitri Lascaris, Daniel Bach, Charles M. Wright, and Jonathan Ptak, for the Ad Hoc Committee of Purchasers including the Class Action Plaintiffs

Peter Griffin, Peter Osborne, and Shara Roy, for Ernst & Young LLP

John Pirie and David Gadsden, for Pöyry (Beijing) Consulting Company Ltd.

Robert W. Staley, for Sino-Forest Corporation

Won J. Kim, Michael C. Spencer, and Megan B. McPhee, for the Objectors, Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndical National de Retraite Bâtirente Inc.

John Fabello and Rebecca Wise for the Underwriters

Ken Dekker and Peter Greene, for BDO Limited

Emily Cole and Joseph Marin, for Allen Chan

James Doris, for the U.S. Class Action

Brandon Barnes, for Kai Kit Poon

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Derrick Tay and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Simon Bieber, for David Horsley

James Grout, for the Ontario Securities Commission

Miles D. O'Reilly, Q.C., for the Junior Objectors, Daniel Lam and Senthilvel Kanagaratnam

HEARD: FEBRUARY 4, 2013

ENDORSEMENT

INTRODUCTION

[1] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers' Committee" or the "Applicant"), including the representative plaintiffs in the Ontario class action (collectively, the "Ontario Plaintiffs"), bring this motion for approval of a settlement and release of claims against Ernst & Young LLP [the "Ernst & Young Settlement", the "Ernst & Young Release", the "Ernst & Young Claims" and "Ernst & Young", as further defined in the Plan of Compromise and Reorganization of Sino-Forest Corporation ("SFC") dated December 3, 2012 (the "Plan")].

[2] Approval of the Ernst & Young Settlement is opposed by Invesco Canada Limited (“Invesco”), Northwest and Ethical Investments L.P. (“Northwest”), Comité Syndical National de Retraite Bâtirente Inc. (“Bâtirente”), Matrix Asset Management Inc. (“Matrix”), Gestion Férique and Montrusco Bolton Investments Inc. (“Montrusco”) (collectively, the “Objectors”). The Objectors particularly oppose the no-opt-out and full third-party release features of the Ernst & Young Settlement. The Objectors also oppose the motion for a representation order sought by the Ontario Plaintiffs, and move instead for appointment of the Objectors to represent the interests of all objectors to the Ernst & Young Settlement.

[3] For the following reasons, I have determined that the Ernst & Young Settlement, together with the Ernst & Young Release, should be approved.

FACTS

Class Action Proceedings

[4] SFC is an integrated forest plantation operator and forest productions company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People’s Republic of China. SFC’s registered office is in Toronto, and its principal business office is in Hong Kong.

[5] SFC’s shares were publicly traded over the Toronto Stock Exchange. During the period from March 19, 2007 through June 2, 2011, SFC made three prospectus offerings of common shares. SFC also issued and had various notes (debt instruments) outstanding, which were offered to investors, by way of offering memoranda, between March 19, 2007 and June 2, 2011.

[6] All of SFC’s debt or equity public offerings have been underwritten. A total of 11 firms (the “Underwriters”) acted as SFC’s underwriters, and are named as defendants in the Ontario class action.

[7] Since 2000, SFC has had two auditors: Ernst & Young, who acted as auditor from 2000 to 2004 and 2007 to 2012, and BDO Limited (“BDO”), who acted as auditor from 2005 to 2006. Ernst & Young and BDO are named as defendants in the Ontario class action.

[8] Following a June 2, 2011 report issued by short-seller Muddy Waters LLC (“Muddy Waters”), SFC, and others, became embroiled in investigations and regulatory proceedings (with the Ontario Securities Commission (the “OSC”), the Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police) for allegedly engaging in a “complex fraudulent scheme”. SFC concurrently became embroiled in multiple class action proceedings across Canada, including Ontario, Quebec and Saskatchewan (collectively, the “Canadian Actions”), and in New York (collectively with the Canadian Actions, the “Class Action Proceedings”), facing allegations that SFC, and others, misstated its financial results, misrepresented its timber rights, overstated the value of its assets and concealed material information about its business operations from investors, causing the collapse of an artificially inflated share price.

[9] The Canadian Actions are comprised of two components: first, there is a shareholder claim, brought on behalf of SFC's current and former shareholders, seeking damages in the amount of \$6.5 billion for general damages, \$174.8 million in connection with a prospectus issued in June 2007, \$330 million in relation to a prospectus issued in June 2009, and \$319.2 million in relation to a prospectus issued in December 2009; and second, there is a noteholder claim, brought on behalf of former holders of SFC's notes (the "Noteholders"), in the amount of approximately \$1.8 billion. The noteholder claim asserts, among other things, damages for loss of value in the notes.

[10] Two other class proceedings relating to SFC were subsequently commenced in Ontario: *Smith et al. v. Sino-Forest Corporation et al.*, which commenced on June 8, 2011; and *Northwest and Ethical Investments L.P. et al. v. Sino-Forest Corporation et al.*, which commenced on September 26, 2011.

[11] In December 2011, there was a motion to determine which of the three actions in Ontario should be permitted to proceed and which should be stayed (the "Carriage Motion"). On January 6, 2012, Perell J. granted carriage to the Ontario Plaintiffs, appointed Siskinds LLP and Koskie Minsky LLP to prosecute the Ontario class action, and stayed the other class proceedings.

CCAA Proceedings

[12] SFC obtained an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") on March 30, 2012 (the "Initial Order"), pursuant to which a stay of proceedings was granted in respect of SFC and certain of its subsidiaries. Pursuant to an order on May 8, 2012, the stay was extended to all defendants in the class actions, including Ernst & Young. Due to the stay, the certification and leave motions have yet to be heard.

[13] Throughout the CCAA proceedings, SFC asserted that there could be no effective restructuring of SFC's business, and separation from the Canadian parent, if the claims asserted against SFC's subsidiaries arising out of, or connected to, claims against SFC remained outstanding.

[14] In addition, SFC and FTI Consulting Canada Inc. (the "Monitor") continually advised that timing and delay were critical elements that would impact on maximization of the value of SFC's assets and stakeholder recovery.

[15] On May 14, 2012, an order (the "Claims Procedure Order") was issued that approved a claims process developed by SFC, in consultation with the Monitor. In order to identify the nature and extent of the claims asserted against SFC's subsidiaries, the Claims Procedure Order required any claimant that had or intended to assert a right or claim against one or more of the subsidiaries, relating to a purported claim made against SFC, to so indicate on their proof of claim.

[16] The Ad Hoc Securities Purchasers' Committee filed a proof of claim (encapsulating the approximately \$7.3 billion shareholder claim and \$1.8 billion noteholder claim) in the CCAA proceedings on behalf of all putative class members in the Ontario class action. The plaintiffs in

the New York class action filed a proof of claim, but did not specify quantum of damages. Ernst & Young filed a proof of claim for damages and indemnification. The plaintiffs in the Saskatchewan class action did not file a proof of claim. A few shareholders filed proofs of claim separately. No proof of claim was filed by Kim Orr Barristers P.C. (“Kim Orr”), who represent the Objectors.

[17] Prior to the commencement of the CCAA proceedings, the plaintiffs in the Canadian Actions settled with Pöyry (Beijing) Consulting Company Limited (“Pöyry”) (the “Pöyry Settlement”), a forestry valuator that provided services to SFC. The class was defined as all persons and entities who acquired SFC’s securities in Canada between March 19, 2007 to June 2, 2011, and all Canadian residents who acquired SFC securities outside of Canada during that same period (the “Pöyry Settlement Class”).

[18] The notice of hearing to approve the Pöyry Settlement advised the Pöyry Settlement Class that they may object to the proposed settlement. No objections were filed.

[19] Perell J. and Émond J. approved the settlement and certified the Pöyry Settlement Class for settlement purposes. January 15, 2013 was fixed as the date by which members of the Pöyry Settlement Class, who wished to opt-out of either of the Canadian Actions, would have to file an opt-out form for the claims administrator, and they approved the form by which the right to opt-out was required to be exercised.

[20] Notice of the certification and settlement was given in accordance with the certification orders of Perell J. and Émond J. The notice of certification states, in part, that:

IF YOU CHOOSE TO OPT OUT OF THE CLASS, YOU WILL BE OPTING OUT OF THE **ENTIRE** PROCEEDING. THIS MEANS THAT YOU WILL BE UNABLE TO PARTICIPATE IN ANY FUTURE SETTLEMENT OR JUDGMENT REACHED WITH OR AGAINST THE REMAINING DEFENDANTS.

[21] The opt-out made no provision for an opt-out on a conditional basis.

[22] On June 26, 2012, SFC brought a motion for an order directing that claims against SFC that arose in connection with the ownership, purchase or sale of an equity interest in SFC, and related indemnity claims, were “equity claims” as defined in section 2 of the CCAA, including the claims by or on behalf of shareholders asserted in the Class Action Proceedings. The equity claims motion did not purport to deal with the component of the Class Action Proceedings relating to SFC’s notes.

[23] In reasons released July 27, 2012 [*Re Sino-Forest Corp.*, 2012 ONSC 4377], I granted the relief sought by SFC (the “Equity Claims Decision”), finding that “the claims advanced in the shareholder claims are clearly equity claims”. The Ad Hoc Securities Purchasers’ Committee did not oppose the motion, and no issue was taken by any party with the court’s determination that the shareholder claims against SFC were “equity claims”. The Equity Claims Decision was

subsequently affirmed by the Court of Appeal for Ontario on November 23, 2012 [*Re Sino-Forest Corp.*, 2012 ONCA 816].

Ernst & Young Settlement

[24] The Ernst & Young Settlement, and third party releases, was not mentioned in the early versions of the Plan. The initial creditors' meeting and vote on the Plan was scheduled to occur on November 29, 2012; when the Plan was amended on November 28, 2012, the creditors' meeting was adjourned to November 30, 2012.

[25] On November 29, 2012, Ernst & Young's counsel and class counsel concluded the proposed Ernst & Young Settlement. The creditors' meeting was again adjourned, to December 3, 2012; on that date, a new Plan revision was released and the Ernst & Young Settlement was publicly announced. The Plan revision featured a new Article 11, reflecting the "framework" for the proposed Ernst & Young Settlement and for third-party releases for named third-party defendants as identified at that time as the Underwriters or in the future.

[26] On December 3, 2012, a large majority of creditors approved the Plan. The Objectors note, however, that proxy materials were distributed weeks earlier and proxies were required to be submitted three days prior to the meeting and it is evident that creditors submitting proxies only had a pre-Article 11 version of the Plan. Further, no equity claimants, such as the Objectors, were entitled to vote on the Plan. On December 6, 2012, the Plan was further amended, adding Ernst & Young and BDO to Schedule A, thereby defining them as named third-party defendants.

[27] Ultimately, the Ernst & Young Settlement provided for the payment by Ernst & Young of \$117 million as a settlement fund, being the full monetary contribution by Ernst & Young to settle the Ernst & Young Claims; however, it remains subject to court approval in Ontario, and recognition in Quebec and the United States, and conditional, pursuant to Article 11.1 of the Plan, upon the following steps:

- (a) the granting of the sanction order sanctioning the Plan including the terms of the Ernst & Young Settlement and the Ernst & Young Release (which preclude any right to contribution or indemnity against Ernst & Young);
- (b) the issuance of the Settlement Trust Order;
- (c) the issuance of any other orders necessary to give effect to the Ernst & Young Settlement and the Ernst & Young Release, including the Chapter 15 Recognition Order;
- (d) the fulfillment of all conditions precedent in the Ernst & Young Settlement; and
- (e) all orders being final orders not subject to further appeal or challenge.

[28] On December 6, 2012, Kim Orr filed a notice of appearance in the CCAA proceedings on behalf of three Objectors: Invesco, Northwest and Bâtirente. These Objectors opposed the

sanctioning of the Plan, insofar as it included Article 11, during the Plan sanction hearing on December 7, 2012.

[29] At the Plan sanction hearing, SFC's counsel made it clear that the Plan itself did not embody the Ernst & Young Settlement, and that the parties' request that the Plan be sanctioned did not also cover approval of the Ernst & Young Settlement. Moreover, according to the Plan and minutes of settlement, the Ernst & Young Settlement would not be consummated (*i.e.* money paid and releases effective) unless and until several conditions had been satisfied in the future.

[30] The Plan was sanctioned on December 10, 2012 with Article 11. The Objectors take the position that the Funds' opposition was dismissed as premature and on the basis that nothing in the sanction order affected their rights.

[31] On December 13, 2012, the court directed that its hearing on the Ernst & Young Settlement would take place on January 4, 2013, under both the CCAA and the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"). Subsequently, the hearing was adjourned to February 4, 2013.

[32] On January 15, 2013, the last day of the opt-out period established by orders of Perell J. and Émond J., six institutional investors represented by Kim Orr filed opt-out forms. These institutional investors are Northwest and Bâtirente, who were two of the three institutions represented by Kim Orr in the Carriage Motion, as well as Invesco, Matrix, Montrusco and Gestion Ferique (all of which are members of the Pöyry Settlement Class).

[33] According to the opt-out forms, the Objectors held approximately 1.6% of SFC shares outstanding on June 30, 2011 (the day the Muddy Waters report was released). By way of contrast, Davis Selected Advisors and Paulson and Co., two of many institutional investors who support the Ernst & Young Settlement, controlled more than 25% of SFC's shares at this time. In addition, the total number of outstanding objectors constitutes approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011.

LAW AND ANALYSIS

Court's Jurisdiction to Grant Requested Approval

[34] The Claims Procedure Order of May 14, 2012, at paragraph 17, provides that any person that does not file a proof of claim in accordance with the order is barred from making or enforcing such claim as against any other person who could claim contribution or indemnity from the Applicant. This includes claims by the Objectors against Ernst & Young for which Ernst & Young could claim indemnity from SFC.

[35] The Claims Procedure Order also provides that the Ontario Plaintiffs are authorized to file one proof of claim in respect of the substance of the matters set out in the Ontario class action, and that the Quebec Plaintiffs are similarly authorized to file one proof of claim in respect of the substance of the matters set out in the Quebec class action. The Objectors did not object to, or oppose, the Claims Procedure Order, either when it was sought or at any time thereafter.

The Objectors did not file an independent proof of claim and, accordingly, the Canadian Claimants were authorized to and did file a proof of claim in the representative capacity in respect of the Objectors' claims.

[36] The Ernst & Young Settlement is part of a CCAA plan process. Claims, including contingent claims, are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA.

[37] It is well established that class proceedings can be settled in a CCAA proceeding. See *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647 [*Robertson*].

[38] As noted by Pepall J. (as she then was) in *Robertson*, para. 8:

When dealing with the consensual resolution of a CCAA claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceedings settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[39] In this case, the notice and process for dissemination have been approved.

[40] The Objectors take the position that approval of the Ernst & Young Settlement would render their opt-out rights illusory; the inherent flaw with this argument is that it is not possible to ignore the CCAA proceedings.

[41] In this case, claims arising out of the class proceedings are claims in the CCAA process. CCAA claims can be, by definition, subject to compromise. The Claims Procedure Order establishes that claims as against Ernst & Young fall within the CCAA proceedings. Thus, these claims can also be the subject of settlement and, if settled, the claims of all creditors in the class can also be settled.

[42] In my view, these proceedings are the appropriate time and place to consider approval of the Ernst & Young Settlement. This court has the jurisdiction in respect of both the CCAA and the CPA.

Should the Court Exercise Its Discretion to Approve the Settlement

[43] Having established the jurisdictional basis to consider the motion, the central inquiry is whether the court should exercise its discretion to approve the Ernst & Young Settlement.

CCAA Interpretation

[44] The CCAA is a "flexible statute", and the court has "jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial

Order”. The CCAA affords courts broad jurisdiction to make orders and “fill in the gaps in legislation so as to give effect to the objects of the CCAA.” [*Re Nortel Networks Corp.*, 2010 ONSC 1708, paras. 66-70 (“*Re Nortel*”)]; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299, 72 O.T.C. 99, para. 43 (Ont. C.J.)]

[45] Further, as the Supreme Court of Canada explained in *Re Ted Leroy Trucking Ltd. [Century Services]*, 2010 SCC 60, para. 58:

CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly described as “the hothouse of real time litigation” has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (internal citations omitted). ...When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the Debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA.

[46] It is also established that third-party releases are not an uncommon feature of complex restructurings under the CCAA [*ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (“*ATB Financial*”); *Re Nortel*, *supra*; *Robertson*, *supra*; *Re Muscle Tech Research and Development Inc.* (2007), 30 C.B.R. (5th) 59, 156 A.C.W.S. (3d) 22 (Ontario S.C.J.) (“*Muscle Tech*”); *Re Grace Canada Inc.* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J.); *Re Allen-Vanguard Corporation*, 2011 ONSC 5017].

[47] The Court of Appeal for Ontario has specifically confirmed that a third-party release is justified where the release forms part of a comprehensive compromise. As Blair J. A. stated in *ATB Financial*, *supra*:

69. In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be “necessary” in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70. The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan ...

71. In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
- c) The Plan cannot succeed without the releases;
- d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72. Here, then – as was the case in T&N – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed ...

73. I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court’s jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

...

78. ... I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms “compromise” and “arrangement” and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

...

113. At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- a) The parties to be released are necessary and essential to the restructuring of the debtor;
- b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
- c) The Plan cannot succeed without the releases;
- d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
- f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[48] Furthermore, in *ATB Financial, supra*, para. 111, the Court of Appeal confirmed that parties are entitled to settle allegations of fraud and to include releases of such claims as part of the settlement. It was noted that “there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given”.

Relevant CCAA Factors

[49] In assessing a settlement within the CCAA context, the court looks at the following three factors, as articulated in *Robertson, supra*:

- (a) whether the settlement is fair and reasonable;
- (b) whether it provides substantial benefits to other stakeholders; and
- (c) whether it is consistent with the purpose and spirit of the CCAA.

[50] Where a settlement also provides for a release, such as here, courts assess whether there is “a reasonable connection between the third party claim being compromised in the plan and the

restructuring achieved by the plan to warrant inclusion of the third party release in the plan”. Applying this “nexus test” requires consideration of the following factors: [*ATB Financial, supra*, para. 70]

- (a) Are the claims to be released rationally related to the purpose of the plan?
- (b) Are the claims to be released necessary for the plan of arrangement?
- (c) Are the parties who have claims released against them contributing in a tangible and realistic way? and
- (d) Will the plan benefit the debtor and the creditors generally?

Counsel Submissions

[51] The Objectors argue that the proposed Ernst & Young Release is not integral or necessary to the success of Sino-Forest’s restructuring plan, and, therefore, the standards for granting third-party releases in the CCAA are not satisfied. No one has asserted that the parties require the Ernst & Young Settlement or Ernst & Young Release to allow the Plan to go forward; in fact, the Plan has been implemented prior to consideration of this issue. Further, the Objectors contend that the \$117 million settlement payment is not essential, or even related, to the restructuring, and that it is concerning, and telling, that varying the end of the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs would extinguish the settlement.

[52] The Objectors also argue that the Ernst & Young Settlement should not be approved because it would vitiate opt-out rights of class members, as conferred as follows in section 9 of the CPA: “Any member of a class involved in a class proceeding may opt-out of the proceeding in the manner and within the time specified in the certification order.” This right is a fundamental element of procedural fairness in the Ontario class action regime [*Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, para. 69], and is not a mere technicality or illusory. It has been described as absolute [*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266]. The opt-out period allows persons to pursue their self-interest and to preserve their rights to pursue individual actions [*Mangan v. Inco Ltd.*, (1998) 16 C.P.C. (4th) 165 38 O.R. (3d) 703 (Ont. C.J.)].

[53] Based on the foregoing, the Objectors submit that a proposed class action settlement with Ernst & Young should be approved solely under the CPA, as the Pöyry Settlement was, and not through misuse of a third-party release procedure under the CCAA. Further, since the minutes of settlement make it clear that Ernst & Young retains discretion not to accept or recognize normal opt-outs if the CPA procedures are invoked, the Ernst & Young Settlement should not be approved in this respect either.

[54] Multiple parties made submissions favouring the Ernst & Young Settlement (with the accompanying Ernst & Young Release), arguing that it is fair and reasonable in the

circumstances, benefits the CCAA stakeholders (as evidenced by the broad-based support for the Plan and this motion) and rationally connected to the Plan.

[55] Ontario Plaintiffs' counsel submits that the form of the bar order is fair and properly balances the competing interests of class members, Ernst & Young and the non-settling defendants as:

- (a) class members are not releasing their claims to a greater extent than necessary;
- (b) Ernst & Young is ensured that its obligations in connection to the Settlement will conclude its liability in the class proceedings;
- (c) the non-settling defendants will not have to pay more following a judgment than they would be required to pay if Ernst & Young remained as a defendant in the action; and
- (d) the non-settling defendants are granted broad rights of discovery and an appropriate credit in the ongoing litigation, if it is ultimately determined by the court that there is a right of contribution and indemnity between the co-defendants.

[56] SFC argues that Ernst & Young's support has simplified and accelerated the Plan process, including reducing the expense and management time otherwise to be incurred in litigating claims, and was a catalyst to encouraging many parties, including the Underwriters and BDO, to withdraw their objections to the Plan. Further, the result is precisely the type of compromise that the CCAA is designed to promote; namely, Ernst & Young has provided a tangible and significant contribution to the Plan (notwithstanding any pitfalls in the litigation claims against Ernst & Young) that has enabled SFC to emerge as Newco/NewcoII in a timely way and with potential viability.

[57] Ernst & Young's counsel submits that the Ernst & Young Settlement, as a whole, including the Ernst & Young Release, must be approved or rejected; the court cannot modify the terms of a proposed settlement. Further, in deciding whether to reject a settlement, the court should consider whether doing so would put the settlement in "jeopardy of being unravelled". In this case, counsel submits there is no obligation on the parties to resume discussions and it could be that the parties have reached their limits in negotiations and will backtrack from their positions or abandon the effort.

Analysis and Conclusions

[58] The Ernst & Young Release forms part of the Ernst & Young Settlement. In considering whether the Ernst & Young Settlement is fair and reasonable and ought to be approved, it is necessary to consider whether the Ernst & Young Release can be justified as part of the Ernst & Young Settlement. See *ATB Financial*, *supra*, para. 70, as quoted above.

[59] In considering the appropriateness of including the Ernst & Young Release, I have taken into account the following.

[60] Firstly, although the Plan has been sanctioned and implemented, a significant aspect of the Plan is a distribution to SFC's creditors. The significant and, in fact, only monetary contribution that can be directly identified, at this time, is the \$117 million from the Ernst & Young Settlement. Simply put, until such time as the Ernst & Young Settlement has been concluded and the settlement proceeds paid, there can be no distribution of the settlement proceeds to parties entitled to receive them. It seems to me that in order to effect any distribution, the Ernst & Young Release has to be approved as part of the Ernst & Young Settlement.

[61] Secondly, it is apparent that the claims to be released against Ernst & Young are rationally related to the purpose of the Plan and necessary for it. SFC put forward the Plan. As I outlined in the Equity Claims Decision, the claims of Ernst & Young as against SFC are intertwined to the extent that they cannot be separated. Similarly, the claims of the Objectors as against Ernst & Young are, in my view, intertwined and related to the claims against SFC and to the purpose of the Plan.

[62] Thirdly, although the Plan can, on its face, succeed, as evidenced by its implementation, the reality is that without the approval of the Ernst & Young Settlement, the objectives of the Plan remain unfulfilled due to the practical inability to distribute the settlement proceeds. Further, in the event that the Ernst & Young Release is not approved and the litigation continues, it becomes circular in nature as the position of Ernst & Young, as detailed in the Equity Claims Decision, involves Ernst & Young bringing an equity claim for contribution and indemnity as against SFC.

[63] Fourthly, it is clear that Ernst & Young is contributing in a tangible way to the Plan, by its significant contribution of \$117 million.

[64] Fifthly, the Plan benefits the claimants in the form of a tangible distribution. Blair J.A., at paragraph 113 of *ATB Financial*, *supra*, referenced two further facts as found by the application judge in that case; namely, the voting creditors who approved the Plan did so with the knowledge of the nature and effect of the releases. That situation is also present in this case.

[65] Finally, the application judge in *ATB Financial*, *supra*, held that the releases were fair and reasonable and not overly broad or offensive to public policy. In this case, having considered the alternatives of lengthy and uncertain litigation, and the full knowledge of the Canadian plaintiffs, I conclude that the Ernst & Young Release is fair and reasonable and not overly broad or offensive to public policy.

[66] In my view, the Ernst & Young Settlement is fair and reasonable, provides substantial benefits to relevant stakeholders, and is consistent with the purpose and spirit of the CCAA. In addition, in my view, the factors associated with the *ATB Financial* nexus test favour approving the Ernst & Young Release.

[67] In *Re Nortel*, *supra*, para. 81, I noted that the releases benefited creditors generally because they "reduced the risk of litigation, protected Nortel against potential contribution claims and indemnity claims and reduced the risk of delay caused by potentially complex

litigation and associated depletion of assets to fund potentially significant litigation costs”. In this case, there is a connection between the release of claims against Ernst & Young and a distribution to creditors. The plaintiffs in the litigation are shareholders and Noteholders of SFC. These plaintiffs have claims to assert against SFC that are being directly satisfied, in part, with the payment of \$117 million by Ernst & Young.

[68] In my view, it is clear that the claims Ernst & Young asserted against SFC, and SFC’s subsidiaries, had to be addressed as part of the restructuring. The interrelationship between the various entities is further demonstrated by Ernst & Young’s submission that the release of claims by Ernst & Young has allowed SFC and the SFC subsidiaries to contribute their assets to the restructuring, unencumbered by claims totalling billions of dollars. As SFC is a holding company with no material assets of its own, the unencumbered participation of the SFC subsidiaries is crucial to the restructuring.

[69] At the outset and during the CCAA proceedings, the Applicant and Monitor specifically and consistently identified timing and delay as critical elements that would impact on maximization of the value and preservation of SFC’s assets.

[70] Counsel submits that the claims against Ernst & Young and the indemnity claims asserted by Ernst & Young would, absent the Ernst & Young Settlement, have to be finally determined before the CCAA claims could be quantified. As such, these steps had the potential to significantly delay the CCAA proceedings. Where the claims being released may take years to resolve, are risky, expensive or otherwise uncertain of success, the benefit that accrues to creditors in having them settled must be considered. See *Re Nortel*, *supra*, paras. 73 and 81; and *Muscle Tech*, *supra*, paras. 19-21.

[71] Implicit in my findings is rejection of the Objectors’ arguments questioning the validity of the Ernst & Young Settlement and Ernst & Young Release. The relevant consideration is whether a proposed settlement and third-party release sufficiently benefits all stakeholders to justify court approval. I reject the position that the \$117 million settlement payment is not essential, or even related, to the restructuring; it represents, at this point in time, the only real monetary consideration available to stakeholders. The potential to vary the Ernst & Young Settlement and Ernst & Young Release to accommodate opt-outs is futile, as the court is being asked to approve the Ernst & Young Settlement and Ernst & Young Release as proposed.

[72] I do not accept that the class action settlement should be approved solely under the CPA. The reality facing the parties is that SFC is insolvent; it is under CCAA protection, and stakeholder claims are to be considered in the context of the CCAA regime. The Objectors’ claim against Ernst & Young cannot be considered in isolation from the CCAA proceedings. The claims against Ernst & Young are interrelated with claims as against SFC, as is made clear in the Equity Claims Decision and Claims Procedure Order.

[73] Even if one assumes that the opt-out argument of the Objectors can be sustained, and opt-out rights fully provided, to what does that lead? The Objectors are left with a claim against Ernst & Young, which it then has to put forward in the CCAA proceedings. Without taking into

account any argument that the claim against Ernst & Young may be affected by the claims bar date, the claim is still capable of being addressed under the Claims Procedure Order. In this way, it is again subject to the CCAA fairness and reasonable test as set out in *ATB Financial*, *supra*.

[74] Moreover, CCAA proceedings take into account a class of creditors or stakeholders who possess the same legal interests. In this respect, the Objectors have the same legal interests as the Ontario Plaintiffs. Ultimately, this requires consideration of the totality of the class. In this case, it is clear that the parties supporting the Ernst & Young Settlement are vastly superior to the Objectors, both in number and dollar value.

[75] Although the right to opt-out of a class action is a fundamental element of procedural fairness in the Ontario class action regime, this argument cannot be taken in isolation. It must be considered in the context of the CCAA.

[76] The Objectors are, in fact, part of the group that will benefit from the Ernst & Young Settlement as they specifically seek to reserve their rights to “opt-in” and share in the spoils.

[77] It is also clear that the jurisprudence does not permit a dissenting stakeholder to opt-out of a restructuring. [*Re Sammi Atlas Inc.*, (1998) 3 C.B.R. (4th) 171 (Ont. Gen. Div. (Commercial List)).] If that were possible, no creditor would take part in any CCAA compromise where they were to receive less than the debt owed to them. There is no right to opt-out of any CCAA process, and the statute contemplates that a minority of creditors are bound by the plan which a majority have approved and the court has determined to be fair and reasonable.

[78] SFC is insolvent and all stakeholders, including the Objectors, will receive less than what they are owed. By virtue of deciding, on their own volition, not to participate in the CCAA process, the Objectors relinquished their right to file a claim and take steps, in a timely way, to assert their rights to vote in the CCAA proceeding.

[79] Further, even if the Objectors had filed a claim and voted, their minimal 1.6% stake in SFC’s outstanding shares when the Muddy Waters report was released makes it highly unlikely that they could have altered the outcome.

[80] Finally, although the Objectors demand a right to conditionally opt-out of a settlement, that right does not exist under the CPA or CCAA. By virtue of the certification order, class members had the ability to opt-out of the class action. The Objectors did not opt-out in the true sense; they purported to create a conditional opt-out. Under the CPA, the right to opt-out is “in the manner and within the time specified in the certification order”. There is no provision for a conditional opt-out in the CPA, and Ontario’s single opt-out regime causes “no prejudice...to putative class members”. [CPA, section 9; *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148, paras. 43-46 (Ont. S.C.J.); and *Eidoo v. Infineon Technologies AG*, 2012 ONSC 7299.]

Miscellaneous

[81] For greater certainty, it is my understanding that the issues raised by Mr. O'Reilly have been clarified such that the effect of this endorsement is that the Junior Objectors will be included with the same status as the Ontario Plaintiffs.

DISPOSITION

[82] In the result, for the foregoing reasons, the motion is granted. A declaration shall issue to the effect that the Ernst & Young Settlement is fair and reasonable in all the circumstances. The Ernst & Young Settlement, together with the Ernst & Young Release, is approved and an order shall issue substantially in the form requested. The motion of the Objectors is dismissed.

MORAWETZ J.

Date: March 20, 2013

Tab 17

1993 CarswellOnt 183

Ontario Court of Justice (General Division — Commercial List)

Lehndorff General Partner Ltd., Re

1993 CarswellOnt 183, [1993] O.J. No. 14, 17 C.B.R. (3d) 24, 37 A.C.W.S. (3d) 847, 9 B.L.R. (2d) 275

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Docket: Doc. B366/92

Counsel: *Alfred Apps, Robert Harrison and Melissa J. Kennedy*, for applicants.

L. Crozier, for Royal Bank of Canada.

R.C. Heintzman, for Bank of Montreal.

J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation.

Jay Schwartz, for Citibank Canada.

Stephen Golick, for Peat Marwick Thorne * Inc., proposed monitor.

John Teolis, for Fuji Bank Canada.

Robert Thorton, for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — referred to

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237, Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, (sub nom. *Re First Investors Corp.*) 46 D.L.R. (4th) 669 (Q.B.), reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — referred to

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — referred to

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — referred to

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Gaz Métropolitain v. Wynden Canada Inc. (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) [affirmed (1982), 45 C.B.R. (N.S.) 11 (Que. C.A.)] — referred to

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Reference re Companies' Creditors Arrangement Act (Canada), [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — referred to

Seven Mile Dam Contractors v. R. (1979), 13 B.C.L.R. 137, 104 D.L.R. (3d) 274 (S.C.) , affirmed (1980), 25 B.C.L.R. 183 (C.A.) — referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — referred to

Slavik, Re (1992), 12 C.B.R. (3d) 157 (B.C. S.C.) — considered

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) — referred to

Ultracare Management Inc. v. Zevenberger (Trustee of) (1990), 3 C.B.R. (3d) 151, (sub nom. *Ultracare Management Inc. v. Gammon*) 1 O.R. (3d) 321 (Gen. Div.) — referred to

United Maritime Fishermen Co-operative, Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.) , varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.) , reversed (1988), 69 C.B.R. (N.S.) 161, 88 N.B.R. (2d) 253, 224 A.P.R. 253, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (C.A.) — referred to

Statutes considered:

Bankruptcy Act, R.S.C. 1985, c. B-3 —

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Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 — preamble

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s. 11

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

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s. 24

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s. 75

Rules considered:

Ontario, Rules of Civil Procedure —

r. 8.01

r. 8.02

Application under Companies' Creditors Arrangement Act to file consolidated plan of compromise and for stay of proceedings.

Farley J.:

1 These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) a stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

2 The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issues under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermögensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the *Limited Partnership Act*, R.S.O. 1990, c. L.16 ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the *Partnership Act*, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately \$370 million, LPC \$45 million and LPC II \$7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately \$543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lender also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

3 This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

- (a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.
- (b) The restructuring of existing project financing commitments.
- (c) New financing, by way of equity or subordinated debt.
- (d) Elimination or reduction of certain overhead.
- (e) Viability of existing businesses of entities in the Lehndorff Group.
- (f) Restructuring of income flows from the limited partnerships.
- (g) Disposition of further real property assets aside from those disposed of earlier in the process.
- (h) Consolidation of entities in the Group; and

- (i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and (b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA may be made on an ex parte basis (s. 11 of the CCAA; *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230 (C.A.); *Re Keppoch Development Ltd.* (1991), 8 C.B.R. (3d) 95 (N.S.T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (*Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

4 "Instant" debentures are now well recognized and respected by the courts: see *Re United Maritime Fishermen Co-operative* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.), at pp. 55-56, varied on reconsideration (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), reversed on different grounds (1988), 69 C.B.R. (N.S.) 161 (N.B. C.A.), at pp. 165-166; *Re Stephanie's Fashions Ltd.* (1990), 1 C.B.R. (3d) 248 (B.C. S.C.) at pp. 250-251; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); *Ultracare Management Inc. v. Zevenberger (Trustee of)* (sub nom. *Ultracare Management Inc. v. Gammon*) (1990), 1 O.R. (3d) 321 (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.), at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.); *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.), at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine

whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)*, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.), at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.*, supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act*, R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.). It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.*, supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

9 Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,

(a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;

(b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and

(c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

10 The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the

company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*, supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 296-298 (B.C. S.C.) and pp. 312-314 (B.C. C.A.) and *Meridian Developments Inc. v. Toronto Dominion Bank*, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 320 where Gibbs J.A. for the court stated:

The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

11 The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see *Gaz Métropolitain v. Wynden Canada Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.) at pp. 290-291 and *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 311-312 (B.C. C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C. S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see *Feifer v. Frame Manufacturing Corp.* (1947), 28 C.B.R. 124 (C.A. Que.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see *Sklar-Pepler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

8. This Act extends and does not limit the provisions of any instrument now or hereafter existing that governs the rights of creditors or any class of them and has full force and effect notwithstanding anything to the contrary contained in that instrument.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see *Quintette Coal Ltd. v. Nippon Steel Corp.*, supra, at pp. 312-314 (B.C.C.A.).

12 It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see *Re Slavik*, unreported, [1992] B.C.J. No. 341 [now reported at 12 C.B.R. (3d) 157 (B.C. S.C.)]. However in the *Slavik* situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact [at p. 159]:

5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

13 It appears to me that Dickson J. in *International Donut Corp. v. 050863 N.D. Ltd.*, unreported, [1992] N.B.J. No. 339 (N.B. Q.B.) [now reported at 127 N.B.R. (2d) 290, 319 A.P.R. 290] was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated [at p. 295 N.B.R.]:

In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained

but it in due course expired without success having been achieved in arranging with creditors a compromise. *That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these* . (Emphasis added.)

14 I am not persuaded that the words of s. 11 which are quite specific as relating as to a *company* can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in *Campeau v. Olympia & York Developments Ltd.* unreported, [1992] O.J. No. 1946 [now reported at 14 C.B.R. (3d) 303 (Ont. Gen. Div.)] at pp. 4-7 [at pp. 308-310 C.B.R.].

The Power to Stay

The court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance Co.* (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) , and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the *Courts of Justice Act* , R.S.O. 1990, c. C.43, which provides as follows:

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": *Arab Monetary Fund v. Hashim* (unreported) [(June 25, 1992), Doc. 24127/88 (Ont. Gen. Div.)], [1992] O.J. No. 1330.

Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the court is specifically granted the power to stay in a particular context, by virtue of statute or under the *Rules of Civil Procedure* . The authority to prevent multiplicity of proceedings in the same court, under r. 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the *C.C.A.A.*, is an example of the former. Section 11 of the *C.C.A.A.* provides as follows.

The Power to Stay in the Context of C.C.A.A. Proceedings

By its formal title the *C.C.A.A.* is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.

In this respect it has been observed that the *C.C.A.A.* is "to be used as a practical and effective way of restructuring corporate indebtedness": see the case comment following the report of *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) , and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105 (C.A.) at p. 113 [B.C.L.R.].

Gibbs J.A. continued with this comment:

To the extent that a general principle can be extracted from the few cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a *discretionary power to restrain judicial or extra-judicial conduct* against the debtor company *the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period* .

(emphasis added)

I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. [In this respect, see also *Sairex GmbH v. Prudential Steel Ltd.* (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77.]

I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in *Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance*, supra (a "Mississauga Derailment" case), at pp. 65-66 [C.P.C.]. The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from *Empire-Universal Films Limited v. Rank*, [1947] O.R. 775 (H.C.) that McRuer C.J.H.C. considered that *The Judicature Act* [R.S.O. 1937, c. 100] then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 (H.C.) and *Canada Systems Group (EST) Ltd. v. Allen-Dale Mutual Insurance Co.* (1982), 29 C.P.C. 60 (H.C.) at pp. 65-66.

15 Montgomery J. in *Canada Systems*, supra, at pp. 65-66 indicated:

Goodman J. (as he then was) in *McCordic v. Bosanquet* (1974), 5 O.R. (2d) 53 in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in *Edmeades v. Thames Board Mills Ltd.*, [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in *Edmeades* was approved by Lord Justice Davies in *Lane v. Willis*; *Lane v. Beach* (*Executor of Estate of George William Willis*), [1972] 1 All E.R. 430, (sub nom. *Lane v. Willis*; *Lane v. Beach*) [1972] 1 W.L.R. 326 (C.A.).

.....

In *Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd.* (1972), 25 D.L.R. (3d) 419, 5 C.P.R. (2d) 122, appeal allowed by consent without costs (sub nom. *Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.*) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:

The principles which must govern in these matters are clearly stated in the case of *Empire Universal Films Ltd. et al. v. Rank et al.*, [1947] O.R. 775 at p. 779, as follows [quoting *St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al.*, [1936] 1 K.B. 382 at p. 398]:

(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

16 Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-à-vis any proceedings taken by any party against the property assets and undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the

"Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. [Appendix omitted.] I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

17 A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Hepburn, *Limited Partnerships*, (Toronto: De Boo, 1991), at p. 1-2 and p. 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the *Bankruptcy Act* (now the BIA) sections 85 and 142.

18 A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario *Rules of Civil Procedure*, O. Reg. 560/84, Rules 8.01 and 8.02.

19 It appears that the preponderance of case law supports the contention that a partnership including a limited partnership is not a separate legal entity. See *Lindley on Partnership*, 15th ed. (London: Sweet & Maxwell, 1984), at pp. 33-35; *Seven Mile Dam Contractors v. R.* (1979), 13 B.C.L.R. 137 (S.C.), affirmed (1980), 25 B.C.L.R. 183 (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad A. Milne, (1985) 23 Alta. L. Rev. 345, at pp. 350-351. Milne in that article made the following observations:

The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in *Re Thorne* between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in *Ruzicks* unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the *Canada Business Corporation Act* [S.C. 1974-75, c. 33, as am.] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

20 It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, "The Control Test of Investor Liability in Limited Partnerships" (1983) 21 Alta. L. Rev. 303; E. Apps, "Limited Partnerships and

the 'Control' Prohibition: Assessing the Liability of Limited Partners" (1991) 70 Can. Bar Rev. 611; R. Flannigan, "Limited Partner Liability: A Response" (1992) 71 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner — the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: *Control Test*, (1992), supra, at pp. 524-525. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-à-vis any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

21 It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of [s. 11 of the CCAA](#) would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the [CCAA](#) allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. It seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

22 The order is therefore granted as to the relief requested including the proposed stay provisions.

Application allowed.

Footnotes

* As amended by the court.

Tab 18

Court of Queen's Bench of Alberta

Citation: Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act), 2007 ABQB 504

Date: 20070731
Docket: 0501 17864
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

**Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine**

Introduction

[1] This application involves the most recent development in the lengthy and complicated Calpine insolvency. That insolvency has required proceedings both in this jurisdiction under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and in the United States under Chapter 11 of the U.S. Bankruptcy Code. The matter is extremely complex, involving many related corporations and partnerships, highly intertwined legal and financial obligations and a number of cross-border issues. The resolution of these proceedings has been delayed by several difficult issues with implications for the insolvencies on both sides of the border. The above-noted applicants (collectively, the "Calpine Applicants") and the U.S. debtors applied to this Court and to the United States Bankruptcy Court of the Southern District of New York in a joint hearing for approval of a settlement of these major issues, which they say will break the deadlock.

[2] Both Courts approved the settlement. These are my reasons for that approval.

Background

[3] Given the complexity of the matter, it will be useful to set out some background. On December 20, 2005, the Calpine Applicants obtained an order of this Court granting them

protection from their creditors under the CCAA. That order appointed Ernst & Young Inc. as Monitor. It also provided for a stay of proceedings against the Calpine Applicants and against Calpine Energy Services Canada Partnership (“CESCA”), Calpine Canada Natural Gas Partnership (“CCNG”) and Calpine Canadian Saltend Limited Partnership (“Saltend LP”). The Monitor’s 23rd Report dated June 28, 2007 refers to the latter three parties collectively as the “CCAA Parties” and to those parties together with the Calpine Applicants as the “CCAA Debtors”. Where I have quoted terms and definitions from the Report, I adopt those terms and definitions for purposes of these Reasons. On the same day, Calpine Corporation and certain of its direct and indirect U. S. subsidiaries filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code. The Monitor refers to Calpine Corporation (“CORPX”), the primary party in the U. S. insolvency proceedings, and its U.S. subsidiaries collectively as the “U.S. Debtors”.

[4] During the course of the CCAA proceedings, a number of applications were made relating to the relationship of the CCAA Debtors and Calpine Power L.P. (the “Fund”), leading ultimately to the short and long-term retolling of the Calgary Energy Centre and the sale of the interest of Calpine Canada Power Ltd. (“CCPL”) in the Fund to HCP Acquisition Inc. (“Harbinger”) in February 2007, a sale that closed simultaneously with Harbinger’s takeover of the publicly-held units in the Fund.

[5] In addition to these issues, progress in the restructuring and the realization of maximum value for assets was made more difficult by various cross-border issues. The Report sets out the following “material cross-border issues that needed to be resolved between the CCAA Debtors and the U.S. Debtors”:

- a. The Hybrid Note Structure (“HNS”) and whether Calpine Canada Energy Finance ULC (“ULC1”), including the holders of the 8 ½% Senior Notes due 2008 (the “ULC1 Notes”) issued by ULC1 and fully and unconditionally guaranteed by CORPX, had multiple guarantee claims against CORPX;
- b. The sale by Calpine Canada Resources Company (“CCRC”) of its holdings of U.S.\$359,770,000 in ULC1 Notes (the “CCRC ULC1 Notes”) and the effect of the U.S. Debtors’ so-called Bond Differentiation Claims (“BDCs”) on such a sale;
- c. Cross-border intercompany claims between the CCAA Debtors and the U.S. Debtors;
- d. Third party claims made against certain CCAA Debtors that were guaranteed by the U.S. Debtors;
- e. The priority of the claim of Calpine Canada Energy Limited (“CCEL”) against CCRC;

- f. A fraudulent conveyance action brought by the CCAA Debtors in this Court (the “Greenfield Action”);
- g. Potential claims by the U.S. Debtors to the remaining proceeds repatriated from the sale of the Saltend Energy Centre;
- h. Cross-border marker claims filed by the U.S. Debtors and the CCAA Debtors and the appropriate jurisdiction in which to resolve those claims; and
- i. Marker claims filed by the ULC1 Indenture Trustee.

[6] In the Report, the Monitor describes the settlement process that led to this application as follows:

- 10. The CCAA Debtors and the U.S. Debtors concluded that the only way to resolve the issues between them was to concentrate on reaching a consensual global agreement that resolved virtually all the issues referred to above. The [CCAA Debtors and the U.S. Debtors] realized that without a global agreement, they could have faced lengthy and costly cross-border litigation.
- 11. Over the last five months, the Monitor and the CCAA Debtors held numerous discussions with the U.S. Debtors regarding a possible global settlement of the outstanding material and other issues. In addition, during various stages of discussion with the U.S. Debtors, the CCAA Debtors and the Monitor sought input from the major Canadian stakeholders as to the format and terms of a settlement.
- 12. While the settlement discussions between the U.S. Debtors and the CCAA Debtors were underway, the ad hoc committee of certain holders of ULC1 Notes reached terms of a separate settlement between the holders of the ULC1 Notes and CORPX (the “Preliminary ULC1 Settlement”). The terms of the Preliminary ULC1 Settlement were agreed to on April 13, 2007 and publicly announced by CORPX on April 18, 2007.
- 13. As a result of the above discussions and negotiations, [a settlement outline (the “Settlement Outline”)] was agreed to on May 13, 2007 and publicly announced by CORPX on May 14, 2007. The Settlement Outline incorporates the terms of the Preliminary ULC1 Settlement. ...
- 14. The parties have negotiated the terms of [a global settlement agreement memorializing the terms of the Settlement Outline (the “GSA”)] ...

17. The [GSA] is subject to the following conditions:
- a. The approval of both this Court and the U.S. Bankruptcy Court;
 - b. The execution of the [GSA]; and
 - c. The CCRC ULC1 Notes being sold.

[7] As the Monitor notes, the GSA resolves all of the material issues that exist between the Calpine Applicants and the U. S. Debtors. The Report describes the “key elements” of the GSA as follows:

- a. The [GSA] provides for the ULC1 Note Holders to effectively receive a claim of 1.65x the amount of the ULC1 Indenture Trustee’s proof of claim . . . against CORPX which results in a total claim against CORPX in the amount of US\$3.505 billion (the “ULC1 1.65x Claim”). The 1.65x factor was agreed between the U.S. Debtors and the ad hoc committee of certain holders of the ULC1 Notes. As a result of the [GSA], the terms of the HNS can be honoured with no material adverse economic impact to the U.S. Debtors, CCAA Debtors or their creditors;
- b. The withdrawal of the BDCs advanced by the U.S. Debtors. . . ;
- c. An agreement between the U.S. Debtors and the CCAA Debtors as to the cooperation in the sale of the CCRC ULC1 Notes;
- d. The priority of claims against CCRC are clarified, including the claim of CCEL against CCRC being postponed to all other claims against CCRC;
- e. The acknowledgement by the U.S. Debtors of certain guarantee claims advanced by creditors in the CCAA proceedings and the agreement by the U.S. Debtors that the quantum of these guarantee claims will be determined by the Canadian Court. The [GSA] contemplates that U.S. Debtors and their official committees will be afforded the right to fully participate in any settlement or adjudication of these guarantee claims. Pursuant to the [GSA], the U.S. Debtors acknowledge their guarantee of the following CCAA Debtors’ creditors’ claims:
 - i. The claims of Alliance Pipeline Partnership, Alliance Pipeline L.P., and Alliance Pipeline Inc. (collectively “Alliance”) for repudiation of certain long-term gas transportation contracts held by CESCA;

- ii. The claims of NOVA Gas Transmission Ltd. (“NOVA”) for the repudiation of certain long-term gas transportation contracts held by CESCO;
 - iii. The claims of TransCanada Pipelines Limited (“TCPL”) for the repudiation of certain long-term gas transportation contracts held by CESCO;
 - iv. The claims of Calpine Power L.P. [the “Fund”] for the repudiation of the tolling agreement between [the Fund] and CESCO (the “CLP Toll Claim”);
 - v. The claims of [the Fund] and Calpine Power Income Fund (“CPIF”) relating to a potential fee resulting from the alleged transfer of the Island co-generation facility (the “Island Transfer Fee Claim”); and
 - vi. The claims of [the Fund] for heat rate indemnity relating to the Island co-generation facility (the “Heat Rate Penalty Claim”); and
- f. The withdrawal of virtually all U.S. and CCAA Debtor Marker Claims;
 - g. The settlement of the Greenfield Action;
 - h. The withdrawal of the UL1 Indenture Trustee Marker Claim;
 - i. The withdrawal of the claims filed by the Indenture Trustee of the Second Lien Notes against the CCAA Debtors;
 - j. The resolution of the quantum of the cross-border intercompany claims...;
 - k. The settlement of the ULC2 Claims as against CCRC (as between the CCAA Debtors and the U.S. Debtors) and also confirmation of the ULC2 guarantee by CORPX;
 - l. The payment of all liabilities of ULC2, including the amounts due on the ULC2 Notes. For example, the ULC2 Indenture Trustee has advised that it believes a make-whole payment is applicable if ULC2 repays the holders of the ULC2 Notes prior to the final payment date as set out in the Indenture (the “ULC2 Make-Whole Premium”). The CCAA Debtors and the U.S. Debtors dispute that the ULC2 Make-Whole Premium is applicable. However, the [GSA] contemplates that if the issue is not resolved by the date of distribution to the ULC2 direct creditors, an

amount sufficient to satisfy the claim may be set aside in escrow pending the determination of the issue;

- m. An agreement on the allocation of professional fees relating to the CCAA proceedings amongst the CCAA Debtors and agreement as to the quantum of certain aspects of the Key Employee Retention Plan. . . ;
- n. Resolution of all jurisdictional issues between Canada and the U.S.; and
- o. An agreement as to the allocation of the proceeds from the sale of Thomassen Turbines Systems, B.V. (“TTS”).

[8] The Monitor describes and analyzes the terms and effect of the GSA in great detail in the Report. It concludes that the GSA is beneficial to the CCAA Debtors and their creditors, providing a medium for an efficient payout of many of the creditors, resolving all material disputes between the CCAA Debtors and the U.S. Debtors without costly and time-consuming cross-border litigation, settling the complex priority issues of CCRC and providing for the admission by the U.S. Debtors of the validity of guarantees provided to certain creditors of the CCAA Debtors. It is important to note that the Monitor unequivocally endorses the GSA.

The Applications

[9] The Calpine Applicants sought three orders from this Court. First, they sought an order approving the terms of the GSA and directing the various parties to execute such documents and implement such transactions as might be necessary to give effect to the GSA. Second, they sought an order permitting CCRC and ULC1 to take the necessary steps to sell the CCRC ULC1 Notes. Third, they sought an extension of the stay contemplated by the initial CCAA order to December 20, 2007.

[10] The application was made concurrently with an application by the U.S. Debtors to the U.S. Bankruptcy Court in New York state, the two applications proceeding simultaneously by videoconference. No objection was taken to the latter two orders sought from this Court and I have granted both. I also gave approval to the GSA with brief oral reasons. I indicated to counsel at the hearing that these more detailed written reasons would be forthcoming as soon as possible. The applications to the U.S. Court, including an application for approval of the GSA, were also granted.

[11] The controversial point in the applications, both to this Court and to the U.S. Court, was approval of the GSA. The parties standing in opposition to the GSA are the Fund, the ULC2 Indenture Trustee and a group referring to itself as the “*Ad Hoc* Committee of Creditors of Calpine Canada Resources Company” (the “*Ad Hoc* Committee”). (HSBC Bank USA, N.A., as ULC1 Indenture Trustee, also filed a technical objection, but it has since been withdrawn.) The bench brief of the *Ad Hoc* Committee states that it “is comprised of members of the *Ad Hoc* Committee of Bondholders of Calpine Canada Energy Finance II ULC ... and Calpine Power,

L.P.”. Thus, the Ad Hoc Committee consists of the Fund and certain unknown ULC2 noteholders. There was some objection to the status of the Ad Hoc Committee to oppose the GSA independently of the Fund, but that objection was not strenuously pursued and I do not need to address it. However, I note that the Fund thus makes its arguments through both the Ad Hoc Committee and its separate counsel, and the ULC2 noteholders make theirs through both the ULC2 Indenture Trustee and the Ad Hoc Committee. I will refer to those parties opposing the GSA collectively as the “Opposing Creditors” hereafter. The Opposing Creditors object to the GSA on a number of grounds and there is much overlap among their positions.

[12] The primary objection is that the GSA amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analysed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:

- a) the GSA must be reviewed as a whole, and it is misleading and inaccurate to focus on one part of the settlement without viewing the package of benefits and concessions in its overall effect. The Opposing Creditors have discounted the benefits to the Canadian estate of the resolution of \$7.4 billion in claims against the CCAA Debtors by arguing that these claims had no value. As the Report notes:

. . . While the Monitor believes it is unlikely that the CCAA Debtors would have been unsuccessful on all the issues [identified earlier in these Reasons as material cross-border issues], there was a real risk of one or more claims being successfully advanced against CCRC by the U. S. Debtors or the ULC1 Trustee and, had this risk materialized, the recovery to the CCRC direct creditors and CESCA creditors would have been materially reduced.
- b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. The Monitor has opined that the GSA allows for the maximum recovery to all the CCAA Debtors’ creditors. According to the Monitor’s conservative calculations, virtually all the Canadian creditors, including the Opposing Creditors, likely will be paid the full amount of their claims as settled or adjudicated, either from the Canadian estate or as a U.S. guarantee claim. If claims are to be paid in full, they are not compromised. If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

The Ad Hoc Committee's Objections

[13] The Ad Hoc Committee asserts that the GSA expropriates assets with a value of approximately U.S.\$650 million to the U.S. Debtors that would otherwise be available to Canadian creditors, leaving insufficient value in the Canadian estates to ensure that the Canadian creditors are paid in full. The Ad Hoc Committee argues that the Canadian creditors will receive less than full recovery and that, therefore, their claims have been compromised.

[14] This submission is misleading. The \$650 million refers to two elements of the GSA: a payout to the U.S. Debtors of \$75 million from CCRC in exchange for the withdrawal of the U.S. Debtors BDCs, settlement of the U.S. Debtors' claims against the Saltend proceeds and the postponement of CCEL's claim against CCRC and the elimination of CCRC's unlimited liability corporation claim against its member contributory, CCEL, which the Opposing Creditors complain effectively denies access to an intercompany claim of \$575 million. I do not accept that the GSA "expropriates" assets to the U.S. Debtors, who had both equity and creditor claims against the Canadian estates that they relinquished as part of the GSA. The GSA is a product of negotiation and settlement and required certain sacrifices on the part of both the U.S. Debtors and the CCAA Debtors. The Ad Hoc Committee's piecemeal analysis of the GSA ignores the other considerable benefits flowing to the Canadian estate from the GSA, including the subordination of CCEL's \$2.1 billion claim against CCRC. As recognized by the Monitor, this postponement permits the CESCO shortfall claim to participate in the anticipated CCRC net surplus, failing which the recovery by creditors of CESCO (notably including the Fund) would be materially reduced. The Ad Hoc Committee also fails to mention that an additional \$50 million of claims against CESCO advanced by the U.S. Debtors have been postponed to the claims of other CESCO creditors.

[15] The Ad Hoc Committee argues that the U.S. Debtors' claims that have been withdrawn are "untested" and "unmeritorious". Certainly, the claims have not been tested through litigation. However, it is the very nature of settlement to withdraw claims in order to avoid protracted and costly litigation. While the Ad Hoc Committee may consider the U.S. Debtors' claims unmeritorious, their saying so does not make it so. The fact remains that the U.S. Debtors have agreed, as part of the GSA, to withdraw claims that would otherwise have to be adjudicated, likely at considerable time and expense.

[16] As part of the GSA, the U.S. Debtors agree to cooperate in the sale of the CCRC ULC1 Notes. The Ad Hoc Committee is of the view that that cooperation "should have been forthcoming in any event". Nevertheless, the U.S. Debtors previously have not been prepared to accede to such a sale, insisting instead on asserting their BDCs. The sale is acknowledged to be critical to resolution of this insolvency and the present willingness of the U.S. Debtors to cooperate therein is of great value.

[17] The Ad Hoc Committee also takes issue with the recovery available under the GSA to the creditors of CESCO, arguing that those creditors face a potential shortfall of at least \$175 million. The cited shortfall of \$175 million is again misleading, failing to take into account that

the Fund, to the extent that its claims are adjudicated to be valid and there is a shortfall in CESCO, will now have the benefit of acknowledged guarantees of these claims by the U.S. Debtors as a term of the GSA. The Monitor thus reports its expectation that the Fund's claims will be paid in full. There exists, therefore, only the potential, under the Monitor's "low" recovery scenario, of a shortfall in CESCO of \$25.1 million. Those creditors who may be at risk of such a shortfall are not the Opposing Creditors, but certain trade creditors to the extent of approximately \$2 million, who are not objecting to the GSA, and certain gas transportation claimants to the extent of approximately \$23 million, who appeared before the Court at the hearing to support the approval of the GSA on the basis that it improves their chances of recovery.

[18] The shortfall, if any, to which the creditors of CESCO will be exposed will depend upon the quantum of the CLP Toll Claim. As yet, this claim remains, to use the Ad Hoc Committee's word, untested. Assessments of its value range from \$142 million to \$378 million. The Monitor's analysis, taking into account the guarantees by the U.S. Debtors contemplated by the GSA, indicates that if this claim is adjudged to be worth \$200 million or less, all of the CESCO creditors will be assured of full payment whether under the "high" or "low" scenarios. Alternatively, under the Monitor's "high" recovery scenario, all creditors of CESCO will receive full payment even if the CLP Toll Claim is worth as much as \$300 million.

[19] Further, as I indicated in my oral reasons, even if the Fund does not receive full payment of the CLP Toll Claim through the Canadian estate, the GSA cannot be said to be a compromise of that claim. The GSA contemplates adjudication of the CLP Toll Claim rather than foreclosing it. While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights. This point is discussed further later in these Reasons.

[20] The Ad Hoc Committee points out that, according to the Report, the GSA results in recovery for CCPL of only 39% to 65%. As the Fund is CCPL's major creditor, the Ad Hoc Committee argues that this level of anticipated recovery constitutes a compromise of the Fund's claim in this respect.

[21] The response to this argument is two-fold. First, the Report indicates that the CCPL recovery range is largely dependent upon the quantum of the Fund's Heat Rate Penalty Claim. The Monitor has taken the conservative approach of estimating the amount of this claim at the amount asserted by the Fund; the actual amount adjudicated may be less, resulting in greater recovery for CCPL. Further, the Monitor notes that, as part of the GSA, CORPX acknowledges its guarantee of the Heat Rate Penalty Claim. Therefore, the Monitor concludes that "[t]o the extent there is a shortfall in CCPL, based again upon the Monitor's expectation that CORPX's creditors should be paid 100% of filed and accepted claims, [the Fund] should be paid in full for the Heat Rate Penalty Claim regardless of whether a shortfall resulted in CCPL". As discussed above, the possibility of a shortfall in the asset pool against which claims may be made is not equivalent to a compromise of those claims. The Monitor reports that only \$25,000 of CCPL's creditors may face a risk of less than 100% recovery after consideration of the CORPX

guarantees under the “low” scenario, and those only to the extent of a \$15,000 shortfall and that the CCAA Debtors are considering options to pay out these nominal creditors in any event.

[22] The Ad Hoc Committee argues that CORPX’s guarantees are not a satisfactory solution to potential shortfalls because resort to the guarantees may result in the issuance of equity rather than the payment of cash. This, however, is by no means certain at this point. Parties who must avail themselves of CORPX’s guarantees will participate in the U.S. bankruptcy proceedings and will be entitled to a say in the ultimate distribution that results from those proceedings. The Opposing Creditors complain that recovery under the guarantees is uncertain as to timing and amount of consideration. However, the GSA removes any hurdle these creditors may have in establishing their rights to guarantees. Without the acknowledgment of guarantees that forms part of the GSA, those creditors who sought to rely on the guarantees faced an inefficient and expensive process to establish their rights in the face of the stay of proceedings in place in the U.S. proceedings. While it is true that the expectation of full payment under the GSA with respect to guarantee claims rests on the Monitor’s expectation that these claims will be paid in full, the U. S. Debtors in a disclosure statement released on June 20, 2007 announced their expectation that their plan of reorganization in the U.S. proceedings would provide for the distribution of sufficient value to pay all creditors in full and to make some payment to existing shareholders.

[23] The Ad Hoc Committee also argues that the GSA purports to dismiss claims filed by the ULC2 Indenture Trustee on behalf of the ULC2 noteholders without consent or adjudication. They further take the position that this alleged dismissal is to occur prior to any payment of the claims of the ULC2 noteholders, such payment being subject to further Court order and to a reserved ability on the part of the CCAA Debtors to seek to compromise certain of the ULC2 noteholders’ claims.

[24] Again, this is an inaccurate characterization of the effect of the GSA. First, as noted above, the GSA contemplates setting aside in escrow sufficient funds to satisfy the claims of the ULC2 noteholders pending adjudication. Thus, there is no compromise. With respect to the timing issue, it is important to remember that these claims are not being dismissed as part of the GSA. They remain extant pending adjudication and, if appropriate, payment from the funds held in escrow.

[25] Finally, while the Ad Hoc Committee does not object to the sale of the CCRC ULC1 Notes, it argues that there is no urgency to such sale and that it should not occur until after there has been a determination of the various claims. As counsel for the Calpine Applicants pointed out, this is a somewhat disingenuous position for the Ad Hoc Committee to take, given its previous expressions of impatience in respect of the sale.

[26] I am satisfied that the potential market for the CCRC ULC1 Notes is volatile and that, now that the impediments to the sale have been removed, it is prudent and indeed necessary for the CCRC ULC1 Notes to be sold as soon as possible. The present state of the market has created an opportunity for a happy resolution of this CCAA filing that should not be allowed to

be lost. In addition to alleviating market risk, the GSA will ensure that interest accruing on outstanding claims will be terminated by their earlier payment.. This is not a small benefit. As an example, interest accrues on the ULC2 Notes at a rate of approximately \$3 million per month plus costs. The earlier payment of these notes that would result from the operation of the GSA thus increases the probability of recovery to the remaining creditors of CCRC.

[27] As the Ad Hoc Committee made clear during the hearing, it wants the right to vote on the GSA but wants to retain the benefit of the GSA terms that it finds advantageous. It suggests that the implementation of the GSA be delayed “briefly” for the calling of a vote and the determination of the ULC2 entitlements and the Fund’s claims with certainty, in accordance with a litigation timetable that has been proposed as part of the application. The “brief” adjournment thus suggested amounts to a delay of roughly 3 ½ months, without regard to allowing this Court a reasonable time to consider the claims after a hearing or the timing considerations of the U. S. Court.

The Fund’s Objections

[28] As noted in its brief, the Fund “fully supports” the position of the Ad Hoc Committee. However, it says it has additional objections.

[29] The Fund objects particularly to the settlement of the Greenfield Action. It argues that the GSA contemplates settlement of the Greenfield Action without payment to CESCA and that, as CESCA’s major creditor, the Fund is thereby prejudiced.

[30] Firstly, the settlement of this claim under the GSA was between the proper claimant, CCNG and the U.S. Debtors. It was not without consideration as alleged. The GSA provides that \$15 million of the possible \$90 million priority claim to be paid to the U. S. Debtors out of the Canadian estate will be netted off in consideration for the Greenfield settlement.

[31] The Fund submits that there are conflict of interest considerations arising from the settlement of the Greenfield matter between the CCAA Debtors and the U.S. Debtors. This argument might have greater force if the Fund were actually compromised or prejudiced in the GSA. However, as I have already noted, the Fund and the remaining creditors of CESCA benefit from the GSA when it is considered on a global basis. It may be that there is a risk that the Fund will be unable to secure complete recovery. However, as discussed above, this does not represent a compromise of the Fund’s claims. Further, as I indicated in my oral reasons, the fact that the Fund may bear some greater risk than other creditors does not, in itself, make the GSA unfair.

[32] The Fund also complains of a potential shortfall in respect of its claims against CCPL. They argue that, even if they are able to have recourse to CORPX’s guarantee in respect of any shortfall in the Canadian estate, they are prejudiced because they may receive equity rather than cash. I have previously addressed some of the issues relating to the possibility that the Fund may have to have recourse to the now-acknowledged guarantees of their disputed claims as part of the U.S. process to obtain full payment. This possibility existed prior to the negotiation of the GSA

and in fact, the possibility of resort to the guarantees may have been of greater likelihood if the \$7.4 billion of claims against the Canadian estate that the GSA eliminates had been established as valid to any significant degree. Without the provision of the GSA that enables the claims of the Fund that give rise to the guarantees being resolved in this Court, the Fund would have faced the possibility of adjudication of those claims in the U.S. proceedings. The Fund now will be entitled to participate with other guarantee claimants in the U.S. and will be entitled to a vote on the proposal of the U.S. Debtors to address those claims. I am not satisfied that the Fund is any worse off in its position as a result of the GSA in this regard.

[33] The Fund further argues that it is not aware of any CORPX guarantee in respect of its most recent claim. A claim was filed against the Fund in Ontario on May 23, 2007 relating to CCPL's management of the Fund. The Fund made application before me on July 24, 2007 for leave to file a further proof of claim against CCPL. I have reserved my decision on that application. The Fund asserts that since there is no CORPX guarantee in respect of this claim, they face a shortfall of \$10.5 million on the "high" scenario basis or \$19.5 million on the "low" scenario basis on this claim. This claim has not yet been accepted as a late claim. It arose after the GSA was negotiated and, therefore, could not have been addressed by the negotiating parties in any event. It is highly contingent, opposed by both the Fund and the CCAA Debtors, and raises issues of whether the indemnity between CCPL and the Fund is even applicable. Even if accepted as a late claim, it would not likely be valued by the CCAA Debtors and the Monitor at anything near its face value. This currently unaccepted late claim is not properly a factor in the consideration of the GSA.

The ULC2 Trustee's Objections

[34] The ULC2 Trustee objects, first, to its exclusion from the negotiation process leading up to the GSA. It states in its brief that "[a]s the ULC2 Trustee was not provided with the ability to participate or seek approval of the proposed resolution of the ULC2 Claims, it cannot support the [GSA] unless and until it is clear that the terms thereof ensure that the ULC2 Claims are provided for in full and the [GSA] does not result in a compromise of any of the ULC2 Claims". Although the ULC2 Trustee may not have participated in the negotiation or drafting of the GSA, it did comment on the issues addressed in the settlement. The problem is that these issues have not been resolved to the satisfaction of the ULC 2 Trustee.

[35] The ULC2 Trustee argues that the GSA provides it with one general unsecured claim in the CCAA Proceedings against ULC2 in an amount alleged to satisfy the outstanding principal amount of the ULC 2 Notes, accrued and unpaid interest and professional fees, costs and expenses of both the Ad Hoc ULC2 Noteholders Committee and the ULC2 Trustee and one guarantee claim against CORPX. It argues that the quantum contemplated by the GSA is insufficient to satisfy the amounts owing under the ULC2 Indenture because it does not take proper account of interest on the ULC2 Notes.

[36] In addition, the ULC2 Trustee takes the position that the GSA fails to provide for the ULC2 Make-Whole Premium. It objects to being required, under the terms of the GSA, to take this matter to the U.S. Bankruptcy Court rather than to this Court.

[37] I am unable to conclude that the GSA compromises the rights of the ULC2 noteholders in the manner complained of by the ULC2 Trustee. First, the GSA contemplates that the ULC2 Trustee will be paid in full, whatever its entitlement is. If the quantum of that entitlement cannot be resolved consensually, the CCAA Debtors have committed to reserve sufficient funds to pay out the claims once they have been resolved.

[38] While the GSA reorganizes the formal claims made by the ULC2 Trustee, the reorganization does not prejudice the ULC2 noteholders financially, as the effect of the reorganized claims is the same and the ULC2 Trustee's right to assert the full amount of its claims remains.

[39] With respect to the requirement that the ULC2 Trustee take the matter of the ULC2 Make-Whole Premium to the U.S. Court, I am satisfied that the United States Bankruptcy Court of the Southern District of New York is an appropriate forum in which to address that and its related issues, given that New York law governs the Trust Indenture and the Trust Indenture provides that ULC II agrees that it will submit to the non-exclusive jurisdiction of the New York Court in any suit, action or proceedings. Granted, there may be arguments that could be made that this Court has jurisdiction over these issues under CCAA proceedings, but s. 18.6 of the CCAA recognizes that flexibility and comity are important to facilitate the efficient, economical and appropriate resolution of cross-border issues in insolvencies such as this one. I note that the GSA assigns responsibility for a number of unresolved claims which could be argued to have aspects that are within the jurisdiction of the U.S. Court to this Court for resolution. I am satisfied that I have the authority under s. 18.6 of the CCAA to approve the assignment of these issues to the U.S. Court even over the objections of the ULC2 Trustee.

[40] The ULC2 Trustee also objects to the timing of the payment of \$75 million to the U.S. Debtors and to the withdrawal of certain oppression claims relating to the sale of the Saltend facility, submitting that the payment and withdrawal should not occur prior to the payment of the claims of the ULC2 noteholders. There was some confusion over an apparent disparity between the Canadian form of order and the U.S. form with respect to the order of distributions of claims. The Canadian order, to which the U.S. order has now been conformed, provides that the \$75 million payment will not occur until the CCRC ULC1 Notes are sold and a certificate is filed with both Courts advising that all conditions of the GSA have been waived or satisfied. While this does not satisfy the ULC2 Trustee's objection under this heading in full, I accept the submission of the CCAA Applicants that the GSA requires certain matters to take effect prior to others in order to allow the orderly flow of funds as set out in the GSA and that the arrangement relating to the escrow of funds protects the ULC2 noteholders in any event.

Analysis of Law re: Plan of Arrangement

[41] It is clear that, if the GSA were a plan of arrangement or compromise, a vote by creditors would be necessary. The Court has no discretion to sanction a plan of arrangement unless it has been approved by a vote conducted in accordance with s. 6 of the CCAA: *Royal Bank v. Fracmaster* (1999), 244 A.R. 93 (C.A.) at para. 13.

[42] The Ad Hoc Committee, the Fund and the ULC2 Trustee rely heavily on *Menegon v. Philip Services Corp.* (1999), 11 C.B.R. (4th) 262 (Ont. S.C.J.) to support their submissions. As noted by Blair, J. in *Philip* at para. 42, in the context of reviewing a plan of arrangement filed in CCAA proceedings involving Philip Services and its Canadian subsidiaries in Canada where the primary debtor, Philip Services, and its United States subsidiaries had also filed for Chapter 11 protection under U.S. law and had filed a separate U.S. plan, the rights of creditors under a plan filed in CCAA proceedings in Canada cannot be compromised without a vote of creditors followed by Court sanction.

[43] The comments made by the Court in *Philip* must be viewed against the context of the specific facts of that case. Philip Services was heavily indebted and had raised equity through public offerings in Canada and the United States. These public offerings led to a series of class actions in both jurisdictions, which, together with Philip Services' debt load and the bad publicity caused by the class actions, led to the CCAA and Chapter 11 filings. At about the same time that plans of arrangement were filed in Canada and the U.S., Philip Services entered into a settlement agreement with the Canadian and U.S. class action plaintiffs that Philip Services sought to have approved by the Canadian Court. The auditors (who were co-defendants with Philip Services in the class action proceedings), former officers and directors of Philip Services who had not been released from liability in the class action proceedings and other interested parties brought motions for relief which included an attack on the Canadian plan of arrangement on the basis that it was not fair and reasonable as it did not allow them their right as creditors to vote on the Canadian plan.

[44] The effect of the plans filed in both jurisdictions was that the claims of Philip Services' creditors, whether Canadian or American, were to be dealt with under the U.S. plan, and only claims against Philip Services' Canadian subsidiaries were to be dealt with under the Canadian plan.

[45] The Court found that if the settlement and the Canadian and U.S. plans were approved, the auditors and the underwriters who were co-defendants in the class action proceedings would lose their rights to claim contribution and indemnity in the class action. The Court held at para. 35 that this was not a reason to impugn the fairness of the plans, since the ability to compromise claims under a plan of arrangement is essential to the ability of a debtor to restructure. The plans as structured deprived these creditors of the ability to pursue their contribution claims in the CCAA proceedings by carving out the claims from the Canadian proceedings and providing that they be dealt with under the U.S. plan in the U.S. Bankruptcy Court. The Court noted that this was so despite the fact that Philip Services had set in motion CCAA proceedings in Canada in

the first place and, by virtue of obtaining a stay, had prevented these creditors from pursuing their claims in Canada. The Canadian plan was stated to be binding upon all holders of claims against Philip Services, including Canadian claimants, without according those Canadian claimants a right to vote on the Canadian plan.

[46] In Blair J.'s opinion, it was this loss of the right of Philip Services' Canadian creditors to vote on the Canadian plan that caused the problem. He found at para. 38 that Philip Services, having initiated and taken the benefits of CCAA proceedings in Canada, could not carve out "certain pesky . . . contingent claimants, and... require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan...without the right to vote on the proposal."

[47] The Court took into account that the auditors, underwriters and former directors and officers of Philip Services would be downgraded to the same status as equity holders under the U.S. plan, rather than having their claims considered as debt claims as they would be in Canada.

[48] These facts are not analogous to the facts of the Calpine restructuring. The CCAA Debtors and the U.S. Debtors are separate entities who have filed separate proceedings in Canada and the United States. No plan of arrangement has been filed or proposed in Canada and no attempt has been made to have a Canadian creditor's claims dealt with in another jurisdiction, except to the extent of continuing to require certain guarantee claims that the Fund has against CORPX dealt with as part of the U.S. proceeding, where the guarantee claims properly have been made and the reference of the ULC2 Trustee's issues to the U. S. Court, which I have found acceptable under s. 18.6 of the CCAA. No Canadian creditor has been denied a vote on a filed Canadian plan of arrangement. To the extent that *Philip* repeats the basic proposition that a plan of arrangement that compromises rights of creditors requires a vote by creditors before it is sanctioned by the Court, this principle has been applied to a situation where there were in existence clearly identified formal plans of arrangement.

[49] Blair J. had different comments to make about the settlement agreement in *Philip*. The settlement agreement was conditional not only upon court approval, but also the successful implementation of both the Canadian and U.S. plans. Philip Services linked the settlement and the plans together and the Court found that the settlement agreement could not be viewed in isolation. Blair J. found that it was premature to approve the settlement which he noted would immunize the class action plaintiffs and Philip Services from the need to have regard to the co-defendants in those actions. He was concerned, for example, that the settlement agreement would deprive the underwriters of certain of their rights under an underwriting agreement. It is interesting that Blair J. commented at para. 31 that what was significant to him in deciding that approval of the settlement was premature was "not the attempt to compromise the claims", but the underwriters' loss of a "bargaining chip" in the restructuring process if the settlement was approved at that point. He also noted at para. 33 that he was not suggesting that the proposed settlement ultimately would not be approved, but only that it was premature at that stage and should be considered at a time more contemporaneous with a sanctioning hearing.

[50] It is noteworthy that Blair J. did not characterize the settlement agreement as a plan of arrangement requiring a vote, even though it was clear that it deprived other creditors of rights, thus compromising those rights. Nor did he question the jurisdiction of the Court to approve such a settlement. He merely postponed approval in light of the inter-relationship of the settlement agreement and the plans.

[51] The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA. The *Philip* case does not aid the creditors who are opposed to the GSA in any suggestion that a Court lacks jurisdiction under the CCAA to approve agreements that may involve resolution of the claims of some but not all of the creditors of a CCAA debtor prior to a vote on a plan of arrangement.

[52] The Opposing Creditors rely on *Cable Satisfaction International, Inc. v. Richter Associés Inc.* (2004), 48 C.B.R. (4th) 205 (Que. S.C.) at para. 46 for the proposition that a court cannot force on creditors a plan which they have not voted to accept. This comment was made by Chaput, J. in the context of a very different fact situation than the one involved in this application. In *Cable Satisfaction*, creditors voting on a plan of arrangement proposed by the CCAA debtor had rejected the plan and approved instead an amended plan proposed at the creditors' meeting by one of the creditors. The Court's comment was made in response to the CCAA debtor's suggestion that the plan it had tabled should be approved because a majority of proxies filed prior to the amendment of the plan approved the original plan.

[53] There is no definition of "arrangement" or "compromise" under the CCAA. In *Cable Satisfaction*, Chaput, J. suggested at para. 35 that, in the context of s. 4 of the CCAA, an arrangement or compromise is not a contract but a proposal, a plan of terms and conditions to be presented to creditors for their consideration. He comments at para. 36 that the binding force of an arrangement or compromise arises from Court sanction, and not from its status as a contract.

[54] It is surely not the case that an arrangement or compromise need be labeled as such or formally proposed as such to creditors in order to require a vote of creditors. The issue is whether the GSA is, by its terms and in its effect, such an arrangement or compromise.

[55] I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously. Those claims will be adjudicated either under the CCAA proceeding or in the U.S. Chapter 11 proceeding and, to the extent they are determined to be valid, the GSA provides a mechanism and a financial framework for their full payment or satisfaction, other than for the possibility of a relatively small deficiency for some creditors of CESCO whose claims are not guaranteed by the U.S. Debtors and an even smaller deficiency of

\$25,000 in CCPL. The creditors of CESCO who are at real risk of suffering a deficiency have not objected to the approval of the GSA. In fact, counsel for TCPL and Alliance, two of the CESCO gas transportation claimants, and Westcoast, a major creditor of CCRC, appeared at the hearing to support approval of the GSA (or, at least in TCPL's case, not to object to it) on the basis that it improves their chances of recovery, resolving as it does all the major cross-border issues that have impeded the progress of this CCAA proceeding.

[56] The Calpine Applicants submit that the GSA can be reviewed and approved by the Court pursuant to its jurisdiction to approve transactions and settlement agreements during the CCAA stay period. They cite *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Comm. List]) at paras. 11 and 23 and *Re Air Canada* (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Comm. List]) at para. 9 in support of their submission that the Court must consider whether such an agreement is fair and reasonable and will be beneficial to the debtor and its stakeholders generally.

[57] In *Playdium*, a CCAA restructuring in which no viable plan had been arrived at, Spence J. found that the Court could approve the transfer of substantially all of the assets of the CCAA debtor to a new corporation in satisfaction of the claims of the primary secured creditors. Against the objection of a party that had the right under certain critical contracts to withhold consent to such a transfer, the Court found that it had the jurisdiction to approve such a transfer of assets over the objection of creditors or other affected parties, citing *Re Lehendorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Comm. List]) and *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 289 (Ont. S.C.J. [Comm. List]). Spence J. found at para. 23 that for such an order to be appropriate, it must be in keeping with the purpose and spirit of the regime created by the CCAA. In determining whether to approve the transfer of assets, he considered the factors enumerated in *Red Cross*.

[58] Whether the transfer constituted a compromise of creditors' rights was not in issue in *Playdium* and the comment was made that the transferees were the only creditors with an economic interest in the CCAA debtor. The case, however, is authority for the proposition that the powers of a supervisory court under the CCAA extend beyond the mere maintenance of the *status quo*, and may be exercised where necessary to achieve the objectives of the statute.

[59] In *Air Canada*, Farley J., in the course of the restructuring, was asked to approve Global Restructuring Agreements ("GRAs"). He cited *Red Cross* as setting out the appropriate guidelines for determining when an agreement should be approved during a CCAA restructuring prior to a plan of arrangement. He commented at para. 9 that:

... I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd.* . . . In *Sammi Atlas Inc.*, *Re* (1998), 3 C.B.R. (4th) 171

(Ont. Gen. Div. [Commercial List]), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi Atlas Inc.*, equitable treatment is not necessarily equal treatment.

[60] The GRA between Air Canada and a creditor, GECC, provided, among other things, for the restructuring of various leasing obligations and provided Air Canada with commitments for financing in return for interim payments on current aircraft rent and specific consideration in a restructured Air Canada. The Monitor noted that the financial benefits provided to Air Canada under the GRA outweighed the costs to Air Canada's estate arising from cross-collateralization benefits provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. The Monitor therefore recommended approval of the GRA.

[61] Another creditor complained at the approval hearing that other creditors were not being given treatment equal to that given to GECC. It appears that part of that unequal treatment was obtained by GECC as part of an earlier DIP financing that was not at issue before Farley J. at the time, but the Court engaged in an analysis of the benefits and costs to Air Canada of the GRA on the basis described above. It is noteworthy that Farley J. considered the suggestion of the objecting creditor that, if the GRA was not approved, GECC would not "abandon the field", but would negotiate terms with Air Canada that the objecting creditor felt would be more appropriate. The Court observed that the delay and uncertainty inherent in such an approach likely would be devastating to Air Canada.

[62] This decision illustrates, in addition to the appropriate test to be applied to a settlement agreement, that such agreements almost inevitably will have the effect of changing the financial landscape of the CCAA debtor to some extent. This is so whether the settlement involves the resolution of a simple claim by a single debtor or the kind of complicated claim illustrated in a complex restructuring such as Air Canada (or Calpine). Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

[63] I am satisfied that no rights are being confiscated under the GSA. Some claims are eliminated, but only with the full consent of the parties directly involved in those specific claims. The existing claims of the ULC2 Trustee are replaced with redesignated claims. However, the financial effect of the redesignated claims is the same, the ULC2 Trustee's right to assert the full amount of its claims remains and the CCAA Debtors and U.S. Debtors have agreed to hold funds in escrow sufficient to satisfy the entirety of those claims, once settled or judicially determined.

[64] The fact that this is a cross-border insolvency does not change the essential nature of the test which a settlement must meet, but consideration of the implications of the cross-border aspects of the situation is necessary and appropriate when weighing the benefits of the settlement for the debtors and their stakeholders generally. It cannot be ignored that the cross-border aspects of the insolvency of this inter-related corporate group have created daunting issues which have stymied progress on both sides of the border for many months. The GSA resolves most of those issues in a reasonably equitable and rational manner, provides a mechanism by which a number of the remaining issues may be resolved in the court of one jurisdiction or the other, and, by reason of the release for sale of the CCRC ULC1 Notes and the fortuity of the market, provides the likelihood of greatly enhanced recoveries and the expectation, supported by the Monitor's careful analysis, that an overwhelming majority of the Canadian stakeholders will be paid in full, either from the Canadian estate or through the U.S. Debtor guarantee process.

[65] In *Red Cross*, the Red Cross, under the Court's supervision in CCAA proceedings, applied to approve the sale of its blood supply assets and operations to two new agencies. One of the groups of blood transfusion claimants objected and called for a meeting of creditors to consider a counterproposal.

[66] Blair J. commented that the assets sought to be transferred were the source of the main value of the Red Cross's assets which might be available to satisfy the claims of creditors. He noted that the pool of funds resulting from the sale would not be sufficient to satisfy all claims, but that the Red Cross and the government were of the opinion that the transfer represented the best hope of maximizing distributions to the claimants. The Court characterized the central question on the motion as being whether the proposed purchase price for the assets was fair and reasonable in the circumstances and as close to maximum as reasonably likely, commenting at para. 16 that "(w)hat is important is that the value of that recovery pool is as high as possible."

[67] The objecting claimants in *Red Cross* asked the Court to order a vote on a proposed plan of arrangement rather than approving the sale. Those supporting the plan argued that approval of the sale transaction in advance of a creditors' vote on a plan of arrangement would deprive the creditors of their statutory right to put forward a plan and vote upon it.

[68] Blair J. declined to order a vote on the proposed plan, exercising his jurisdiction under ss. 4 and 5 of the CCAA to refuse to order a vote because of his finding that the proposed plan was unworkable and unrealistic in the circumstances.

[69] He then proceeded to consider whether the Court had jurisdiction to make an order approving the sale of substantial assets of a debtor company before a plan has been placed before the creditors for approval.

[70] Some of the objecting claimants submitted that the authority under s. 11 of the CCAA was narrow and would not permit such a sale. Others suggested that the sale should be permitted to proceed, but the transaction should be part of the plan of arrangement eventually put forth by

the Red Cross, with the question of whether it was appropriate and supportable determined in that context by way of vote. The latter argument is similar in effect to that made by the Opposing Creditors in this case.

[71] Blair J. rejected these submissions, finding that, realistically, the sale could not go forward on a conditional basis. He found that he had jurisdiction to make the order sought, noting at para. 43 that the source of his authority was found in the powers allocated to the Court to impose terms and conditions on the granting of a stay under s. 11 of the CCAA and may also be “grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to ‘fill in the gaps in legislation so as to give effect to the objects of the CCAA’.”

[72] At para. 45, Blair J. made the following comments, which resonate in this application:

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton’s restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), “the history of CCAA law has been an evolution of judicial interpretation”. It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and

it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted) [Emphasis in *Red Cross*.]

[73] Blair J. then stated that he was satisfied that the Court not only had jurisdiction to make the order sought, but should do so, noting the benefits of the sale and concluding at para. 46 that to forego the favourable purchase price “would in the circumstances be folly”.

[74] While there are clear differences between the *Red Cross* sale transaction and the GSA in this case, what the *Red Cross* transaction did was quantify with finality the pool of funds available for distribution to creditors. The GSA does not go that far but, in its adjustments and allocations of inter-corporate debt and settlement of outstanding inter-corporate claims, it has implications for the value of the Canadian estate on an overall basis and implications for the funds available to creditors on an entity-by-entity basis. As recognized in *Red Cross*, *Air Canada* and *Playdium*, transactions that occur during the process of a restructuring and before a plan is formally tendered and voted upon often do affect the size of the estate of the debtor available for distribution.

[75] That is why settlements and major transactions require Court approval and a consideration of whether they are fair, reasonable and beneficial to creditors as a whole. It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court’s ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and within the confines of the legislation.

[76] In this case, as in *Red Cross*, the Opposing Creditors have suggested that approval of the GSA sets a dangerous precedent. The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.

[77] The issue of the jurisdiction of supervising judges in CCAA proceedings to make orders that do not merely preserve the *status quo* was considered by the Ontario Court of Appeal in *Re Stelco Inc.* (2005), 78 O.R. (3d) 254 at para. 18. This was an appeal of an order made by Farley J. approving agreements made by the debtor with two of its stakeholders and a finance provider. One of the agreements provided for a break fee if the plan of arrangement proposed by Stelco failed to be approved by the creditors. The Court noted at para. 20 that the break fee could deplete Stelco’s assets. However, Rosenberg, J.A., for the Court, also noted at para. 3 that the Stelco CCAA process had been going on for 20 months, longer than anyone had expected, and that the supervising judge had been managing the process throughout. He then reviewed some of the many obstacles to a successful restructuring and found that the agreements resolved at least a few of the paramount problems.

[78] At para. 16, the Court stated that the objecting creditors argued, as they have in this case, that the orders sought would have the effect of substituting the Court's judgment for that of the creditors who have the right under s. 6 of the CCAA to approve a plan. Nevertheless, the Court of Appeal held that Farley J. had the jurisdiction to approve the agreements under s. 11 of the CCAA, which provides a broad jurisdiction to impose terms and conditions on the granting of a stay. The Court commented as follows at paras. 18-9:

In my view, s. 11(4) includes the power to vary the stay and allow the company to enter into agreements to facilitate the restructuring, provided that the creditors have the final decision under s. 6 whether or not to approve the Plan. The court's jurisdiction is not limited to preserving the *status quo*. The point of the CCAA process is not simply to preserve the *status quo* but to facilitate restructuring so that the company can successfully emerge from the process. ...

In my view, provided the orders do not usurp the right of the creditors to decide whether to approve the Plan the motions judge had the necessary jurisdiction to make them. The orders made in this case do not usurp the s. 6 rights of the creditors and do not unduly interfere with the business judgment of the creditors. The orders move the process along to the point where the creditors are free to exercise their rights at the creditors' meeting.

[79] The CCAA Debtors in this case were faced with challenges similar to those faced by Stelco in its restructuring. This CCAA proceeding is in its nineteenth month. As set out earlier, the process had encountered considerable hurdles relating to the nature of the ULC1 noteholder claims, the inter-corporate debt claims and the BDCs. The same creditors who object to this application were, in previous applications, clamouring for the resolution of the ULC1 noteholder issue and for the sale of the CCRC ULC1 Notes. The GSA resolves these issues and allows the process to move forward with a view to dealing with the remainder of the issues in an orderly and efficient way and with the expectation that this insolvency can be concluded with the determination and payment of virtually all claims by year-end.

Conclusion

[80] Viewed against the test of whether the GSA is fair, reasonable and beneficial to creditors as a whole, the GSA is a remarkable step forward in resolving this CCAA filing. It eliminates approximately \$7.5 billion in claims against the CCAA Debtors. It resolves the major issues between the CCAA Debtors and the U.S. Debtors that had stalled meaningful progress in asset realization and claims resolution. Most significantly, it unlocks the Canadian proceeding and provides the mechanism for the resolution by adjudication or settlement of the remaining issues and significant creditor claims and the clarification of priorities. The Monitor has concluded through careful and thorough analysis that the likely outcome of the implementation of the GSA is payment in full of all Canadian creditors. As the Ad Hoc Committee concedes, the GSA removes the issues that the members of the Committee have recognized for many months as the

major impediments to progress. The sale of the CCRC ULC1 Notes is a necessary precondition to resolution of this matter but, contrary to the Ad Hoc Committee's submissions, that sale cannot occur otherwise than in the context of a settlement with those parties whose claims directly affect the Notes themselves. I am satisfied that the GSA is a reasonable, and indeed necessary, path out of the deadlock.

[81] I am also persuaded that the GSA provides clear benefits to the Canadian creditors of the CCAA Debtors and that, on an individual basis, no creditor is worse off as a result of the GSA considered as a whole. While it does not guarantee full payment of claims, the GSA substantially reduces the risk that this goal will not be achieved. Crucially, the GSA is supported and recommended unequivocally by the Monitor, who was involved in the negotiations and who has analysed its terms thoroughly. I am mindful that the GSA is not without risk to the Fund. However, that some risk falls upon the Fund does not make the GSA unfair. As the Calpine Applicants point out, particularly in the insolvency context, equity is not always equality. Given the Monitor's assessment that the risk of less than full payment to the CESCA creditors is relatively remote, I am satisfied that such risk does not obviate the fairness of the GSA.

[82] The settlement of issues represented by the GSA is without precedent in its breadth and scope. That is perhaps appropriate given the enormous complexity and the highly intertwined nature of the issues in this proceeding. The cross-border nature of many of the issues adds to the delicacy of the matter. Given that complexity, it behooves all parties and this Court to proceed cautiously and with careful consideration. Nevertheless, we must proceed toward the ultimate goal of achieving resolution of the issues. Without that resolution, the Canadian creditors face protracted litigation in both jurisdictions, uncertain outcomes and continued frustration in unravelling the Gordian knot of intercorporate and interjurisdictional complexities that have plagued these proceedings on both sides of the border. In my view, the GSA represents enormous progress, and I approve it.

Heard on the 24th day of July, 2007.

Dated at the City of Calgary, Alberta this 31st day of July, 2007.

B.E. Romaine
J.C.Q.B.A.

Major Canadian Appearances:

Larry B. Robinson, Q.C. and Sean F. Collins of McCarthy Tetrault LLP

Jay A. Carfagnini, Fred Myers, Brian Empey and Joseph Pasquariello of Goodmans LLP
for the CCAA Debtors

Patrick McCarthy, Q.C. and Josef A. Krueger of Borden Ladner Gervais LLP
for the Monitor

Robert I. Thornton, John L. Finnigan and Rachelle F. Moncur of ThorntonGroutFinnigan LLP
for the Ad Hoc Committee

Sean F. Dunphy and Elizabeth Pillon of Stikeman Elliott LLP
for the ULC2 Trustee

Howard A. Gorman of Macleod Dixon LLP
for the ULC1 Noteholders Committee

Peter H. Griffin and Peter J. Osborne of Lenczner Slaght Royce Smith Griffin LLP
for the U.S. Debtors

Peter T. Linder, Q.C. and Emi R. Bossio of Peacock Linder & Halt LLP
for the Fund

Ken Lenz of Bennett Jones LLP
for the HSBC Bank USA, N.A., as ULC1 Indenture Trustee

Jay A. Swartz of Davies Ward Phillips & Vineberg LLP
for Lehman Brothers

Rinus De Waal of Fasken Martineau DuMoulin LLP
for the Unsecured Creditors' Committee

Neil Rabinovitch of Fraser Milner Casgrain LLP
for the Unofficial Committee of 2nd Lien Debtholders

B. A. R. Smith, Q.C. of Fraser Milner Casgrain LLP
for Alliance Pipelines

Douglas I. McLean
for TransCanada Pipelines Limited

Tab 19

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

**SUPERIOR COURT OF JUSTICE
(Commercial List)**

RE: 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
CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST
BOOKS INC. AND CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON, Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING COMPANY, CEDROM-SNI INC.,
TORONTO STAR NEWSPAPERS LTD., ROGERS PUBLISHING LIMITED and
CANWEST PUBLISHING INC., Defendants

BEFORE: Pepall J.

COUNSEL: *Kirk Baert*, for the Plaintiff

Peter J. Osborne and Kate McGrann, for Canwest Publishing Inc.

Alex Cobb, for the CCAA Applicants

Ashley Taylor and Maria Konyukhova, for the Monitor

REASONS FOR DECISION

Overview

[1] On January 8, 2010, I granted an initial order pursuant to the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") in favour of Canwest Publishing Inc. ("CPI") and related entities (the "LP Entities"). As a result of this order and subsequent orders, actions against the LP Entities were stayed. This included a class proceeding against CPI brought by

Heather Robertson in her personal capacity and as a representative plaintiff (the “Representative Plaintiff”). Subsequently, CPI brought a motion for an order approving a proposed notice of settlement of the action which was granted. CPI and the Representative Plaintiff then jointly brought a motion for approval of the settlement of both the class proceeding as against CPI and the *CCAA* claim. The Monitor supported the request and no one was opposed. I granted the judgment requested and approved the settlement with endorsement to follow. Given the significance of the interplay of class proceedings with *CCAA* proceedings, I have written more detailed reasons for decision rather than simply an endorsement.

Facts

[2] The Representative Plaintiff commenced this class proceeding by statement of claim dated July 25, 2003 and the action was case managed by Justice Cullity. He certified the action as a class proceeding on October 21, 2008 which order was subsequently amended on September 15, 2009.

[3] The Representative Plaintiff claimed compensatory damages of \$500 million plus punitive and exemplary damages of \$250 million against the named defendants, ProQuest Information and Learning LLC, Cedrom-SNI Inc., Toronto Star Newspapers Ltd., Rogers Publishing Limited and CPI for the alleged infringement of copyright and moral rights in certain works owned by class members. She alleged that class members had granted the defendants the limited right to reproduce the class members’ works in the print editions of certain newspapers and magazines but that the defendant publishers had proceeded to reproduce, distribute and communicate the works to the public in electronic media operated by them or by third parties.

[4] As set out in the certification order, the class consists of:

A. All persons who were the authors or creators of original literary works (“Works”) which were published in Canada in any newspaper, magazine, periodical, newsletter, or journal (collectively “Print Media”) which Print Media have been reproduced, distributed or communicated to the public by telecommunication by, or pursuant to the purported authorization or permission of, one or more of the defendants, through any

electronic database, excluding electronic databases in which only a precise electronic reproduction of the Work or substantial portion thereof is made available (such as PDF and analogous copies) (collectively “Electronic Media”), excluding:

- (a) persons who by written document assigned or exclusively licensed all of the copyright in their Works to a defendant, a licensor to a defendant, or any third party; or
- (b) persons who by written document granted to a defendant or a licensor to a defendant a license to publish or use their Works in Electronic Media; or
- (c) persons who provided Works to a not for profit or non-commercial publisher of Print Media which was licensor to a defendant (including a third party defendant), and where such persons either did not expect or request, or did not receive, financial gain for providing such Works; or
- (d) persons who were employees of a defendant or a licensor to a defendant, with respect to any Works created in the course of their employment.

Where the Print Media publication was a Canadian edition of a foreign publication, only Works comprising of the content exclusive to the Canada edition shall qualify for inclusion under this definition.

(Persons included in clause A are thereafter referred to as “Creators”. A “licensor to a defendant” is any party that has purportedly authorized or provided permission to one or more defendants to make Works available in Electronic Media. References to defendants or licensors to defendants include their predecessors and successors in interest)

B. All persons (except a defendant or a licensor to a defendant) to whom a Creator, or an Assignee, assigned, exclusively licensed, granted or transmitted a right to publish or use their Works in Electronic Media.

(Persons included in clause B are hereinafter referred to as “Assignees”)

C. Where a Creator or Assignee is deceased, the personal representatives of the estate of such person unless the date of death of the Creator was on or before December 31, 1950.

[5] As part of the *CCAA* proceedings, I granted a claims procedure order detailing the procedure to be adopted for claims to be made against the LP Entities in the *CCAA* proceedings. On April 12, 2010, the Representative Plaintiff filed a claim for \$500 million in respect of the claims advanced against CPI in the action pursuant to the provisions of the claims procedure order. The Monitor was of the view that the claim in the *CCAA* proceedings should be valued at \$0 on a preliminary basis.

[6] The Representative Plaintiff's claim was scheduled to be heard by a claims officer appointed pursuant to the terms of the claims procedure order. The claims officer would determine liability and would value the claim for voting purposes in the *CCAA* proceedings.

[7] Prior to the hearing before the claims officer, the Representative Plaintiff and CPI negotiated for approximately two weeks and ultimately agreed to settle the *CCAA* claim pursuant to the terms of a settlement agreement.

[8] When dealing with the consensual resolution of a *CCAA* claim filed in a claims process that arises out of ongoing litigation, typically no court approval is required. In contrast, class proceeding settlements must be approved by the court. The notice and process for dissemination of the settlement agreement must also be approved by the court.

[9] Pursuant to section 34 of the *Class Proceedings Act*, the same judge shall hear all motions before the trial of the common issues although another judge may be assigned by the Regional Senior Judge (the "RSJ") in certain circumstances. The action had been stayed as a result of the *CCAA* proceedings. While I was the supervising *CCAA* judge, I was also assigned by the RSJ to hear the class proceeding notice and settlement motions.

[10] Class counsel said in his affidavit that given the time constraints in the *CCAA* proceedings, he was of the view that the parties had made reasonable attempts to provide adequate notice of the settlement to the class. It would have been preferable to have provided

more notice, however, given the exigencies of insolvency proceedings and the proposed meeting to vote on the *CCAA* Plan, I was prepared to accept the notice period requested by class counsel and CPI.

[11] In this case, given the hybrid nature of the proceedings, the motion for an order approving notice of the settlement in both the class action proceeding and the *CCAA* proceeding was brought before me as the supervising *CCAA* judge. The notice procedure order required:

- 1) the Monitor and class counsel to post a copy of the settlement agreement and the notice order on their websites;
- 2) the Monitor to publish an English version of the approved form of notice letter in the National Post and the Globe and Mail on three consecutive days and a French translation of the approved form of notice letter in La Presse for three consecutive days;
- 3) distribution of a press release in an approved form by Canadian Newswire Group for dissemination to various media outlets; and
- 4) the Monitor and class counsel were to maintain toll-free phone numbers and to respond to enquiries and information requests from class members.

[12] The notice order allowed class members to file a notice of appearance on or before a date set forth in the order and if a notice of appearance was delivered, the party could appear in person at the settlement approval motion and any other proceeding in respect of the class proceeding settlement. Any notices of appearance were to be provided to the service list prior to the approval hearing. In fact, no notices of appearance were served.

[13] In brief, the terms of the settlement were that:

- a) the *CCAA* claim in the amount of \$7.5 million would be allowed for voting and distribution purposes;

- b) the Representative Plaintiff undertook to vote the claim in favour of the proposed *CCAA* Plan;
- c) the action would be dismissed as against CPI;
- d) CPI did not admit liability; and
- e) the Representative Plaintiff, in her personal capacity and on behalf of the class and/or class members, would provide a licence and release in respect of the freelance subject works as that term was defined in the settlement agreement.

[14] The claims in the action in respect of CPI would be fully settled but the claims which also involved ProQuest would be preserved. The licence was a non-exclusive licence to reproduce one or more copies of the freelance subject works in electronic media and to authorize others to do the same. The licence excluded the right to licence freelance subject works to ProQuest until such time as the action was resolved against ProQuest, thereby protecting the class members' ability to pursue ProQuest in the action. The settlement did not terminate the lawsuit against the other remaining defendants. Under the *CCAA* Plan, all unsecured creditors, including the class, would be entitled to share on a pro rata basis in a distribution of shares in a new company. The Representative Plaintiff would share pro rata to the extent of the settlement amount with other affected creditors of the LP Entities in the distributions to be made by the LP Entities, if any.

[15] After the notice motion, CPI and the Representative Plaintiff brought a motion to approve the settlement. Evidence was filed showing, among other things, compliance with the claims procedure order. Arguments were made on the process and on the fairness and reasonableness of the settlement.

[16] In her affidavit, Ms. Robertson described why the settlement was fair, reasonable and in the best interests of the class members:

In light of Canwest's insolvency, I am advised by counsel, and verily believe, that, absent an agreement or successful award in the Canwest Claims Process, the prospect of recovery for the Class

against Canwest is minimal, at best. However, under the Settlement Agreement, which preserves the claims of the Class as against the remaining defendants in the class proceeding in respect of each of their independent alleged breaches of the class members' rights, as well as its claims as against ProQuest for alleged violations attributable to Canwest content, there is a prospect that members of the Class will receive some form of compensation in respect of their direct claims against Canwest.

Because the Settlement Agreement provides a possible avenue of recovery for the Class, and because it largely preserves the remaining claims of the Class as against the remaining defendants in the class proceeding, I am of the view that the Settlement Agreement represents a reasonable compromise of the Class claim as against Canwest, and is both fair and reasonable in the circumstances of Canwest's insolvency.

[17] In the affidavit filed by class counsel, Anthony Guindon of the law firm Koskie Minsky LLP noted that he was not in a position to ascertain the approximate dollar value of the potential benefit flowing to the class from the potential share in a pro rata distribution of shares in the new corporation. This reflected the unfortunate reality of the *CCAA* process. While a share price of \$11.45 was used, he noted that no assurance could be given as to the actual market price that would prevail. In addition, recovery was contingent on the total quantum of proven claims in the claims process. He also described the litigation risks associated with attempting to obtain a lifting of the *CCAA* stay of proceedings. The likelihood of success was stated to be minimal. He also observed the problems associated with collection of any judgment in favour of the Representative Plaintiff. He went on to state:

... The Representative Plaintiff, on behalf of the Class, could have elected to challenge Canwest's initial valuation of the Class claim of \$0 before a Claims Officer, rather than entering into a negotiated settlement. However, a number of factors militated against the advisability of such a course of action. Most importantly, the claims of the Class in the class proceeding have not been proven, and the Class does not enjoy the benefit of a final judgment as against Canwest. Thus, a hearing before the Claims Officer would necessarily necessitate a finding of liability as against Canwest, in addition to a quantification of the claims of the Class against Canwest.

... a negative outcome in a hearing before a Claims Officer could have the effect of jeopardizing the Class claims as against the remaining defendants in the class proceeding. Such a finding would not be binding on a judge seized of a common issues trial in the class proceeding; however, it could have persuasive effect.

Given the likely limited recovery available from Canwest in the Claims Process, it is the view of Class Counsel that a negotiated resolution of the quantification of Class claim as against Canwest is preferable to risking a negative finding of liability in the context of a contested Claims hearing before a Claims Officer.

[18] The Monitor was also involved in the negotiation of the settlement and was also of the view that the settlement agreement was a fair and reasonable resolution for CPI and the LP Entities' stakeholders. The Monitor indicated in its report that the settlement agreement eliminated a large degree of uncertainty from the *CCAA* proceeding and facilitated the approval of the Plan by the requisite majorities of stakeholders. This of course was vital to the successful restructuring of the LP Entities. The Monitor recommended approval of the settlement agreement.

[19] The settlement of the class proceeding action was made prior to the creditors' meeting to vote on the Plan for the LP Entities. The issues of the fees and disbursements of class counsel and the ultimate distribution to class members were left to be dealt with by the class proceedings judge if and when there was a resolution of the action with the remaining defendants.

Discussion

[20] Both motions in respect of the settlement were heard by me but were styled in both the *CCAA* proceedings and the class proceeding.

[21] As noted by Jay A. Swartz and Natasha J. MacParland in their article “*Canwest Publishing – A Tale of Two Plans*”¹:

“There have been a number of *CCAA* proceedings in which settlements in respect of class proceedings have been implemented including *McCarthy v. Canadian Red Cross Society, (Re:) Grace Canada Inc., Muscletech Research and Development Inc., and (Re:) Hollinger Inc.* ... The structure and process for notice and approval of the settlement used in the LP Entities restructuring appears to be the most efficient and effective and likely a model for future approvals. Both motions in respect of the Settlement, discussed below, were heard by the *CCAA* judge but were styled in both proceedings.” [citations omitted]

(a) Approval

(i) *CCAA* Settlements in General

[22] Certainly the court has jurisdiction to approve a *CCAA* settlement agreement. As stated by Farley J. in *Re Lehndorff General Partner Ltd.*,² the *CCAA* is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Very broad powers are provided to the *CCAA* judge and these powers are exercised to achieve the objectives of the statute. It is well settled that courts may approve settlements by debtor companies during the *CCAA* stay period: *Re Calpine Canada Energy Ltd.*³; *Re Air Canada*⁴; and *Re Playdium Entertainment Corp.*⁵ To obtain approval of a settlement under the *CCAA*, the moving party must establish that: the transaction is fair and reasonable; the transaction will be beneficial to the debtor and its stakeholders generally; and the

¹ Annual Review of Insolvency Law, 2010, J.P. Sarra Ed, Carswell, Toronto at page 79.

² (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) at 31.

³ [2007] A.B.Q.B. 504 at para. 71; leave to appeal dismissed [2007] A.B.C.A. 266 (Alta. C.A.).

⁴ (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J.).

⁵ (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J.) at para. 23.

settlement is consistent with the purpose and spirit of the *CCAA*. See in this regard *Re Air Canada*⁶ and *Re Calpine*.⁷

(ii) Class Proceedings Settlement

[23] The power to approve the settlement of a class proceeding is found in section 29 of the *Class Proceedings Act*, 1992⁸. That section states:

29(1) A proceeding commenced under this *Act* and a proceeding certified as a class proceeding under this *Act* may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

(2) A settlement of a class proceeding is not binding unless approved by the court.

(3) A settlement of a class proceeding that is approved by the court binds all class members.

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceedings;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[24] The test for approval of the settlement of a class proceeding was described in *Dabbs v. Sun Life Assurance Co. of Canada*⁹. The court must find that in all of the circumstances the

⁶ *Supra.* at para. 9.

⁷ *Supra.* at para. 59.

⁸ S.O. 1992, C.6.

settlement is fair, reasonable and in the best interests of those affected by it. In making this determination, the court should consider, amongst other things:

- a) the likelihood of recovery or success at trial;
- b) the recommendation and experience of class counsel; and
- c) the terms of the settlement.

As such, it is clear that although the *CCAA* and class proceeding tests for approval are not identical, a certain symmetry exists between the two.

[25] A perfect settlement is not required. As stated by Sharpe J. (as he then was) in *Dabbs v. Sun Life Assurance Co. of Canada*¹⁰:

Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

[26] Where there is more than one defendant in a class proceeding, the action may be settled against one of the defendants provided that the settlement is fair, reasonable and in the best interests of the class members: *Ontario New Home Warranty Program et al. v. Chevron Chemical et al.*¹¹

(iii) The Robertson Settlement

[27] I concluded that the settlement agreement met the tests for approval under the *CCAA* and the *Class Proceedings Act*.

⁹ [1998] O.J. No. 1598 (Ont. Gen. Div.) at para. 9.

¹⁰ (1998) 40 O.R. (3rd) 429 at para 30.

¹¹ [1999] O.J. No. 2245 (Ont. S.C.J.) at para. 97.

[28] As a general proposition, settlement of litigation is to be promoted. Settlement saves time and expense for the parties and the court and enables individuals to extract themselves from a justice system that, while of a high caliber, is often alien and personally demanding. Even though settlements are to be encouraged, fairness and reasonableness are not to be sacrificed in the process.

[29] The presence or absence of opposition to a settlement may sometimes serve as a proxy for reasonableness. This is not invariably so, particularly in a class proceeding settlement. In a class proceeding, the court approval process is designed to provide some protection to absent class members.

[30] In this case, the proposed settlement is supported by the LP Entities, the Representative Plaintiff, and the Monitor. No one, including the non-settling defendants all of whom received notice, opposed the settlement. No class member appeared to oppose the settlement either.

[31] The Representative Plaintiff is a very experienced and sophisticated litigant and has been so recognized by the court. She is a freelance writer having published more than 15 books and having been a regular contributor to Canadian magazines for over 40 years. She has already successfully resolved a similar class proceeding against Thomson Canada Limited, Thomson Affiliates, Information Access Company and Bell Global Media Publishing Inc. which was settled for \$11 million after 13 years of litigation. That proceeding involved allegations quite similar to those advanced in the action before me. In approving the settlement in that case, Justice Cullity described the involvement of the Representative Plaintiff in the class proceeding:

The Representative Plaintiff, Ms. Robertson, has been actively involved throughout the extended period of the litigation. She has an honours degree in English from the University of Manitoba, and an M.A. from Columbia University in New York. She is the author of works of fiction and non-fiction, she has been a regular contributor to Canadian magazines and newspapers for over 40 years, and she was a founder member of each of the Professional Writers' Association of Canada and the Writers' Union of Canada. Ms. Robertson has been in communication with class members about the litigation since its inception and has obtained funds from

them to defray disbursements. She has clearly been a driving force behind the litigation: *Robertson v. Thomson Canada*¹².

[32] The settlement agreement was recommended by experienced counsel and entered into after serious and considered negotiations between sophisticated parties. The quantum of the class members' claim for voting and distribution purposes, though not identical, was comparable to the settlement in *Robertson v. Thomson Canada*. In approving that settlement, Justice Cullity stated:

Ms. Robertson's best estimate is that there may be 5,000 to 10,000 members in the class and, on that basis, the gross settlement amount of \$11 million does not appear to be unreasonable. It compares very favourably to an amount negotiated among the parties for a much wider class in the U.S. litigation and, given the risks and likely expense attached to a continuation of the proceeding, does not appear to be out of line. On this question I would, in any event, be very reluctant to second guess the recommendations of experienced class counsel, and their well informed client, who have been involved in all stages of the lengthy litigation.¹³

[33] In my view, Ms. Robertson's and Mr. Guindon's description of the litigation risks in this class proceeding were realistic and reasonable. As noted by class counsel in oral argument, issues relating to the existence of any implied license arising from conduct, assessment of damages, and recovery risks all had to be considered. Fundamentally, CPI was in an insolvency proceeding with all its attendant risks and uncertainties. The settlement provided a possible avenue for recovery for class members but at the same time preserved the claims of the class against the other defendants as well as the claims against ProQuest for alleged violations attributable to CPI content. The settlement brought finality to the claims in the action against CPI and removed any uncertainty and the possibility of an adverse determination. Furthermore,

¹² [2009], O.J. No. 2650 at para. 15.

¹³ *Robertson v. Thomson Canada*, [2009] O.J. No. 2650 para. 20.

it was integral to the success of the consolidated plan of compromise that was being proposed in the *CCAA* proceedings and which afforded some possibility of recovery for the class. Given the nature of the *CCAA* Plan, it was not possible to assess the final value of any distribution to the class. As stated in the joint factum filed by counsel for CPI and the Representative Plaintiff, when measured against the litigation risks, the settlement agreement represented a reasonable, pragmatic and realistic compromise of the class claims.

[34] The Representative Plaintiff, Class Counsel and the Monitor were all of the view that the settlement resulted in a fair and reasonable outcome. I agreed with that assessment. The settlement was in the best interests of the class and was also beneficial to the LP Entities and their stakeholders. I therefore granted my approval.

Pepall J.

Released: March 15, 2011

CITATION: Robertson v. ProQuest Information and Learning Company, 2011 ONSC 1647
COURT FILE NO.: 03-CV-252945CP / CV-10-8533-00CL
DATE: 20110315

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

IN THE MATTER OF THE *COMPANIES' CREDITORS*
ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
CANWEST PUBLISHING INC./PUBLICATIONS
CANWEST INC., CANWEST BOOKS INC. AND
CANWEST (CANADA) INC.

- AND -

HEATHER ROBERTSON,

Plaintiff

AND:

PROQUEST INFORMATION AND LEARNING
COMPANY, CEDROM-SNI INC., TORONTO STAR
NEWSPAPERS LTD., ROGERS PUBLISHING
LIMITED and CANWEST PUBLISHING INC.,

Defendants

REASONS FOR DECISION

Pepall J.

Released: March 15, 2011

Tab 20

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES')	<i>Sean F. Dunphy and Ashley John Taylor,</i>
<i>CREDITORS ARRANGEMENT ACT, R.S.C.</i>)	<i>for Air Canada</i>
1985, c. C-36, AS AMENDED)	
)	<i>Peter J. Osborne and Peter H. Griffin,</i>
AND IN THE MATTER OF SECTION 191 OF)	<i>for the Monitor</i>
THE CANADA BUSINESS CORPORATIONS)	
ACT, R.S.C. 1985, c. C-44, AS AMENDED)	<i>Howard Gorman, for the Ad Hoc</i>
)	<i>Unsecured Creditors Committee</i>
AND IN THE MATTER OF A PLAN OF)	
COMPROMISE OR ARRANGEMENT OF)	<i>Aubrey Kauffman, for the Ad Hoc</i>
AIR CANADA AND THOSE SUBSIDIARIES)	<i>Committee of Various Creditors</i>
LISTED ON SCHEDULE "A")	
)	<i>Jay Swartz, for Deutsche Bank</i>
APPLICATION UNDER THE COMPANIES')	
<i>CREDITORS ARRANGEMENT ACT, R.S.C.</i>)	<i>Mark Gelowitz, for Trinity Time</i>
1985, c. C-36, AS AMENDED)	<i>Investments</i>
)	
)	<i>Robert Thornton and Gregory Azeff,</i>
)	<i>for GE Capital Aviation Services Inc.</i>
)	
)	<i>J. Porter, for Cerberus</i>
)	
)	<i>Kevin McElcheran, for CIBC</i>
)	
)	<i>Murray Gold, for CUPE</i>
)	
)	<i>Ian Dick, for AG Canada</i>
)	
)	<i>James Tory, for Air Canada Board</i>
)	
)	<i>Joseph J. Bellissimo, for the Aircraft</i>
)	<i>Lessor/Lender Group</i>
)	
)	<i>Terri Hilborn, for Unionized Retiree</i>
)	<i>Committee</i>
)	
)	<i>William Sasso and Sharon Strosberg,</i>
)	<i>for Mizuho International, PLC</i>
)	
)	<i>Jim Dube, for Deutsche Lufthansa A.G.</i>
)	
)	HEARD: January 16, 2004

FARLEY J.:

[1] These reasons deal with three matters which the court was asked to approve Air Canada (AC) entering into various agreements; simply put they were as follows:

- (1) the Merrill Lynch (ML) indemnity;
- (2) the entering into the amendments to the Trinity Agreement; and
- (3) the Global Restructuring Agreements (GRA).

ML Indemnity

[2] There was no opposition to this. The court was advised that such an indemnity was customarily given and that the terms of this particular one were such as is normally given. I therefore approve AC granting such an indemnity to ML.

Trinity Amendments

[3] As I understood the submissions this morning, Mizuho a member of the Unsecured Creditors Committee (UCC) was the only interested party which spoke out against the Trinity amendments. It continues to be dissatisfied with the process by which Trinity was selected as the equity plan sponsor. I merely point out, once again, that this process was not of the Court's choosing but rather one which AC commenced on notice to the service list and as to which there were no objections before Trinity was selected on November 8, 2003 (together with the "fiduciary out" provision contained in its proposal). Aside from the court approvals envisaged by that process, the court only became involved when it was appreciated that there were some difficulties with the practical implementation of the process.

[4] I further understand that the Ad Hoc Committee of Various Creditors (CVC) withdrew its opposition yesterday along with its cross motion. The UCC (one assumes on some majority basis) supported the Trinity Amendments but indicated that, as a sounding board, it wished to continue sounding that it still had concerns about aspects of corporate governance and management incentives.

[5] I have no doubt, if adjustments in any particular area make sense between the signatories (AC and Trinity) and to the extent that any beneficiaries are involved, that such adjustments will be made for everyone's overall benefit (everyone in the sense of AC including all of its stakeholders including creditors, labour, management, pensioners, etc.) not only for the short term interests but the long term interests of AC emerging from these CCAA proceedings as an ongoing viable enterprise on into the future, well able to serve the public (both Canadian and foreign). A harmonious relationship with trust and respect flowing in all directions amongst the stakeholders will be to everyone's long term advantage. With respect to corporate governance though, I am able to make a more direct observation. A director, no matter who nominates that person, owes duties and obligations to the corporation, not the nominator: see *820099 Ontario Ltd. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), aff'd (1991), 3 B.L.R. (2d) 113 (Div. Ct.).

[6] There was no evidence to show that the Board of AC in exercising its fiduciary duties did not properly consider on a quantitative and qualitative basis the factors (on a pro and con basis)

relating to whether Cerberus had provided a Superior Proposal (as that was defined in section 9 of the Trinity Agreement approved earlier by this Court). Indeed there was no complaint from

Cerberus in this respect. The Board's letter to me of December 22, 2003 carefully reviewed the considerations which the Board (with the assistance of Seabury and ML, together with the general oversight and views of the Monitor) gave in their deliberations with their ultimate decision that the Cerberus December 10, 2003 proposal was not a Superior Proposal with the result that the Board has selected Trinity to be the equity program sponsor in accordance with the Trinity amended deal. I approve AC executing the Trinity amended deal and implementing same, with the recognition and proviso that there may be further amendments/adjustments which may be entered into subject to the guidelines of my discussion above. I note in particular that the UCC helpfully pointed out that section 7.3 still needs to be modified, and that is being worked on. The Air Canada Pilots Association observed that there still needed to be some fine-tuning at para. 22 of its factum noting that: "These matters of the detailed implementation of the Amended Trinity Investment Agreement can all be resolved by good faith negotiations between Air Canada, Trinity and affected stakeholders, with the assistance and support of the Monitor"; I did not have the benefit of any submissions in this regard (para.22) nor was any expected to either be given or taken as the parties all appreciated that this was not to be an exercise in "nitpicking".

[7] At paragraph 71 of its 19th report, the Monitor stated:

71. The Monitor is of the continuing view that the Equity Solicitation Process must be completed as soon as possible. The restructuring process and many other restructuring initiatives have been delayed by approximately two months as a result of the continued uncertainty concerning the selection of the equity plan sponsor. The equity solicitation process must be concluded so that the balance of the restructuring process can be completed before the expiry on April 30, 2004 of the financing commitments from each of Trinity, GECC and DB pursuant to the Standby Agreement. The Monitor recommends that this Honourable Court approve the Company's motion seeking approval of the Amended Trinity Investment Agreement.

[8] I would therefore approve the Trinity amendments so that AC can proceed to enter into and implement the Amended Trinity Investment Agreement. I note that this approval is not intended to determine any rights which third parties may have.

GRA

[9] As with the previous approvals, I take the requirement under the CCAA is that approval of the Court may be given where there is consistency with the purpose and spirit of that legislation, a conclusion by the Court that as a primary consideration, the transaction is fair and reasonable and will be beneficial to the debtor and its stakeholders generally: see *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 at 201 (B.C.C.A.). In *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.), Blair J. at p. 316 adopted the principles in *Royal Bank of Canada v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) as an appropriate guideline for determining when an agreement or transaction should be approved during a CCAA restructuring but prior to the actual plan of reorganization being in place. In *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.), I observed at p. 173 that in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are

compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights. I think that philosophy should be applicable to the circumstances here involving the various stakeholders. As I noted immediately above in *Sammi*, equitable treatment is not necessarily equal treatment.

[10] The Monitor's 19th report at paragraphs 20-21 indicates that:

20. The GRA provides the following benefits for Air Canada:

- The retention of a significant portion of its fleet of core aircraft, spare engines and flight simulators, which are critical to its ongoing operations;
- The restructuring of obligations with respect to 106 of 107 Air Canada and Jazz air operating, parked and undelivered aircraft (effective immediately for 12 GECC-managed aircraft and upon exit from CCAA for the remaining 94 GECC-owned aircraft, except as indicated below), including lease rate reductions on 51 aircraft (of which 3 aircraft have been returned as of the current date), cash flow relief for 29 aircraft, termination of the Applicants' obligations with respect to 20 parked aircraft (effective immediately), the cancellation of 4 future aircraft lease commitments and the restructuring of the overall obligations with respect to 2 aircraft. Obligations with respect to the last remaining aircraft remain unaffected as it is management's view that this lease was already at market;
- Exit financing of approximately US\$585 million (the "Exit Facility") to be provided by GECC upon the Company's emergence from CCAA;
- Aircraft financing up to a maximum of US\$950 million (the "RJ Aircraft Financing") to be provided by GECC and to be used by Air Canada to finance the future purchase of approximately 43 regional jet aircraft; and
- The surrender of any distribution on account of any deficiency claims under the CCAA Plan with respect to GECC-owned aircraft only, without in any way affecting GECC's right to vote on the Plan in respect of any deficiency claim.

21. In return for these restructuring and financing commitments, the GRA provides for the following:

- Payment of all current aircraft rent by Air Canada to GECC, during the interim period until emergence from CCAA proceedings, at contractual lease rates for GECC-owned aircraft and at revised lease rates for GECC-managed aircraft;

- The delivery of notes refinancing existing obligations to GECC in connection with 2 B747-400 cross-collateralized leases (the “B747 Restructuring”) including one note convertible into equity of the restructured Air Canada at GECC’s option;
- The delivery of stock purchase warrants (the “Warrants”) for the purchase of an additional 4% of the common stock of the Company at a strike price equal to the price paid by any equity plan sponsor; and
- The cross-collateralization of all GECC and affiliate obligations (the “Interfacility Collateralization Agreement”) on Air Canada’s emergence from CCAA proceedings for a certain period of time.

The Monitor concluded at paragraph 70:

70. The Monitor notes that, if considered on their own, the lease concessions provided to Air Canada by GECC pursuant to the GRA differ substantially from those being provided by other aircraft lessors. In addition, the Monitor notes that GECC has benefitted from the cross collateralization on 22 aircraft pursuant to the CCAA Credit Facility and Interfacility Collateralization Agreement, particularly as it relates to the settlement of Air Canada’s obligations to GECC under the B747 Restructuring. However, the Monitor also notes that the substantial benefits provided to Air Canada under the GRA including the availability of US \$585 million of exit financing and US\$950 million of regional jet aircraft financing are significant and critical to the Company’s emergence from CCAA proceedings in an expedited manner. In the Monitor’s view the financial benefits provided to Air Canada under the GRA outweigh the costs to the Applicants’ estate arising as a result of the cross collateralization benefit provided to GECC under the CCAA Credit Facility and Interfacility Collateralization Agreement. Accordingly, the Monitor recommends to this Honourable Court that the GRA be approved.

[11] The GRA was opposed by the UCC (again apparently on some majority basis as one of its members, Cara, was indicated as being in favour and I also understand that Lufthansa was also supportive); the UCC’s position was supplemented by separate submissions by another of its members, CIBC. I agree with the position of the UCC that the concern of the court is not with respect to the past elements of the DIP financing by GE and the cross-collateralization of 22 aircraft that agreement provided for. I also note the position of the UCC that it recognizes that the GRA is a package deal which cannot be cherry picked by any stakeholder nor modified by the Court; the UCC accepts that the GRA must be either taken as a package deal or rejected. It suggested that GE, if the court rejects the GRA as advocated by the UCC, will not abandon the field but rather it will stay and negotiate terms which the UCC feels would be more appropriate. That may be true but I would observe that in my view the delay and uncertainty involved would likely be devastating for AC. Would AC be able to meet the April 30, 2004 deadline for the Trinity deal which requires that the GRA be in place? What would the effect be upon the booking public?

[12] I note that the UCC complains that other creditors are not being given equal treatment. However, counsel for another large group of aircraft lessors and financiers indicated that they had no difficulty with the GRA. Indeed, it seems to me that GE is in a somewhat significantly different position than the other creditors given the aforesaid commitment to provide an Exit Facility and an RJ facility. Trinity and Deutsche Bank (DB) with respect to their proposed inflow of \$1 billion in equity would be subordinate to GE; this new money (as opposed to sunk old money of the UCC and as well as that of the other creditors) supports the GRA. I note as well although it is “past history” that GE has compromised a significant portion of its \$2 billion claim for existing commitments down to \$1.4 billion, while at the same time committing to funding of large amounts for future purposes, all at a time when the airline industry generally does not have ready access to such.

[13] With respect to the two 747 LILOs (lease in, lease out), there is the concession that AC will enjoy any upside potential in an after marketing while being shielded from any further downside. GE has also provided AC with some liquidity funding assistance by deferring some of its charges to a latter period post emergence. Further it has been calculated that as to post filing arrears, there will be a true up on emergence and assuming that would be March 31, 2004, it is expected that there would be a wash as between AC and GE, with a slight “advantage” to AC if emergence were later. I pause to note here that emergence sooner rather than later is in my view in everyone’s best interests – and that everyone should focus on that and give every reasonable assistance and cooperation.

[14] With respect to the snapback rights, I note that AC would be able to eliminate same by repaying the LILO notes and the Tranche Loans and AC would be legally permitted to eliminate this concern 180 days post emergence. I recognize that AC would be in a much stronger functional and psychological bargaining position to obtain replacement funding post emergence than it is now able to do while in CCAA protection proceedings. I would assume that such a project would be a financial priority for AC post emergence and that timing should not prevent AC from starting to explore that possibility in the near future (even before emergence). I also note that GE anticipates that the snapback rights would not likely come into play, given, I take it, its analysis of the present and future condition of AC and its experience and expertise in the field. I take it as a side note that GE from this observation by it will not have a quick trigger finger notwithstanding the specific elements in the definition of Events of Default; that of course may only be commercial reality – and that could of course change, but one would think that GE would have to be concerned about its ongoing business reputation and thus have to justify such action. Snapback rights only come into existence upon emergence, not on the entry into the GRA.

[15] I conclude that on balance the GRA is beneficial to AC and its stakeholders; in my view it is fair and reasonable and in the best interests of AC. It will permit AC to get on with the remaining and significant steps its needs to accomplish before it can emerge. The same goes for the Trinity deal. I therefore approve AC’s entering into and implementing the GRA, subject to the same considerations as to completing the documentation and making amendments/adjustments as I discussed above in Trinity Amendments.

[16] Orders accordingly.

J. M. Farley

Released: January 16, 2004

Tab 21

Secured Transactions in Personal Property in Canada, 3rd Ed. § 10:4

Secured Transactions in Personal Property in Canada, 3rd Edition

Richard H. McLaren

Chapter 10. Debtor's Rights

I. Rights Independent of Default

A. Rights in Connection with the Collateral

§ 10:4. Right to Obtain a Discharge on the Registry: ss. 55, 56, 57—The Discharge of Registrations of Security Interests in Collateral other than Consumer Goods: s. 56.

The secured party must furnish a signed financing change statement within ten days after receipt of a written demand “to any person having an interest in the collateral” if the secured party's interest has been perfected by registering a financing statement and either all the obligations under the security agreement have been performed or part of the collateral covered by the agreement is to be released because of a payment or performance of the obligations. If a secured party fails to send a financing statement after a proper demand for one, he becomes liable to the person making the demand for a \$500 penalty under s. 56(4) and, in addition, for any damages resulting from that failure. Prompt discharge is encouraged to enable parties to obtain refinancing as fast as possible. However, the secured party may be protected from the sanctions of s. 56(4) if a reasonable excuse is provided for late delivery. For instance, a large corporation with branch offices may not be able to perform the necessary administrative tasks within the ten-day period.

Subsection 56(4) is also activated where a financing statement was registered, but no security interest was ever acquired.¹ Such a scenario could develop because a financing statement was registered before the execution of a security agreement, as permitted by s. 45, except where the collateral is consumer goods. The debtor or another may then present the financing change statement to the appropriate registry office for registration. Such a situation arose in *Matco Capital Ltd. v. Ramparts Energy Ltd.*,² when the appellants in the case registered a financing statement over the respondent's present and after-acquired personal property prior to the existence of a debtor-creditor relationship. The relationship would have been formed by the retraction of preferred shares resulting in debt. The court found that since the existence of the debt itself was dependent on uncertain future events, there was not enough certainty to support the registration of a financing statement under s. 43(4) of the Alberta Act. Therefore, the master's order to discharge the appellants' registrations under ss. 50(3) and 50(4) was upheld by the trial court.

Subsections 56(2.1), 56(2.2), and 56(2.3) serve to give “the person named in the financing statement as the debtor” the right to change the collateral classification indicated on the financing statement to more precisely reflect the collateral in which the secured party has an interest. The main purpose of s. 56(2.1) is to provide a debtor with a right to require a secured party to limit its registration to the specific collateral in which the secured party actually has a security interest. Subsection 56(2.2) allows a debtor to demand the removal of excessive financing statement collateral classifications. For example if a secured party holds an interest in inventory but also checked off “equipment” box when registering the financing statement. Subsection 56(2.3) permits a debtor to request a secured party who holds an interest in particular assets of a broader class to file a financing change statement properly limiting the scope of the collateral classification.

In the unlikely event that the sanctions of s. 56(4) are not sufficient to gain the secured party's co-operation, the courts are given wide powers in s. 56(5). A court order can be obtained, upon payment into court of any sums in dispute, ordering the partial or complete discharge of the security interest. If the secured party will not or cannot register the appropriate financing change statement, then there is power in s. 56(5)(b)(i) to order the registrar to “amend the recorded information to indicate that

the registration of the financing statement has been discharged or partially discharged". Section 56(5)(b)(ii) provides a parallel power regarding information recorded in the land registry. None of the other Acts have this provision.

The powers under s. 56(5) have been held to be discretionary. In *Toronto Dominion Bank v. Peelco Manufacturing Ltd.*,³ an application was made under the equivalent s. 55(5) of the prior Manitoba Act to strike out the registration of a financing statement registered by an unpaid vendor, following a sale by tender by a receiver on behalf of a secured party. The power of the court under the section was held to be discretionary. No order was granted because:

- there was no risk to the registering party;
- the receiver had conducted the sale by tender in accordance with the Act;
- there was no registration under the Act at the time of the tender, thereby creating a priority dispute; and finally,
- the issue of right to possession as between the secured party and its receiver and the unpaid vendor was the subject of pending litigation in Ontario, where the court had ordered the posting of a bond in order to obtain the release of the collateral secured so that it might be sold by tender.

An order was granted releasing or discharging from any claim for security the collateral acquired by the innocent purchaser for value through the tender process.

In *Rutter Inc. v. BMO Capital Corp.*,⁴ the plaintiff debtor requested a discharge of the PPS A registration. There was a dispute as to the amount of money that the plaintiff owed the defendant. The defendant creditor refused to discharge the registration without full payment including the disputed sum of money. Pursuant to s. 56(5), the court held that the undisputed amount of money should be paid to the defendants and the disputed amount of money should be paid into the court pending further action by the plaintiff debtor. If the debtor did not commence an action within 30 days, the money in court is to be paid immediately to the creditor.

The judicial power to discharge security agreements can be limited by competing statutes and court orders. In *Ontario Securities Commission v. Paramount Equity Financial Corporation*,⁵ the applicant Provincial Securities Regulator sought a court order adjourning a petition filed by the application respondent land developer and for the land developer to comply with a receivership order. The petition sought an order pursuant to ss. 50(3)(a) and 50(8)(b) of the British Columbia PPSA to discharge certain security agreements between the land developer and a secured creditor. The secured creditor was the subject of a receivership order issued by the Ontario Superior Court of Justice (the "Ontario Court"). The receivership was registered in the British Columbia Supreme Court pursuant to s. 3 of the British Columbia *Judgement and Decrees Act*⁶ (the "Enforcement Act"). The receivership order prevented any proceedings from being commenced or continued against the secured creditor and the receiver or affecting the secured creditor's property without the written consent of the receiver or leave of the Ontario Court. The court found that the receivership order was given effect in British Columbia pursuant to s. 4(a) of the Enforcement Act and therefore, prevented the land developer from continuing the petition. The court also found that s. 6(3)(a) of the Enforcement Act precluded the court from granting discretionary relief under ss. 50(3) and 50(8)(b) of the PPSA. The court refused to discharge the security agreements and allowed the application. The court ordered the land developer to comply with the receivership order and adjourned the petition.

During the continuance of a financing arrangement, a secured party may assign its interest. If the assignor secured party has already filed a financing change statement pursuant to s. 47, the assignor will no longer be the secured party of record to which s. 56 will apply. The provisions of s. 47⁷ are permissive and not mandatory with the result that the registry may not be up to date. A secured party who has assigned its interest would normally want to take advantage of those provisions as liability for the duty to supply information concerning the secured transaction under s. 18 will continue until there has been a financing change statement registered indicating the assignment.⁸ Section 56(6)⁹ ensures that if such a secured party receives notice under s. 56(1)(a), the person requiring discharge is entitled to be informed of the name and address of the latest successor known to

the original secured party within 15 days of receipt of that notice. If this duty is not complied with, the original secured party will be required to pay the person making the demand \$500 as well as any resulting damages. This sanction is analogous to that found in s. 18(6). The fixed dollar amount is intended to be a negative motivator. It also serves to avoid proof of damages which might be either unprovable or negligible in amount.

The Saskatchewan and Manitoba Acts differ from the other Acts in that the compulsory discharge of notice provision of s. 50(5) does not apply to the registration of agreements registered under the former *Corporation Securities Registration Act*¹⁰ (“CSRA”) in Saskatchewan or the *Corporations Act*¹¹ or any statute enacted before the *Corporations Act* providing for registration of a security interest in Manitoba. The other Acts contain an exemption with respect to the registration of trust indentures¹² similar to that of Saskatchewan and Manitoba, but not the corporate legislation exemption.

The exception in Saskatchewan highlights an original feature of the Saskatchewan PPSA. Under the CSRA, registrations would survive in perpetuity. Section 74(2) of the Saskatchewan Act indicates that all unexpired filings or registrations under the CSRA are deemed to be registered and perfected by the Act. Section 44(1) provides that a registration under the Act is effective for the length of time indicated on the financing statement. In addition, pursuant to s. 4(2)(c) of the Regulations, a registration may last for an infinite number of years at the option of the registering party. Hence, there are two situations in which a filing will be perpetual: under the Act where a document was originally filed in the securities registry under the CSRA, or, where it is indicated on the financing statement that registration is to last indefinitely. A security interest taken under a trust indenture would be a typical situation where an unlimited registration would be desired. Thus, where a financing statement was registered in perpetuity because it was originally filed under the provisions of the CSRA or because it concerns a trust indenture filed under the Act, the financing statement or financing change statement cannot be removed pursuant to the compulsory discharge provision in s. 50(5). Rather, the person making the demand must apply for an order directing the statement to be removed from the registry under s. 50(9).

The exception in Manitoba has similar form and purpose to the Saskatchewan exception. Under the *Corporations Act* and former *Companies Act*, registrations would survive in perpetuity. Section 74(2) of the Manitoba Act indicates that all unexpired filings or registrations under the *Corporations Act* and the former *Companies Act* are deemed to be registered and perfected by the Act. Similar to Saskatchewan, s. 44(1) of the Manitoba Act provides that a registration under the Act is effective for the length of time indicated on the financing statement and pursuant to s. 11(1)(b)(ii) of the Regulations a registration may last for an infinite number of years. Therefore, for the same reasons as in Saskatchewan the financing statement or financing change statement cannot be discharged pursuant to the compulsory discharge provision in s. 50(5). Discharge must be completed by applying for an order under s. 50(9).

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Footnotes

- 1 In *Sharma v. Heffernan*, 2020 CarswellOnt 14345, 13 P.P.S.A.C. (4th) 527 (Ont. S.C.J.) financing statements were registered against government employees. The court found that the statements were registered out of spite after the Canada Revenue Agency denied the respondent an HST refund. The financing statements were registered without acquiring security interests in the property to which they related. The court ordered penalties of \$500 for each financing statement not discharged within 10 days of the demand pursuant to s. 56(4).
- 2 *Matco Capital Ltd. v. Ramparts Energy Ltd.*, 2008 CarswellAlta 908, 13 P.P.S.A.C. (3d) 28 (Alta. Q.B.).
- 3 *Toronto Dominion Bank v. Peelco Manufacturing Ltd.*, 1989 CarswellMan 27, 9 P.P.S.A.C. 118 (Man. Q.B.)
- 4 *Rutter Inc. v. BMO Capital Corp.*, 2005 CarswellOnt 1641, 7 P.P.S.A.C. (3d) 279 (Ont. S.C.J.), affirmed 2005 CarswellOnt 4955 (Ont. C.A.).

- 5 Ontario Securities Commission v. Paramount Equity Financial Corporation, 2020 CarswellBC 1064, 12 P.P.S.A.C. (4th) 237 (B.C. S.C.).
- 6 S.B.C. 2003, c. 29.
- 7 See s. 45(1) Alta. Act; s. 45(1) B.C.; s. 45(1) Man. Act; s. 45(1) N.B. Act; s. 46(1) N.S. Act; s. 46(1) N.L. Act; s. 45(1) P.E.I. Act; s. 45(1) Sask. Act; s. 44 Yuk. Act; s. 45(1) N.W.T. Act; s. 45(1) Nun. Act.
- 8 Section 55(2) of the prior Act, which required a secured party to register all assignments before discharge, does not have a counter-part in the revised Act. Its purpose, to ensure that the complete chain of events was recorded in the registration system, is now unnecessary because of the different method of linking registrations. Furthermore, the absence of the section simplifies the discharge process.
- 9 See s. 50(3)(c), 50(3)(d) and 50(4)(a)(iii) Alta. Act; s. 50(3)(c), 50(3)(d) and 50(4)(c) B.C. Act; s. 50(3)(c), 50(3)(d) and 50(4)(c) Man. Act; s. 50(3)(c), 50(3)(d) and 50(4)(c) N.B. Act; ss. 51(3)(c), 51(3)(d) and 51(4)(c) N.S. Act; ss. 51(3)(c), 51(3)(d) and 51(4)(c) N.L. Act; s. 50(3)(c), 50(3)(d) and 50(4)(c) P.E.I. Act; s. 50(3)(c), 50(3)(d) and 50(4)(c)(i) Sask. Act; s. 50(4)(c) Yuk. Act; s. 50(3)(c), 50(3)(d) and 50(4)(a)(iii) N.W.T. Act; s. 50(3)(c), 50(3)(d) and 50(4)(a)(iii) Nun. Act.
- 10 R.S.S. 1978, c. 39 [repealed S.S. 1979–80, c. 18].
- 11 R.S.M. 1987, c. C225.
- 12 Section 2 of the Sask. Act and s. 1 of the Man. Act define “trust indentures”.

Secured Transactions in Personal Property in Canada, 3rd Ed. § 16:33

Secured Transactions in Personal Property in Canada, 3rd Edition

Richard H. McLaren

Chapter 16. Registration — Ontario

IV. Mechanics of Registration

B. Completion of Forms

3. Form 2C

§ 16:33. Mandatory Discharge of a Registration Relating to Consumer Goods

Section 55 permits the registration of a complete discharge or partial discharge by the registration of a financing change statement. A consumer debtor who has repaid a loan could be detrimentally affected by the absence of a discharge because the registration may act as a clog on the consumer's credit record. This was a significant problem under the prior Act because consumer debtors were unaware of their right to demand a financing change statement from the secured party for the purpose of discharging the registration. Section 57(1) of the revised Act is intended to ensure that a registration which includes consumer goods as collateral is discharged. It requires a secured party to register the financing change statement discharging the registration (a Form 2C or 3C) or the certificate of discharge in the land registry office discharging a notice of security interest under s. 54 within 30 days after all the obligations under the security agreement that created a security interest in consumer goods has been performed or forgiven. The duty to register a discharge applies to all such security agreements where all the obligations have been performed or forgiven after proclamation of the Act (October 10, 1989) even though the security agreement was made under the prior Act.¹

The period of discharge required by s. 57 has been extended on three occasions as a response to situations in which the registry was temporarily shut down, twice because of strikes by the Ontario Public Service Employees Union ("OPSEU") in 1996 and 2002, and once because of the power blackout in August 2003. From February 26 to April 3, 1996, from March 13 to May 8, 2002 and from August 14 to August 24, 2003, respectively, the registry was shut down and unavailable to effect discharges under s. 57. Section 57(1.1)² dealt with the situation where the 30-day period for discharge arose during the 1996 shutdown by extending the period for discharge from April 4 to April 12, 1996, four business days after the registry became operational again. An Ontario Regulation³ deals with the situation where the 30-day period for discharge arose during the 2002 and 2003 shutdowns. Where the 30-day period expired during the 2002 shutdown, the period for discharge was extended from May 9 to May 23, 2002. May 9, 2002 became the "reinstatement date" or the first day the computer registry was operational for registering and searching when the registrar published a notice to that effect in the *Ontario Gazette* 135:21 (May 25, 2002, p. 624). Due to an intervening statutory holiday on May 20, 2002 and a considerable backlog in registration processing, the extended period for re-registration ran from May 9 to May 23, 2002. Where the 30-day period expired during the 2003 shutdown, the period for discharge was extended from August 25 to September 4, 2003. If the discharge is effected during the specified period, this fulfils the secured party's duty under s. 57.

If a party has undertaken to discharge a registration, the party cannot maintain the priority status of the original registration if it fails to discharge the registration. In 1035005 *Ontario Inc. v. Lakewood Trailer Estates (1983) Ltd.*,⁴ the bank failed to discharge a registration of its security agreement with the debtor company after it had undertaken to do so. Instead, the bank entered into a further, unrelated loan arrangement with the debtor company and unilaterally decided to renew the registration of the original agreement yearly as part of the new lending arrangement. When the company became insolvent, the bank claimed priority over subsequent mortgagees due to its yearly renewals of its original registration. However, the court held that since

no security agreement was signed or registered regarding the new lending arrangement, the yearly renewals of the original registration did not relate to the new arrangement. The bank had not maintained its priority status. Allowing the bank in this case to have priority over subsequent secured creditors would render useless the reliability of undertakings such as are often used by honourable parties in land and personalty transactions. If creditors felt that they could not rely on such undertakings, commercial transactions would become more complicated and expensive than necessary.

A failure to comply with this obligation can result in a secured party being liable for a statutory fine of \$500 which is payable to a debtor who submits a written notice to the secured party requiring payment. This amount and any damages suffered as a result of the failure to comply are recoverable in any court of competent jurisdiction. Registrants should establish procedures to ensure the prompt discharge of consumer goods registrations to avoid payment of the statutory penalty.

In addition to the mandatory discharge provision in s. 57 of the Act, s. 56(1) gives “any person having an interest in the collateral covered by the security agreement” the right to demand delivery of a financing change statement (a Form 2C or 3C). The secured party need only comply with the demand if either all the obligations under the security agreement have been performed, or there has been agreement to release part of the collateral covered by the security agreement. The court will encourage a prompt discharge of the security agreement to enable parties to obtain refinancing even if there is a dispute over the parties' obligations. For example, in *Rutter Inc. v. BMO Capital Corp.*,⁵ the plaintiff debtor requested a discharge of the PPSA registration. There was a dispute as to the amount of money that the plaintiff owed the defendant. The defendant creditor refused to discharge the registration without full payment including the disputed sum of money. Pursuant to s. 56(5), the court held that the undisputed amount of money should be paid to the defendant and that the security agreement should be discharged. The disputed amount of money should be paid into the court pending further action by the plaintiff debtor. Section 57(3) expressly preserves the rights of a consumer debtor or other person having an interest in the collateral to make a s. 56 demand. Since there is no minimum time period for submitting a demand for a discharge, it could be made immediately after all the obligations under the security agreement have been performed.

The secured party must have “a reasonable excuse” or comply with a valid demand within the ten-day period after receipt of a demand specified in s. 56(4). A failure to comply can result in a secured party being liable to a statutory fine of \$500 which is payable to the person making the demand. This amount and any damages resulting from the failure to comply are recoverable in any court of competent jurisdiction.

In *Myers v. Blackman*,⁶ the applicant creditors applied for an order under s. 56(5) directing the registrar to discharge a financing statement. The respondent debtors had inappropriately registered a financing statement under the Act asserting a security interest in the applicants' personal property. The applicants had then sent the respondents a demand under s. 56(2) to register a financing change statement discharging the financing statement within ten days. As the registration was without colour of right, the court made an order under s. 56(5) to have the PPSA registration against the applicants discharged. In finding that the respondents did not have a valid security interest and had also failed to respond to the applicants' demand within ten days, the court ordered the respondents to pay \$500 pursuant to ss. 56(2) and 56(4).

The Ontario Superior Court of Justice dealt with a similar set of facts in *Sekulovski v. Georgiou*.⁷ In this case the applicant applied for an order that the respondent's PPSA registrations against his father's estate and the applicant be discharged. The court found that the respondent had no security agreement or security interest in the personal property of the estate or the applicant. Pursuant to ss. 56(2) and 56(4) of the PPSA the court ordered the defendant to pay the required \$500 statutory damage amount, along with \$10,000 in punitive damages, as the respondent had refused to discharge the statement within ten days of receiving the applicant's demand to do so.

- 1 Section 76(1)(b) makes the Act applicable to every security agreement made on or after April 1, 1976 if the security agreement was one to which the prior Act applied. The mandatory discharge provision does not appear to apply retrospectively to agreements where all the obligations were performed or forgiven before October 10, 1989.
- 2 Section 57(1.1) was added to the Ont. Act by the *Personal Property Security Amendment Act, 1996*, S.O. 1996, c. 5, s. 4(1).
- 3 *Inability to Operate Registration System*, O. Reg. 365/03 revokes and replaces its predecessor, *Inability to Operate Registration System*, O. Reg. 150/02 and follows the approach that was taken in 2002, when the Ontario PPSA registration system was closed as a result of the strike by OPSEU.
- 4 1035005 Ontario Inc. v. Lakewood Trailer Estates (1983) Ltd., 1995 CarswellOnt 1109, 10 P.P.S.A.C. (2d) 37 (Ont. Gen. Div.).
- 5 Rutter Inc. v. BMO Capital Corp., 2005 CarswellOnt 1641, 7 P.P.S.A.C. (3d) 279 (Ont. S.C.J.), affirmed 2005 CarswellOnt 4955 (Ont. C.A.).
- 6 Myers v. Blackman, 2014 CarswellOnt 12481, 2 P.P.S.A.C. (4th) 318 (Ont. S.C.J.).
- 7 Sekulovski v. Georgiou (2022), 2022 ONSC 1819, 2022 CarswellOnt 3770, 76 E.T.R. (4th) 117, 15 P.P.S.A.C. (4th) 57 (Ont. S.C.J.).

Tab 22

CITATION: Myers v. Blackman, 2014 ONSC 5226
COURT FILE NO.: CV-14-511026
DATE: 20140911

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michael S. Myers and Papazian Heisey Myers, Applicants

AND:

Gail Marie Blackman, Larry Curtis Blackman and 8750432 Canada Inc.,
Respondents

BEFORE: Mr. Justice Graeme Mew

COUNSEL: *James S. Quigley and Michael Hackl*, for the applicants

Gail Blackman, in person

HEARD: 8 September 2014 at Toronto

ENDORSEMENT

[1] The applicants claim that on 11 June 2014 the respondents, without any legal right to do so, registered a financing statement under the *Personal Property Security Act* asserting a security interest in the applicants' personal property. They now move for an order under section 56(5) of the PPSA directing the registrar to discharge the financing statement, seeking the sum of \$500 as provided for by section 56(4) of the PPSA as well as amounts for damages for injurious falsehood and punitive damages, and costs on a full indemnity basis.

[2] The corporate respondent claims that it is owed \$2,755,000 by the applicants as a result of the non-payment by the applicants of an invoice in that amount rendered for "Threats and Attempted Intimidation", "Unsolicited Correspondence" and "Unauthorized Use of Name".

[3] Although the respondents have not produced any evidence of the existence of security agreement between the corporate respondent and either of the applicants, they rely on equity as the source of the corporate respondent's authority to encumber the applicants' property with a financing statement.

History

[4] The applicant law firm ("PHM") and Mr. Myers, one of its senior partners, were retained by National Bank of Canada to recover from the respondents Gail Blackman and Larry

Blackman the unpaid balance of a line of credit provided by the Bank to the individual respondents.

[5] A demand letter was sent by the applicants to the individual respondents on 24 October 2013. The letter advised that the PHM were the solicitors for the Bank. The amount demanded was \$21,076.50, upon which interest continued to accrue.

[6] Gail Blackman responded on 30 October 2014. Her letter is reproduced in full:

THIS IS A PRIVATE COMMUNICATION BETWEEN THE PARTIES
NOTICE TO AGENT IS NOTICE TO PRINCIPAL- NOTICE TO PRINCIPAL IS NOTICE TO AGENT
Applicable to all successors and assigns
Silence is acquiescence/Agreement/Dishonour

COUNTER OFFER

October 30, 2013

[Address]

Dear Mr Myers,

I hope you are having a wonderful day. In follow up to your letter to Gail Blackman dated October 24,2013, I find this a serious issue and would like to resolve it but before I am able to engage in any kind of business with you, I would require verification of the following from you;

1. Proof of standing, and/or
2. A lawful contract between yourself and Gail Blackman, and/or
3. A contract between you and the bank to deal with this specific matter, and/or
4. A notarized copy of your power of attorney from the bank to verify your standing.

Your failure to provide the requested verification of your claim by registered post within five (5) business days constitutes agreement of the following terms;

1. You are a third party interloper
2. You have no legal standing
3. You have no first hand knowledge of this matter
4. Your claim is fraudulent
5. Any damages I may suffer, you will be held culpable, including any negative marks made to credit reference agencies, of which you will, at your own cost have removed.

6. The apparent account in question is settled and closed, that you will no longer pursue this matter any further

7. You agree to pay for my time and effort in this matter.

Further communication from you, either by phone or mail or registered mail will confirm that you are personally now assuming full commercial LIABILITY for the unlawful and fraudulent claims of the National Bank, OR, you are confirming that you are an equal respondent on the commercial lien and affidavit of obligation that may be created should the harassment continue.

Should you provide the requested evidence that I owe your organization or your client any outstanding amount and that you can provide proof that they have assigned your agency, I will be happy to pay any verified claim in full.

Please provide the requested verification, in writing, by registered post within 5 business days of the date of this letter. No response from you will be deemed as your acceptance of the terms of this NOTICE.

Sincerely,

Gail Blackman
All Rights Reserved

No assured value. No liability. Errors & Omissions Excepted
WITHOUT PREJUDICE. WITHOUT RECOURSE. WITHOUT ASSUMPSIT

[7] PHM responded on 6 November, rejecting Ms. Blackman's unilateral imposition of obligations and advising that a court claim would be forthcoming.

[8] There were further letters from Ms. Blackman. It is unnecessary for their contents to be recited in full in this endorsement. Suffice it to note that in a letter dated 28 November 2013, Ms. Blackman described herself as, *inter alia*, the "Secured Party Creditor".

[9] On 9 December 2013 PHM commenced a Small Claims Court proceeding against Mr. and Ms. Blackman. The Plaintiff's Claim was served on 10 January 2014.

[10] Ms. Blackman wrote to Mr. Myers on 15 January 2014. That letter included the same notices at the top and bottom of the letter as the 30 October correspondence. The body of the letter stated:

Who are you? As you have failed to provide any proof of standing, as there is no lawful contract between you and GAIL BLACKMAN, and/or GAIL MARIE BLACKMAN and/or LARRY BLACKMAN and/or LARRY CURTIS BLACKMAN. Any debts owed by GAIL BLACKMAN, and/or GAIL MARIE BLACKMAN and/or LARRY BLACKMAN and/or LARRY CURTIS BLACKMAN are paid.

As you have failed to provide any proof of standing, nothing is owed to you. Continued communication attempts, without proof of standing, are attempts to defraud, deceive, manipulate and/or waste valuable time and will result in the attached fee schedule, in effective immediately.

CEASE and DESIST all harassment, communication and communication attempts with GAIL BLACKMAN, and/or GAIL MARIE BLACKMAN and/or LARRY BLACKMAN and/or LARRY CURTIS BLACKMAN immediately.

By: Gail Blackman

[11] The attached fee schedule is reproduced in Appendix "A" to this endorsement.

[12] Neither of the individual respondents defended the Small Claims Court action. They did, however, write to the clerk of the court stating that they refused to be bound by the jurisdiction of the court. They subsequently produced a copy of the Plaintiff's Claim document over which the words "NEW ORIGINAL" had been written in red pen and stamped "VOID" over the signatures of the plaintiff's representative and the clerk who issued the claim.

[13] Mr. and Ms. Blackman were noted in default on 19 February 2014 and a default judgment for \$20,536.99 was obtained the same day. PHM sent a copy of the default judgment to the individual respondents on 27 March 2014.

[14] This appears to have generated a response on 4 April 2014, the tone and content of which are consistent with the earlier letters from Ms. Blackman, save that the letter purports to be from the corporate respondent. It make reference is made to a "public notice" which had supposedly advised that the unauthorised use of Ms. Blackman's name would incur a penalty of \$250,000 per day. The same "public notice" also made reference to the "vessel" known as Gail Marie Blackman now being the lawful property of a private trust, that trust apparently being the corporate respondent.

[15] The 4 April 2014 letter encloses an invoice from the corporate respondent for \$15,000,000.

[16] A corporate records search discloses that the corporate respondent was incorporated on 8 January 2014. Ms. Blackman is the only named director.

[17] After further, unproductive, correspondence, which included another fee schedule, similar to the one attached to the "public notice" of 4 February 2014, but this time purporting to be from the corporate respondent (and adding a charge for "Fraud" of \$2,000,000 per instance), a letter from the corporate respondent was sent to the applicants on 10 June 2014, enclosing an invoice for \$2,755,000 and a copy of a PPSA Registration verification obtained by the corporate respondent against the applicants.

[18] On 1 August 2014 Ms. Blackman attempted to commence a private criminal prosecution against Mr. Myers alleging fraud, trespass and breach of trust in relation to his "alleged claim

and default judgment”. The information was declined by a Justice of the Peace in Oshawa with an indication that the matter should be dealt with in Toronto.

[19] On 13 August 2014 the applicants sent the respondents a demand under section 56(2) of the PPSA to register a financing change statement discharging the financing statement within 10 days. The applicants' letter points out that in the absence of a signed security agreement between either of the applicants and any of the respondents, there is no valid security interest and, hence, no right to register a financing statement.

[20] By letter dated 26 August 2014, written in the name of the corporate respondent, Mr. Myers was informed that the PPSA registration against him personally would only be withdrawn upon payment of \$10,255,000. While the respondents apparently attempted to amend their financing statement to remove PHM, the document was filed after the expiry of the 10 day window prescribed by the PPSA.

The PPSA Registration Should Be Discharged

[21] It is clear on the facts that the PPSA registration against the applicants was filed without colour of right and should be discharged forthwith.

Other Remedies

[22] However, the applicants seek more. They say that the respondents are “Organized Pseudolegal Commercial Argument” (or “OPCA”) litigants, as described by Rooke A.C.J.C.Q.B.A. in *Meads v Meads*, 2012 ABQB 571 (CanLII).

[23] Specifically, they assert that the registration of a bogus financing statement against them, the continued abuse of the PPSA registration system by maintaining a false and voidable registration and the continuation of a harassing and abusive campaign by seeking a “ridiculous” amount of money from Mr. Myers in return for a discharge merit awards of damages and costs against all defendants.

[24] Thus they request, in addition to the discharge order:

- a. The sum of \$500 as provided by section 56(4) of the PPSA;
- b. An award of punitive damages and damages for injurious falsehood of \$75,000 in favour of PHM;
- c. An award of punitive damages and damages for injurious falsehood of \$25,000 in favour of Mr. Myers;
- d. That the individual respondents should be held liable for the actions of the corporate respondent; and
- e. Costs of the application on a full indemnity basis.

[25] Whether or not the respondents are OPCA litigants (Ms. Blackman says they are not and claims to have been unfamiliar with the term), a number of the characteristics of such litigants, as described by Rooke A.C.J.C.Q.B.A. in *Meads*, are present in this case.

[26] An often employed tactic of OPCA litigants is said to be the use of “foisted” obligations in various forms – with the recipient being given a limited amount of time to respond and disagree, failing which they are held to have agreed to the terms of a unilateral agreement.

[27] The fee schedules sent to the applicants are typical of foisted agreements and are wholly invalid and devoid of merit (see *Meads* at para 470).

Statutory Damages under Section 56 (4) of the PPSA

[28] The absence of any legitimate basis to assert a PPSA registration merits a statutory award under section 56, the relevant subsections of which provide:

(2) Where a financing statement or notice of security interest is registered under this Act and the person named in the financing statement or notice as the secured party has not acquired a security interest in the property to which the financing statement or notice relates, any person having an interest in the property may deliver a written notice to the person named as the secured party demanding registration of a financing change statement referred to in section 55 or a certificate of discharge referred to in subsection 54 (4), or both, and the person named as the secured party shall register the financing change statement or the certificate of discharge, or both, as the case may be.

(4) Where the secured party, without reasonable excuse, fails to register the financing change statement, or certificate of discharge or partial discharge, or all of them, as the case may be, required under subsection (1), (2), (2.1), (2.2) or (2.3) within 10 days after receiving a demand for it, the secured party shall pay \$500 to the person making the demand and any damages resulting from the failure; the sum and damages are recoverable in any court of competent jurisdiction.

[29] Given the finding that none of the respondents have a security interest and the respondents having failed within 10 days to respond to the applicants’ demands that an effective financing change statement be filed, subsection (4) is engaged and the amount of \$500 is payable by way of damages.

Punitive Damages

[30] In *Meads*, the court said that punitive damages are warranted when a person files a spurious personal property claim on the basis of a foisted unilateral agreement (*Meads* at para 525). In *MBNA Canada Bank v Luciani*, 2011 ONSC 6347, D.M. Brown J. found that the conduct of the respondent in that case in registering a false financing statement constituted an

abuse of the PPSA registration system and that the respondent's attempted "shake down" of MBNA Canada Bank by demanding a line of credit in return for a discharge amounted to "reprehensible conduct" (see *MBNA Bank* at paras 14-17).

[31] In *Whiten v Pilot Insurance Co.*, [2002] 1 S.C.R. 595, the Supreme Court listed a number of criteria which should inform a determination of whether punitive damages are appropriate in a given case. Starting with the principle that punitive damages are very much the exception than the rule, the conduct of a party against whom an order for punitive damages is made must not only depart to a marked degree from ordinary standards of decent behaviour, but the circumstances must be such that, absent an award of punitive damages, the misconduct would go otherwise unpunished or other penalties would be inadequate to achieve the objectives of retribution, deterrence and denunciation.

[32] The applicants assert that punitive damages are both deserved and necessary in this case. They submit that the only reason that Mr. Justice Brown did not award punitive damages in the *MBNA Bank* case is that they were not requested.

[33] In my view any award of punitive damages in this case will not, as a practical matter, achieve the objectives canvassed in the *Whiten* case. In so concluding I should not be taken as condoning any aspect of the respondents' actions. Their conduct is highly reprehensible. As will be seen, in addition to the statutory damage award of \$500, there will be a significant award of costs made in this case. While the object of costs is compensatory, not punitive, the willingness of courts to make substantial costs awards may deter some parties who might otherwise be tempted to emulate the conduct of the respondents in the present case.

Damages for Injurious Falsehood

[34] I would not award damages for injurious falsehood either. While the financing statement filed by the corporate respondent was false and actuated by malice, there is no evidence of actual injury. Although it may be sufficient in some cases to prove that the words on which a defendant's actions were founded were calculated to cause pecuniary damage, it seems to me that the respondents' actions in this case were part of a broad "shake down" attempt, rather than calculated to induce persons not to deal with the applicants (see generally *Lysko v Braley* (2006), 79 O.R. (3d) 721 (C.A.) at 133).

Costs

[35] In the *MBNA Canada Bank* case, Mr. Justice Brown awarded full indemnity costs against the respondent for filing a false PPSA registration and then attempting to "shake down" the bank for money. The conduct of the corporate respondent and Ms. Blackman in the present case is no less reprehensible. However I would limit costs to the substantial indemnity basis claimed in the notice of application (the claim for full indemnity costs not having been advanced until the factum and in oral argument).

[36] The applicants submitted a bill of costs for \$25,462.11 on a full indemnity basis. I find the hours spent and the rates charged reasonable in all of the circumstances. I fix costs on a substantial indemnity scale at \$22,500 inclusive of disbursements and HST.

Respondents' Remedies

[37] If, as submitted by Ms. Blackman, she and Mr. Blackman were not indebted to the National Bank, then it was her right to defend the Small Claims Court action. They chose not to do that and have not, to date, sought to set aside the default judgment that National Bank obtained against them.

[38] And if Ms. Blackman truly believes that the defendants are indebted to her, then her remedy is to commence an action against them in a court of competent jurisdiction.

Personal Liability of Individual Defendants

[39] Where a corporation is used as a shield for fraudulent or improper conduct, it is appropriate to hold the responsible individuals personally accountable: *642947 Ontario Ltd. v Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at 68. In the present case, the corporate respondent appears to have been incorporated principally, if not exclusively, for the purpose of shielding Ms. Blackman, its principal and directing mind, from the consequences of her dealings with and concerning the applicants and their client.

[40] As early as 28 November 2013, Ms. Blackman was describing herself as a "Secured Party Creditor". She should not be permitted to shield behind a corporate veil to avoid the consequences of her subsequent improper use of the PPSA scheme.

[41] Ms. Blackman should therefore be held severally and jointly liable for the obligations to pay damages and costs arising from this endorsement. There is, however, no evidence to attribute similar culpability to Mr. Blackman and I therefore make no order against him personally.

[42] Given the nature of this matter, the need for the respondents' approval of a draft judgement on this application is dispensed with. Counsel may provide me (*via* my judicial assistant) with a draft judgment which, if satisfactory, I will sign and return to the applicants for entry and issuance.

Mew J

Date: 11 September 2014

Correction made:

22 September 2014:

In paragraph 21 the words “**was filed**” were inserted.

APPENDIX "A"

**ALL RIGHTS RESERVED
FOR AND ON THE PUBLIC RECORD
FEE SCHEDULE**

SEC	CHARGE	FEE
1	Base fee	\$5,000.00 a day or any part thereof
2	Responding to Unsolicited commercial mail	\$1,000.00 per page
3	Theft of my property	\$500,000.00 per item
4	Threats and/or attempted intimidation	\$1,000,000.00 per instance
5	Violence against my person	\$5,000,000.00 per person involved
6	Forced Confinement	\$10,000.00 per hour or any part thereof detained
7	Unauthorized use of my NAME on any form	\$1,000,000.00 per use
8	Attend any invitation without my written and signed consent	\$5,000.00 per hour and any part thereof
9	A non refundable deposit on a full disclosure tender, prior to my considering any contract offers without obligation and/or guarantee of acceptance	\$100,000.00
10	Any and all costs I incur or deem appropriate as a result of any billable infraction and/or infractions	Unlimited at my sole discretion

- All persons are jointly and individually accountable in their capacity as an agent and/or trustee and/or personally, civilly, commercially, criminally liable for their actions and/or participation.
- Agencies and/or corporations and/or government bodies shall jointly and individually be held accountable and liable and charged at an identical rate for any and all infractions committed by their agents and/or trustees and/or those acting on their behalf
- My fee for appearing in court and/or performing a role as a Government Agent is \$50,000.00 per hour. I do not extend credit. I require payment to be made prior to any and all court hearings via certified check made payable to my name.
- All bills are due upon receipt
- This fee schedule is subject to change without notice

Tab 23

CITATION: Sekulovski v. Georgiou, 2022 ONSC 1819
COURT FILE NO.: 05-009/2020
DATE: 20220323

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
STOJA SEKULOVSKI	)	<i>Benjamin Arkin</i> for the Applicant
	)	
	)	
	)	
	)	
Applicant	)	
	)	<i>Angela Casey and Adam Giancola</i> for the
– and –	)	Respondent Melanie Georgiou
	)	
MELANIE GEORGIOU, MICHAEL	)	
SEKULOVSKI and THE ESTATE	)	
TRUSTEE OF THE ESTATE OF JIM	)	<i>Michael Sekulovski</i> , not represented by a
SEKULOVSKI, deceased	)	lawyer
	)	
	)	
Respondents	)	
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	)	HEARD: February 18, 2022
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CAVANAGH J.

REASONS FOR JUDGMENT

Introduction

[1] In this application, the applicant, Stoja Sekulovski (“Stoja”), applies for relief in relation to the estate of her late husband Jim Sekulovski (“Jim”).

[2] Jim died without a will on January 7, 2019. He is survived by his wife, Stoja, his adult son, Michael Sekulovski (“Michael”), and his adult daughter, Melanie Georgiou (“Melanie”). Melanie is the biological daughter of Stoja and Jim. Michael is Jim’s son from a previous marriage.

[3] Stoja seeks (i) an order for dependants’ support under the *Succession Law Reform Act*, RSO 1990, c. S. 26 (the “*SLRA*”); (ii) an order requiring the respondent, Michael, to account for and pay to the estate the amount of \$251,537.50 representing Jim’s interest in the estate of his late mother, Maslina Sekulovski, that Michael asserts he received as a gift; and (iii) an order that registrations made by Michael under the *Personal Property Security Act*, RSO 1990, c. P.10 (the “*PPSA*”) against the estate and against Stoja be discharged, together with a statutory payment in the amount of \$500 and payment of punitive damages.

- [4] Michael opposes the application.
- [5] Melanie supports the application.
- [6] For the following reasons, I grant the application and make an order:
- a. for dependant's support for Stoja Sekulovski, with provision for payments to Melanie Georgiou and Michael Sekulovski out of the residue of the estate;
 - b. requiring Michael Sekulovski to pay to the estate the amount he received from the estate of Maslina Sekulovski; and
 - c. requiring Michael Sekulovski to discharge the *PPSA* registrations he made against the estate and against Stoja, and pay to Stoja Sekulovski (i) under s. 56(4) of the *PPSA* in the amount of \$500, and (ii) punitive damages in the amount of \$10,000.

Factual Background

- [7] Stoja tendered three affidavits upon which she relies on this application.
- [8] Rob Levesque, a lawyer, was appointed as the Estate Trustee During Litigation for the estate of Jim Sekulovski ("ETDL") on January 6, 2020. Mr. Levesque swore an affidavit on January 28, 2022.
- [9] Melanie affirmed affidavits on January 16, 2020, November 19, 2020, and February 11, 2022.
- [10] Michael tendered an affidavit sworn on February 20, 2020 that was prepared when Michael was represented by a lawyer. Michael appeared at the hearing of this application unrepresented by counsel.
- [11] Michael also relies on an affidavit entitled "Living Testimony in the Form of an Affidavit of Fact" sworn May 8, 2021, an affidavit entitled "Living Testimony in the Form of an Affidavit of Negative Averment" sworn February 3, 2022, and an affidavit entitled "Living Testimony in the Form of an Affidavit of Non Response and Rebuttal" sworn February 5, 2022. Michael also relies on affidavits from David Hristov ("David"), Michael's first cousin, sworn May 8, 2021, Donka Hristov ("Donka"), Michael's aunt, sworn May 8, 2021, and Blagoj Hristov ("Blagoj"), Michael's uncle, sworn May 8, 2021.
- [12] Melanie's counsel scheduled cross-examinations of Donka, David and Blagoj to be held on August 12, 2021. Each failed to attend the cross-examination and Certificates of Non-Attendance were obtained.
- [13] Melanie's counsel scheduled a cross-examination of Michael on his affidavits sworn February 20, 2020 and May 8, 2021. In response to service of the Notice of Examination, Michael stated that he "had no obligation under the rules of Civil Procedure" as they do not apply to him.

Michael failed to attend his scheduled cross-examination and a Certificate of Non-Attendance was obtained.

[14] The affidavits sworn by Michael, David Hristov, Donka Hristov, and Blagoj Hristov contain bald, declaratory assertions of how Jim wished his property to be distributed. I do not regard these statements to be probative of any facts in issue. Although the facts on this application are generally not contentious, where there is a conflict in the evidence between Stoja and Michael or Melanie and Michael, I prefer the evidence given by Stoja and Melanie.

Jim and Stoja's life together

[15] Jim Sekulovski died of cancer and complications of alcoholism at the age of 67 on January 7, 2019.

[16] Stoja and Jim met through mutual friends in 1981. They were both immigrants from Macedonia and bonded over their shared values, culture, and language. Ten months after they met, they married. Stoja and Jim were married for 30 years until Jim's death 2019.

[17] Stoja and Jim raised two children together: Jim's son, Michael, from his prior marriage, was born in 1975, and their daughter Melanie was born in 1982. Michael was six years old when Jim and Stoja married. Jim gained full custody of Michael when he was seven years old, and they had no contact with his birth mother from that point on.

[18] Jim and Stoja had a traditional marriage. Jim was the main breadwinner, working as a carpet flooring installer. He worked long hours and travelled for his job. Stoja was a stay-at-home wife and mother. Her role was to keep house and be the primary caregiver for Michael and Melanie. Her household tasks included meal planning, grocery shopping, vacuuming, tidying, washing floors and windows, cleaning bathrooms, laundry, ironing, and mending clothes for Jim and the children. Jim contributed to the outdoor chores including gardening and mowing the lawn.

[19] Stoja's responsibilities grew. In 1987, when the children were both in school, she began working night shifts in a factory earning \$8 dollars per hour to bring in some money. In the morning, when her shift ended, she would come home to feed the children their breakfast and get them ready for school. Then she would attend to the household chores. Stoja estimates that she did 25-30 hours of household work on top of her hours employed outside the home every week at this time and throughout the marriage.

[20] Beginning with this factory job and throughout Stoja's working life, her pay was deposited into her and Jim's joint account.

[21] Stoja and Jim did not make a lot of money and could not afford to live lavishly. They did not take elaborate vacations or drive luxury cars. When the children were young, they bought a parcel of vacant land in Tiny, Ontario. Over the course of several years, they built the cottage together; Jim worked with his hands and Stoja contributed by minding the children, running errands, and preparing meals. They built a toolshed first and slept in it until the cottage was fit to move into.

[22] The idea to buy this particular lot came from Jim's friend and co-worker, Norman Ilkos. Norman and his wife, Polly, had recently bought the lot that would ultimately be right across the street. Jim, Stoja, Norman and Polly became good friends together. Norman Ilkos and Polly Ilkos were each examined as witnesses for this application.

[23] For his entire adult life, Jim had struggled with alcoholism. However, he was a functioning alcoholic that had not fundamentally affected their lives. This changed in 2005 when Jim was arrested for impaired driving and his licence was suspended.

[24] Jim turned down his family's and friends' efforts to help him get treatment. He began drinking more. His mental and physical health deteriorated. He retired just a year later, at age 55, because he was unable to work.

[25] With Jim's retirement, Stoja became the primary breadwinner.

[26] After his retirement, Jim began to spend more time at the cottage. Stoja chauffeured Jim to the cottage and back. She would spend time at the cottage herself every one or two weeks. When she could not be there, she would call Polly and Norman Ilkos every day to check on Jim.

[27] As Jim's health continued to deteriorate, including from a serious head injury suffered in 2008, Stoja took on more and more of the couple's responsibilities. She assumed Jim's outside chores at home and at the cottage, including gardening and mowing the lawn.

Events leading to Jim's death

[28] In November 2017, Jim was hospitalized for a week and diagnosed with complications of his alcohol abuse, including liver problems and a mass on his gallbladder that could become cancerous if left untreated. Jim left the hospital and did not follow up on treatment.

[29] In mid-December 2018, Jim's health collapsed. He could no longer walk. He was incontinent. He was nauseous. He could not clean himself. Stoja became responsible for Jim's personal care. She took a leave from her job to take care of him. Melanie pleaded with Jim to go to a hospital, and he agreed to do so on December 28, 2018. Ten days later, Jim died in the hospital in the presence of Stoja and Melanie.

Stoja's circumstances today

[30] Stoja turned 66 years old on October 9, 2021. She is in good physical health, but she suffers from insomnia and stress. On April 29, 2021, she retired from her job in the sewing department of Keilhauer, a company that manufactures seating and tables for meeting rooms, offices, and hotel lobbies.

[31] Stoja's current financial circumstances are set out in detail in her affidavit sworn January 15, 2022 and the attached Form 13.1 Financial Statement. The following is a summary of this information.

[32] Stoja net worth is approximately \$380,000. This consists of an investment condominium (\$505,000), the vacant lot next to the cottage (\$80,000), and her savings (\$95,000), less the mortgage on the condominium (\$258,500), income taxes on disposition of RRSPs (\$11,000), and the contingent costs of sale of the real properties (\$33,000).

[33] Stoja has monthly income of \$2,100 and monthly expenses of \$7,696, leaving a shortfall of \$5,532 per month (plus home insurance, which is not included in her financial statement now because the estate is currently paying). If her currently unleased condominium is leased for \$2,500 per month, her shortfall would be \$3,032 per month (or slightly more because of extra income tax she will pay on the net rent).

Stoja's circumstances in the future

[34] Stoja hopes to continue owning and living in her home at 45 Greendowns Drive. She enjoys gardening and spends time at the house outside. She does not wish to have to move to a condominium with no yard.

[35] Stoja has no private health insurance. The financial statement does not include any buffer for the expenses of aging, including personal support care and nursing care, medications that are not covered by the Ontario Drug Benefit, rent and meals at a retirement home, modifications to the home, accessibility aids, occupational therapy, physical therapy etc.

Michael's and Melanie's circumstances

[36] Michael and Melanie are both independent adults and they support themselves.

[37] Michael is 46 years old. He has a college diploma and is qualified as an aircraft maintenance engineer. According to Michael's February 2020 affidavit, he works for Air Canada as an aircraft maintenance engineer. He has owned his own home since 2003.

[38] Melanie is 39 years old. She works for TD Canada Trust as a senior manager in process engineering. She is married with two daughters ages 10 and seven. She and her husband are self-supporting.

Evidence related to Maslina Sekulovski's estate

[39] In November 2016, Jim's mother, Maslina, passed away.

[40] Maslina's Last Will and Testament provides that the residue of her estate is to be split among her three children in equal shares: one share to her son, Boris Sekulovski, one share to Jim, and one share to her daughter, Donka Hristov. Maslina's Will appoints Boris, Jim, and Donka as co-estate trustees.

[41] The main asset of Maslina's Estate was a property at 4 Dunlop Avenue, Toronto. The house was sold in 2018 and the proceeds of sale of \$742,734.82 were paid to Maslina's Estate. The money was deposited to a bank account of the Estate at Canadian Imperial Bank of Commerce ("CIBC").

[42] On December 28, 2018, as Jim's health continued to worsen, he was taken to Scarborough General Hospital. By December 30, 2018, Jim had been transferred to the palliative care ward due to the severity of his condition.

[43] On January 3, 2019, two representatives of CIBC visited Jim at the hospital to witness his signature on documents opening an estate account for Maslina's estate.

[44] On the morning of January 4, 2019, Michael entered Jim's hospital room with his aunt Donka. Melanie was present. Donka had a piece of paper with her. Melanie's evidence is that she saw Donka wake Jim from his sleep, prop him to an upright position and place a pen in his hand.

[45] Melanie's evidence is that she was upset that Michael and Donka were putting a paper in front of her father to sign because she felt that he was not in a condition to sign documents. She argued with Michael about this and tried to prevent Jim from signing the document by physically placing her body between her father and Donka. Melanie's evidence is that Michael grabbed her arm and forcefully pinned her against the wall while Donka got Jim to sign the document. Melanie's evidence is that no one explained to Jim what he was signing, and no one said the word "will" to him. Melanie's evidence is that Donka said only: "This is the last letter we need you to sign for the estate account. We need you to sign to settle Mom's estate and house."

[46] In his affidavit, Michael states that around 11 o'clock a.m., his aunt Donka arrived at the hospital, and he greeted her. She told him that she had some estate business to discuss with Michael's father and he knew that it related to his grandmother's estate but did not know the details. When Michael and Donka arrived at his Jim's room, Melanie was there. Michael suggested that they both leave the room in order to give Jim and Donka some privacy. Melanie became very agitated and refused to leave. It was clear to Michael that this would not be a private meeting and he approached Jim who was awake and alert and raised the bed to a more upright position for him and told him that Donka had something urgent she wished to speak with him about. He then stepped away to the corner of the room so that Donka could talk to him.

[47] Donka showed the document to Jim and spoke to him about it. Michael did not hear exactly what she said, and he does not believe that Melanie did either. Michael's evidence is that Donka handed Jim the document and the pen and, at this point, Melanie became hysterical and used her body to create a barrier between Donka and Jim. Michael's evidence is that Jim was becoming frustrated by this behaviour and pleaded with Melanie to stop, but she refused to listen. Michael took Melanie's arm and escorted her off to the side of the room. He denies that he forcefully pinned her against the wall or bruised her arm. Once Melanie was out of the way, Jim signed the document. After signing it, he returned it to Donka. Melanie was still very upset, and security came to the room.

[48] Michael's former lawyer subsequently sent to Melanie's lawyers a copy of the document Jim signed at the hospital entitled "Last Will and Testament". The document is dated January 3, 2019 although it was signed on January 4, 2019. The document reads:

During my declining health and hospitalization, I, James (Jimmy,
Dimce) herby (sic) testify, IN THE ESTATE OF MASLINA

SEKULOVSKI, as my final will and testament to grant my
CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE
WITH A WILL to the following recipient:

I am naming my heir Michael Sekulovski (Son) to be appointed to
100% of my inheritance upon my death.

I hereby certify this to be true and witnessedon (sic) this day January
3, 2019.

[49] When the document was sent to Melanie's lawyer's, Michael's former lawyer took the position that the document evidences Jim's intention to gift his share of Maslina's estate to Michael which gift was perfected according to his instructions.

[50] Subsequently, Michael, Donka and Boris executed two documents. The first document dated January 4, 2019 states that Donka "here by want to give our brother's James Jimmy Dimce the third of the estate of \$251875.1 to Michael Sekulovski ...". The second document dated "Jan, /2019" reads:

In continuation to letter signed by Boris Sekulovski Donka Hristov to give a third of their mothers estate (ESTATE OF MASLINA SEKULOVSKI) TO THEIR NEPHEW Michael Sekulovski on behalf of their brother Executor AND the Beneficiary of the estate, the amount divided into three equal amounts of \$251537.5 as per the Estate account 00432/2627531 balance of \$754612.58

[51] Michael states that these documents were prepared by CIBC.

[52] On January 7, 2019, a cheque for \$251,537.50 was issued to Michael from Maslina's estate account.

[53] Melanie's position is that the payment to Michael is not a valid gift, and this money needs to be returned to Jim's estate. Michael's position is that the payment is a valid gift.

Analysis

[54] There are three issues to be determined on this application. I address each in turn.

ISSUE 1: Is Jim's one-third share of Malina's estate an asset of his estate?

[55] Stoja and Melanie seek to have Jim's \$251,537.50 interest in the Estate of his mother, Maslina Sekulovski ("Maslina") returned to Jim's Estate. They submit that this interest was improperly transferred to Michael around the time of Jim's death.

Is the transfer to Michael a valid gift?

[56] Melanie submits that the elements of a valid gift have not been satisfied. Stoja adopts and supports this submission.

[57] In *McNamee v. McNamee*, 2011 ONCA 533, the Court of Appeal, at para. 24, set out the essential ingredients of a legally valid gift. There must be: (1) an intention to make a gift on the part of the donor, without consideration or expectation of remuneration, (2) an acceptance of the gift by the donee and (3) a sufficient act of delivery or transfer of the property to complete the transaction.

[58] The onus is on the donee to establish the test stated in *McNamee*. The donee must show that the transaction was a gift by proving a clear and unmistakable intention on the part of the donor to make a gift to the donee. The evidence of intention must be such as to be inconsistent with any other intention or purpose. See *Foley v. McIntyre*, 2014 ONSC 194, at para. 143; aff'd 2015 ONCA 382.

[59] Melanie's evidence is that no one explained to Jim what he was signing, and no one said the word "will" to him. Melanie overheard Donka say only: "This is the last letter we need you to sign for the estate account. We need you to sign to settle Mom's estate and house."

[60] Michael's evidence is that he did not hear exactly what Donka said when she spoke with Jim about the document. He saw Jim sign the document and, although Jim was physically weak at the time, he did not require assistance to sign the document. Michael's evidence is that Jim's signature looks shaky because he did not have a solid surface to write on – only his hospital bed.

[61] Melanie's evidence about what she heard is not challenged by Michael's evidence or by cross-examination. I accept her evidence.

[62] In his first affidavit, Michael states that while his grandmother was alive, his father and his Aunt Donka told him that Jim promised his mother that he would give his share of the Dunlop house to Michael. This evidence is hearsay and is in respect of facts that are highly contentious. Under rule 39.01(5), evidence on information and belief should not be received on an application except with respect to facts that are not contentious. Further, this evidence could not be tested on cross-examination because Michael and Donka refused to attend to be cross-examined. I do not give any weight to this evidence.

[63] The document that Jim signed is entitled 'LAST WILL AND TESTAMENT' and, although the text refers to the Estate of Maslina, it purports to be Jim's final will and testament whereby he names Michael "to be appointed to 100% of my inheritance upon my death". Michael does not take the position that this document has effect as a valid will but that it is evidence of Jim's intention to make a gift to Michael of his interest in Maslina's estate.

[64] Melanie's evidence is that Jim was told by Donka that the letter is needed to settle his mother's estate account. Given this evidence, the text of the document, and the circumstances in which it was signed, I find that Michael has failed to satisfy his onus of proving that by signing

the document, Jim's clear and unmistakable intention was to make a gift to Michael and that he did not sign it for any other purpose.

[65] Michael has also failed to show a sufficient act of delivery or transfer by Jim of a gift to Michael. Jim did not sign either of the two documents that were signed by Michael, Boris and Donka. These documents appear to have been provided to CIBC to authorize the issuance of a cheque to Michael. These documents appear to show their intention, but not Jim's intention, to transfer Jim's share of his mother's estate to Michael. The third requirement for a valid gift is also not satisfied.

[66] Michael has failed to show that Jim made a valid gift to Michael of his interest in Maslina's estate.

[67] I conclude that the purported gift by Jim to Michael of Jim's one-third share of the estate of his mother is invalid.

[68] Given this conclusion, it is not necessary for me to decide whether the gift is voidable because of the application of the doctrine of undue influence.

ISSUE 2: Did Jim make adequate provision for the proper support of Stoja and, if not, what provision should be made for Stoja out of the assets of his estate?

[69] Stoja applies for dependants' support under section 58 of the *SLRA*. Subsection 58(1) of the *SLRA* provides:

58(1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

[70] The term "dependant" is defined in s. 57 of the *SLRA* to include a spouse of the deceased to whom deceased was providing support or was under a legal obligation to provide support immediately before his or her death. As a married spouse, Stoja is a dependant under this definition.

[71] Section 62(1) of the *SLRA* provides that in determining the amount and duration, if any, of support, the court shall consider all the circumstances of the application including a list of specified factors. In *Cummings v. Cummings*, 2004 CanLII 9339 (ON CA), the Court of Appeal, at para. 34, described these factors as "a mélange of criteria based not only on needs and means but also on legal and moral or ethical claims".

[72] The legal obligations and moral obligations are to be applied in the context of considering the factors listed in s. 62(1) and the general direction to consider all the circumstances. See *Cummings*, at para. 46.

[73] Under s. 62(1), the court has broad authority to make an appropriate dependant's support award, which may include the transfer of property in kind and the payment of a lump-sum.

[74] Under s. 63(3), the court may accept such evidence as it considers proper of the deceased's reasons, so far as ascertainable, for making the dispositions in his or her will, or for not making adequate provision for a dependant.

[75] Stoja relies on evidence from Mr. Ilkos for why Jim did not make adequate provision for her support. When he was examined, Mr. Ilkos gave the following evidence:

69 Q. Did Jim ever talk to you about his will and his estate plan?

A. Jim didn't - didn't believe - you talk to me, but he didn't believe in things like that.

70 Q. What do you mean he didn't believe in things like that? What did he tell you about that?

A. "What for?" he says. Wife gonna kick you out? She get it. When I die, who cares?

71 Q. Did he ever tell you what he expected to happen with this property when he died?

A. He says it belongs to Stella, so what for I got to make - even Stella approaching him for - for a will, and he says, No. When I go, it's yours.

163 Q. Did Jimmy ever say to you what he expected to happen to his property after he died?

A. After he died, Stella was said to make indeed, he says after I die is yours. Why you complaining?

(Reporter seeks clarification.)

THE WITNESS: Automatically is yours.

MS. CASEY: Who's?

THE WITNESS: Stella's.

BY MR. GIANCOLA:

164 Q. So Jimmy said to you, Automatically –

A. It's hers.

165 Q. "Hers" being Stella's?

A. Yes.

166 Q. So correct me if I'm wrong, so his understanding, according to you, is that if he did not make a will, Stella would get this property after he died?

A. Legally, that's what he told me, legally it belongs to the wife. That's why he didn't want to spend the money and effort to make a will.

[76] Stoja relies on this evidence to explain why Jim did not make provision for Stoja's support. She submits that Jim thought he made provision for Stella's support, but he was mistaken. I accept this evidence.

Factors in s. 62(1)

[77] The factor in s. 62(1)(a) is the dependant's current assets and means. Stoja has net assets of \$380,000, consisting mainly of her condominium, a lot beside the cottage in Tiny Township, and some registered savings. Her monthly income is \$2,614 (CPP and her survivor pension). If Stoja were to rent the condominium, the rents would be approximately \$2,500 per month on a gross basis. Stoja has provided a sworn financial statement attesting to this information.

[78] The factor in s. 62(1)(b) is the assets and means that the dependant is likely to have in the future. Stoja would have \$840,000 in net worth based on a distribution from the Estate (\$380,000 plus \$460,000 (the value of the distribution from the assets of the Estate, not including the disputed assets)). Stoja is retired and does not have private health insurance.

[79] The factor in s. 62(1)(c) is Stoja's capacity to contribute to her own support. Stoja is able to contribute to her support based her current means, but she will be unable to contribute additional amounts in the future.

[80] The factor in s. 62(1)(d) is the dependant's age and physical and mental health. Stoja is 66 years old. She is in good physical health, although she suffers from insomnia and stress. On the evidence, it is expected that she has many years to live.

[81] The factor in s. 62(1)(e) is the dependant's needs, in determining which the court shall have regard to the dependant's accustomed standard of living. Stoja has lived at 45 Greendowns Drive for 45 years, since 1981. The home has a yard, and Stoja likes to garden. Stoja and Jim had a cottage, and although the cottage was sold, Stoja's accustomed standard of living included spending leisure time at the cottage. Stoja drives an older vehicle, a 2013 Mazda 3, which is starting to need expensive repairs. She will need a new vehicle and a replacement car every four to eight years as long as she is able to drive. Although Stoja has not travelled a great deal in the past, the

cottage is now sold, and Stoja's evidence is that she would like to travel to see her family in Macedonia and Australia and she would like, occasionally, to go on a vacation to somewhere warm, like an all-inclusive resort.

[82] The factor in s. 62(1)(f) is the measures available for Stoja to become able to provide for her own support and the length of time and cost involved to enable her to take those measures. Stoja has monthly expenses (based on her financial statement) of just under \$7,700 per month, including expenses to maintain the house at 45 Greendowns Drive. Her monthly income is \$2,614, resulting in a shortfall of about \$5,500 monthly. If the condominium is rented, the shortfall would be \$3,032 monthly. If Stoja lives to the age of eighty (20 years) she will need approximately \$730,000 to fund her monthly budget (on a straight calculation). This does not include a provision for the expenses of aging.

[83] The factor in s. 62(1)(g) is the proximity and duration of Stoja's relationship with Jim. Stoja had a very close and very long relationship with Jim over their 38-year marriage. They shared culture, language and values. They raised two children together. They were partners in managing their household and their finances were intertwined. Stoja supported Jim through his struggles with alcoholism.

[84] The factor in s. 62(1)(h) is the contributions made by Stoja to Jim's welfare, including indirect and non-financial considerations. Stoja was a traditional housewife who worked 25-30 hours per week doing housework, even after she started working outside the home. In 2005, circumstances changed following Jim's charge for impaired driving. He retired from his job, and he started to drink more. Stoja became the primary breadwinner and she continued to do the household work. Stoja would drive Jim to the cottage, and when she was not there, she checked in with the neighbours at the cottage and asked them to check on Jim. Beginning in 2008, after Jim suffered a serious head injury, Stoja had to contribute even more to the marriage. In the final days of Jim's life, Stoja took on responsibility for Jim's personal care.

[85] The factor in s. 62(1)(i) is the contributions made by Stoja to the acquisition, maintenance and improvement of Jim's property. Stoja contributed her wages from work outside the home to their joint account, and she contributed to building the cottage.

[86] The factor in s. 62(1)(k) is whether Jim has a legal obligation to provide support for another person. Jim has no legal obligation to provide support for either of his children. As set out above, both Michael and Melanie are self-sufficient.

[87] Other factors in s. 62(1) are either inapplicable or overlap with factors already addressed.

Assets of the Estate

[88] The ETDL provided affidavit evidence for this application. As an exhibit to his affidavit, the ETDL provided an updated statement of assets and liabilities and accounting of the administration of the estate.

[89] Stoja's position is that the estate has assets, including disputed assets, worth \$1,424,578 for the purpose of her dependant's support claim. This consists of:

- a. undisputed assets in the ETDL's hands with a value of \$1,102,300 consisting of 45 Greendowns Drive with a value of \$965,000, and the balance of \$137,300 in trustee investments and cash;
- b. the disputed share of Jim's late mother, Maslina Sekulovski's, estate worth \$251,875.10;
- c. the disputed funds held by Jim's brother, Boris, in the amount of \$38,562.40; and
- d. Jim's Tangerine RRSP with a value of \$31,840.83 of the date of his death, which was designated and paid out to Michael, but which is an asset deemed to be part of the estate for the purpose of Stoja's dependant support claim, under s. 72(1)(g) of the *SLRA*.

[90] The estate's outstanding liabilities are:

- a. income taxes - The house is increased in value since the date of death. If the house is sold by the estate, they will be approximately \$80,000 in income taxes payable on the capital gain. If the house is transferred to Stoja, it will be on a tax-deferred rollover basis.
- b. ETDL's future compensation: the ETDL is compensated on an hourly rate. He has received his compensation up to December 21.
- c. Miscellaneous other liabilities: under \$10,000.

[91] If the estate is administered in intestacy and with only the undisputed assets included, Stoja will receive a distribution of approximately \$460,000 (that is, a preferential share of \$200,000 plus one-third of the net residue of the estate).

[92] The ETDL has brought a separate application for directions regarding beneficial ownership of \$38,562.40 held in trust by Boris and Helen Sekulovski. I do not address this issue on this application.

Valuation of Stoja's claim for dependants' support

[93] In *Cummings*, the Court of Appeal held, at para. 50, that when examining all of the circumstances of an application for dependants' relief, the court must consider, (a) what legal obligations would have been imposed on the deceased had the question of provision arisen during his lifetime; and (b) what moral obligations arise between the deceased and his or her dependants as a result of society's expectations of what a judicious person would do in the circumstances. The moral considerations are not to be contemplated in addition to, or in isolation from, the factors in s. 62 (1).

[94] In *Earl v. McAllister*, 2021 ONSC 4050 (CanLII), the Divisional Court, citing *Quinn v. Carrigan*, 2014 ONSC 5682 (Div. Ct.) held, at para. 37, that where there are multiple claims to an interest in the estate, the appropriate analysis to be undertaken consists of the following steps: (i)

identify all dependants who have a claim; (ii) tentatively value those claims by considering the factors set out in the legislation and the legal and moral obligations of the estate; (iii) identify the non-dependant persons who may have a legal or moral claim to the estate; and (iv) balance the competing claims by taking into account the size of the estate, the strength of the claims, and the intentions of the deceased.

[95] In *Poitras Estate v. Poitras*, 2016 ONSC 5049 (CanLII), an application was made by the spouse of the deceased for an order under s. 58 of the *SLRA*. The application judge explained the moral obligation of the deceased, prior to his death, to ensure that his spouse is properly cared for in the years following his death:

The moral obligation to care for a dependant following the death of the person who was providing support is said to be an obligation of high order (see *Tataryn, supra*, at paras. 30, 35). There is a wide discretion granted to the court under the *SLRA* to devise an adequate, just and equitable sharing of Gilles' estate. Each case turns on its own facts but it would not be exceptional for the legal and moral claims of a surviving spouse, following a lengthy marriage, to consume the bulk of a modest, even moderate-size, estate. By comparison, the claims of independent, adult children are more tenuous but if the size of the estate permits, some provision for children ought to be made (*Tataryn, supra*, para. 31).

[96] In *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, the Supreme Court of Canada addressed the moral claims on the testator in that case:

I turn next to the moral claims on the testator. The highest moral claim arises from the fact that Mrs. Tataryn has outlived her husband and must be provided for in the "extra years" which fate has accorded her. This is not a legal claim in the sense of a claim which the law would have enforced during the testator's lifetime. It is, however, a moral claim of a high order on the facts of this case. Mr. and Mrs. Tataryn regarded their estate as being there to provide for their old age. It cannot be just and equitable to deprive Mrs. Tataryn of that benefit simply because her husband died first. To confine her to such sums as her son may see fit to give her, as the testator proposed, fails to recognize her deserved and desirable independence and constitutes inadequate recognition of her moral claim.

[97] Stoja is Jim's only dependant. At the first stage of the analysis, only her claim is valued.

[98] At the second stage of the analysis, I consider the legal obligations that would have been imposed on Jim had the question of provision arisen during his lifetime together with his moral obligations as described in the jurisprudence, having regard to the factors in s. 62(1) of the *SLRA*.

[99] If the estate were administered as an intestacy, the house at 45 Greendowns Drive would have to be sold to make the distributions that are required. If the estate is administered in intestacy and with only the undisputed assets included, Stoja would receive about \$460,000. She would be left with assets of approximately \$840,000 to last for the rest of her life. Stoja would be unable to purchase a replacement house in Toronto. She would have no alternative but to live in her condominium or rent another place to live.

[100] Stoja's reasonable expectation was that she would live in this house during her retirement years. To require Stoja to move from her home to rental accommodations, or to the condominium, would not be consistent with the lifestyle she enjoyed during her 38-year marriage.

[101] The circumstances of this case are similar to those in *Tataryn*, where the dependant and the testator were married for many years and through their joint efforts they amassed an estate held in the testator's name at the time of his death, including the house in which they lived. The Supreme Court of Canada considered the legal and moral claims on the testator and held that it would not be just and equitable to deprive the dependant of her expected benefit of the assets of the testator's estate that she had contributed to during their marriage simply because her husband died first. An order was made granting to the dependant title to the matrimonial home.

[102] When I consider the factors in s. 62(1) and the legal obligations that would have been imposed on Jim had the question of provision arisen during his lifetime together with his moral obligations, I conclude that it would be unfair and unjust to deprive Stoja of the right to live in her home during her retirement years simply because Jim died first. I am satisfied that Stoja has a right to remain in the home at 45 Greendowns Drive. Title to this home should be vested in Stoja.

[103] Stoja has a need for monthly payments of \$5,532. This obligation could be met by continuing the interim support order and increasing the amount from \$4,317 to \$5,532 (this amount would be reduced by the amount of rental income Stoja may receive from rental of the condominium). Payment of amounts to satisfy this obligation, to provide a buffer against future needs as she ages, and to provide Stoja with the freedom and independence that she and Jim planned to have in their retirement, would consume the entirety of Jim's estate.

[104] As part of the balancing exercise, I take into consideration Stoja's position with respect to Jim's wishes. Stoja appreciates that Jim would have wanted to recognize his children and provide something for them too. Stoja accepts that Jim's wishes in this regard would be recognized fairly by an order providing that the balance of the net estate after the transfer of her home to her and payment of the debts and expenses of the estate be split into three equal shares to be divided among herself, Melanie, and Michael. Stoja's position is subject to the reservation that any amount payable to Michael out of the estate should be set off against any amounts he may be found to owe to the estate or Stoja, including Jim's share of Maslina's estate, damages, and costs. Stoja seeks an order for dependant's support on this basis.

[105] Having regard to Stoja's position concerning Jim's wishes that provision be made for his children and the effect to be given to his wishes in the balancing exercise, and Stoja's requested order for dependant's support, I accept that an order for Stoja's support should provide that the

balance of the net estate after the transfer of her home to her and payment of the debts and expenses of the estate be divided into three equal shares among Stoja, Melanie, and Michael.

ISSUE 3 Should the registrations by Michael under the PPSA against Stoja and the Estate be discharged? If so, should statutory payments and/or punitive damages be ordered?

[106] Before June 22, 2020, Michael was represented by two different legal counsel with experience in estates litigation. On June 22, 2020 he gave notice that he had removed his lawyer as legal counsel. He advised that he is not a “legal person” nor “bound to an Estate Act”. He purported to “remove my consent from this or ANY legal proceeding”.

[107] In his affidavit, Mr. Levesque, in his capacity as ETDL, provided evidence concerning Michael’s position on the ETDL’s authority after he had discharged his legal counsel.

[108] Mr. Levesque’s evidence is that Michael took steps to prevent him from administering the estate, including sending official -looking “Notices” to the realtor he had retained to sell the cottage property owned by the estate, advising that he was not authorized to sell the property.

[109] Mr. Levesque’s evidence is that, ultimately, Michael commenced an action for “trespass” against him, other counsel involved in this litigation, the proposed mediator, and two of the Justices who had made orders in this proceeding. On January 21, 2021, Michael’s trespass action was summarily dismissed under Rule 2.1.01(1) of the *Rules of Civil Procedure*. The Court held that Michael’s trespass action is on its face frivolous, vexatious and an abuse of the process of the court. The Court observed that the court filings include several legal and stylistic elements common to litigants described by Rooke A.C.J.Q.B.A. in *Meads v. Meads*, 2012 ABQB 571 as “Organized Pseudolegal Commercial Argument (or “OPCA”) litigants. See *Sekulovski v. Arkin*, 2021 ONSC 439.

[110] In the costs award made in Michael’s action on February 24, 2021, the Court found that Michael’s claims were frivolous, vexatious and an abuse of the process of the court and awarded substantial indemnity costs against Michael. In the Court’s reasons for the costs award, the Court specifically addressed the jurisprudence in relation to cases under the *PPSA* in which substantial indemnity costs were awarded: *Sekulovski v. Arkin*, 2021 ONSC 1401 (CanLII).

[111] Mr. Levesque’s evidence is that the dismissal of Michael’s trespass action has not dissuaded him from attempting to interfere with the administration of the estate. Mr. Levesque states that on January 21, 2022, Michael sent a letter by email and registered mail to the ETDL and to counsel for Stoja and counsel for Melanie. He wrote that “[a]s Son and blood heir of Dimce (Jim) Sekulovski, i possess inherent power of attorney and i write in the capacity as Grantor for the Estate and authorized Representative for RYS-TRUST, a proxy operating in the private who is the secured party and 1st lien holder of the Estate”. Michael attached a Registration Confirmation issued by ServiceOntario dated January 10, 2022 confirming registration of a *PPSA* Financing Statement. Michael demanded that “all legal process and court proceedings MUST STOP IMMEDIATELY” and that “[l]iens will be removed when an equitable settlement is reached”.

[112] On January 27, 2022, Michael sent a letter to a judge of this Court who had made an order for interim dependant’s support. Michael purported to give notice of a “superior security interest

and the highest claim to the estate” and he states that “[e]ffective immediately RYS-TRUST will now administer all property of the Estate that exists in both substance and in form”. Mr. Levesque’s evidence is that he has no knowledge of the entity that Michael calls “RYS-TRUST” and no knowledge of any basis for Michael to register notice of a security interest against assets of the estate.

[113] In his January 27, 2022 letter, Michael made demands of the judge that she produce “authority to administer said Estate” and “evidence that establishes a superior claim and/or a security interest in said estate”. Michael again stated in his letter that “[l]iens will be removed when a equitable settlement is reached”. The letter attached copies of a Financing Change Statement registered under the PPSA against “Sekulovski, Dimce Jim” as debtor and a separate Financing Change Statement registered against Stoja Sekulovski as debtor as well as other Financing Change Statements the effects of which are unclear.

[114] By email dated January 28, 2022, counsel for Stoja demanded pursuant to s. 56 of the *PPSA* that Michael register a certificate of discharge with respect to all *PPSA* registrations he has made against Stoja Sekulovski, the estate of Jim Sekulovski, and any other party to the pending application in this application.

[115] In response, Michael sent a document named “LIVING TESTIMONY IN THE FORM OF AN AFFIDAVIT OF NON RESPONSE AND REBUTTAL”. Michael made reference in this document to the email from Stoja’s counsel and advised, among other statements in the document, “[a]s a consequence of his failure to respond to by (sic) conditional acceptance to his offer, I, hereby note Mr. Arkin in default”.

[116] Michael has not discharged the *PPSA* registrations against Stoja and against Jim’s Estate.

[117] Michael does not have a security agreement with Jim’s estate or with Stoja. He does not have a security interest against personal property of either of them. There is no basis for the registrations by Michael under the *PPSA*.

[118] Subsection 56(2) of the *PPSA* provides:

Where a financing statement or notice of security interest is registered under this Act and the person named in the financing statement or notice as the secured party has not acquired a security interest in the property to which the financing statement or notice relates, any person having an interest in the property may deliver a written notice to the person named as the secured party demanding registration of a financing change statement referred to in section 55 or a certificate of discharge referred to in subsection 54(4), or both, and the person named as the secured party shall register the financing change statement or the certificate of discharge, or both, as the case may be.

[119] Subsection 56(4) of the PPSA provides:

Where the secured party, without reasonable excuse, fails to register the financing change statement, or certificate of discharge or partial discharge, or all of them, as the case may be, required under subsection (1), (2), (2.1), (2.2), or (2.3) within 10 days after receiving a demand for it, the secured party shall pay \$500 to the person making the demand and any damages resulting from the failure; the sum and damages are recoverable in any court of competent jurisdiction.

[120] Subsection 56(5) of the *PPSA* provides that upon application to the Superior Court of Justice, the court may order the registrar to amend the information recorded in the central file registration system to indicate that the registration of the financing statement has been discharged or partially discharged, as the case may be.

[121] In *MBNA Canada Bank v. Luciani*, 2011 ONSC 6347, the respondent registered a financing statement under the *PPSA* against the applicant bank claiming a security interest in respect of an obligation by the bank to him. The bank demanded that the respondent discharge the financing statement and the applicant responded saying that he would do so provided the bank extended a credit line to his wife and him. The bank refused and moved for an order discharging the financing statement registration.

[122] In his decision in *MBNA*, D.M. Brown J. (as he then was) described the registration as “a new twist on the Sovereign Man” scheme. Brown J. noted that the registered financing statement ‘combined a jumble of references to sections of the Uniform Commercial Code, with allusions to passages from the Old Testament and archaic legalese as part of the creation of the ‘agreement’’. Brown J. referred to other documents sent by the respondent including a statement demanding a response and stating that “silence, or failure to respond as prescribed, stands as your stipulation, consent, and tacit approval, ... and will stand as final judgment in this matter”. Brown J. held, at para 16:

Mr. Luciani failed to provide a reasonable excuse for its failure to register a certificate of discharge. His reliance on the “Sovereign Man” scheme to justify his actions simply shows the extent of the mischief this pernicious scheme may cause. The Bank has requested an order that Mr. Luciani pay it the statutory amount of \$500 prescribed by section 56(4) of the *PPSA* for his failure to register a discharge. The Bank is entitled to such amount, and I order Mr. Luciani to pay that \$500 to the Bank within 10 days of the date of this order. The Bank has not sought any further damages.

[123] The Bank was awarded its full indemnity costs.

[124] In *Myers v. Blackman*, 2014 ONSC 5226 (CanLII), the respondents registered a financing statement under the *PPSA* without any legal right to do so and asserted a security interest in the

applicants' personal property. The applicants moved for an order under section 56(5) of the *PPSA* directing the registrar to discharge the financing statement and seeking payment of the sum of \$500 as provided for by section 56(4) as well as damages for injurious falsehood and punitive damages, together with costs on a full indemnity basis. The applicants contended that the respondents are OPCA litigants. Mew J. noted that whether the respondents are OPCA litigants or not, a number of characteristics of such litigants, as described by Rooke A.C.J.Q.B.A. in *Meads*, were present. Mew J. stated that an often employed tactic of OPCA litigants is said to be the use of "foisted" obligations in various forms - with the recipient being given a limited amount of time to respond and disagree, failing which they are held to have agreed to the terms of a unilateral agreement.

[125] Mew J. addressed the claim in *Myers* for punitive damages, at paras. 30 and 33:

In *Meads*, the court said that punitive damages are warranted when a person files a spurious personal property claim on the basis of a foisted unilateral agreement (*Meads* at para. 525). In *MBNA Canada Bank v. Luciani*, 2011 ONSC 6347, D.M. Brown J. found that the conduct of the respondent in that case in registering a false financing statement constituted an abuse of the *PPSA* registration system and that the respondent's attempted "shake down" of MBNA Canada Bank by demanding a line of credit in return for a discharge amounted to "reprehensible conduct" (see *MBNA Bank* at paras. 14-17).

...

In my view any award of punitive damages in this case will not, as a practical matter, achieve the objectives canvassed in the *Whiten* case. In so concluding I should not be taken as condoning any aspect of the respondents' actions. Their conduct is highly reprehensible. As will be seen, in addition to the statutory damage award of \$500, there will be a significant award of costs made in this case. While the object of costs is compensatory, not punitive, the willingness of courts to make substantial costs awards may deter some parties who might otherwise be tempted to emulate the conduct of the respondents in the present case.

[126] Stoja submits that Michael's conduct has exhibited all of the hallmarks of an OPCA litigant who has engaged in an ongoing pattern of conduct with a view to undermining the court's authority and obstructing the process of the court, including by commencing a legal action against judges of this Court, the ETDL, and counsel representing opposing parties, and by registering financing statements under the *PPSA* without any justification and refusing to discharge these registrations.

[127] Stoja submits, citing *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), at paras. 36 and 43, that an award of punitive damages is justified and necessary. Stoja submits that an award of \$50,000 in punitive damages is proportionate to the amounts at issue and will serve as a satisfactory specific and general deterrent.

[128] In *Whiten*, the Supreme Court of Canada confirmed that punitive damages may be awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that offends the court's sense of decency. An award of punitive damages is limited to misconduct

that represents a marked departure from ordinary standards of decent behaviour. The objective of an award of punitive damages is to punish a defendant rather than to compensate a plaintiff. The general objectives of an award of punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (the means by which the judge or jury expresses its outrage at the egregious conduct). See *Whiten*, at paras. 36 and 68.

[129] On the evidence before me, I am satisfied that Michael's actions in registering documents under the *PPSA* against Stoja and against Jim's estate and in refusing to discharge the registrations (unless an "equitable settlement" is reached) qualify as thoroughly reprehensible conduct that was knowingly engaged in, without any colourable legal justification, for the purpose of showing contempt for the legal process of this application and to attempt to gain an unfair advantage. These registrations were made after Michael's action against two judges of this Court, the ETDL, and opposing counsel was dismissed under rule 2.1.01 of the *Rules of Civil Procedure* as frivolous, vexatious and an abuse of the process of the court. In these circumstances, an award of punitive damages is justified and necessary to show the Court's condemnation of the actions that Michael has taken by making registrations under the *PPSA*, to denounce this conduct, and to deter Michael and others who may consider engaging in such conduct from doing so.

[130] The statutory payment of \$500 provided for by s. 56(4) of the *PPSA* is not, in the circumstances of this case, a sufficient deterrent. This amount reflects a minimum statutory payment to be made following a refusal to discharge a wrongful registration under the *PPSA*. In my view, however, the amount of punitive damages that Stoja seeks, \$50,000, is more than would be proper and necessary on the facts of this case. An award of punitive damages of \$10,000, in addition to the statutory payment of \$500 under s. 56(4) of the *PPSA*, will show the Court's denunciation of Michael's conduct and, hopefully, will serve to deter him and others from engaging in this conduct in the future.

Disposition

[131] For these reasons, I make the following orders:

- a. A declaration that Stoja Sekulovski is a dependant of Jim Sekulovski within the meaning of Part V of the *SLRA*;
- b. A declaration that Jim Sekulovski failed to make proper and adequate provision out of his estate and assets for the proper support of Stoja;
- c. An order that the ETDL is authorized to complete the administration of the estate;
- d. An order that the ETDL shall transfer the 45 Greendowns Drive property to Stoja in partial satisfaction of her interest in the estate as a beneficiary and dependant;
- e. An order that Michael shall pay to the estate \$251,875.10 representing the amount he received from Maslina Sekulovski's estate;

- f. An order that the balance of the residue of the estate after payment of the estate's liabilities, debts, and expenses shall be divided in equal shares among Stoja, Melanie, and Michael;
- g. An order discharging any and all registrations made by Michael under the *PPSA* against the estate and Stoja. It is unclear whether there is evidence in the record of unjustified *PPSA* registrations against others, namely, the ETDL, Melanie, and the lawyers for any parties to this litigation. If so, the discharge order also applies to such registrations;
- h. An order that Michael pay to Stoja \$500 being the statutory amount pursuant to s. 56(4) of the *PPSA*;
- i. An order that Michael pay punitive damages to Stoja in the amount of \$10,000; and
- j. An order that any and all amounts payable to Michael out of the estate shall be set off against amounts he owes to the estate.

[132] Stoja seeks costs of this application, and she has provided a Costs Outline. Melanie also seeks an award of costs, and she has provided a Costs Outline. At the hearing, Michael advised that he rejects the costs that are claimed against him in their entirety. He submitted that each party should bear their own costs.

[133] I will receive written submissions from any party seeking costs (not exceeding 5 pages, double spaced, excluding costs outlines) within 15 days. Michael may provide responding costs submissions in writing within 15 days thereafter (also not to exceed 5 pages double spaced, excluding any costs outline). If so advised, any party seeking costs may make written reply submissions (not exceeding 3 pages) within 10 days thereafter.

Cavanagh J.

Released: March 23, 2022

CITATION: Sekulovski v. Georgiou, 2022 ONSC 1819
COURT FILE NO.: 05-009/2020
DATE: 20220323

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

STOJA SEKULOVSKI

Applicant

- and -

MELANIE GEORGIU, MICHAEL SEKULOVSKI
and THE ESTATE TRUSTEE OF THE ESTATE OF
JIM SEKULOVSKI, deceased

Respondents

REASONS FOR JUDGMENT

Cavanagh J.

Released: March 23, 2022

Tab 24

CITATION: STN Labs Inc. v. Saffron Rouge Inc., 2010 ONSC 3042
COURT FILE NO.: 928/09
DATE: 20100526

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: STN LABS INC., Applicant

AND:

SAFFRON ROUGE INC., Respondent

BEFORE: MORAWETZ J.

COUNSEL: A. K. Mitchell, for the Applicant, STN Labs Inc.

J. Larry, for the Respondents Saffron Rouge Inc., Jeff Binder and Kirstin Binder

HEARD: May 3, 2010

ENDORSEMENT

[1] The Applicant, STN Labs Inc. (“STN”), brings this application for an order that the appointment by STN of Deloitte & Touche Inc. (“Deloitte”) as private receiver and manager (the “Receiver”), pursuant to the terms of security granted by the Respondent, Saffron Rouge Inc. (“Saffron”), to STN, be confirmed by this court and for ancillary orders that Saffron deliver possession of the collateral which is subject to the security (the “Property”) to the Receiver.

[2] STN does not seek the appointment of a receiver by this court.

[3] STN has a three-prong relationship with Saffron:

(a) STN loaned money to Saffron;

(b) STN owns 50% of the common shares of Saffron;

(c) STN provided website development and related support services to Saffron pursuant to a website development and related support services agreement (the “Website Development Agreement”).

[4] STN advanced to Saffron a \$100,000 loan (the “Initial \$100,000 Advance”) on September 30, 2008, to provide Saffron with working capital.

[5] On March 26, 2009, Saffron and STN entered into a loan facility agreement (the “Loan Facility Agreement”) and Saffron confirmed the Initial \$100,000 Advance plus accrued interest.

[6] In addition, Saffron executed a grid promissory note (the “Grid Promissory Note”) which was attached as a schedule to the Loan Facility Agreement. The Grid Promissory Note has been completed to include the Initial \$100,000 Advance plus interest totalling \$4,800.

[7] At this time, an amended general security agreement (“GSA”) was given as security for the Initial \$100,000 Advance granting STN a first-ranking interest in Saffron’s present and future property. The Initial \$100,000 Advance was repayable commencing on January 31, 2010.

[8] On March 26, 2009, Saffron and STN entered into the Website Development Agreement, pursuant to which Saffron engaged STN to perform ongoing services relating to the design and construction of Saffron’s website, online marketing, the hosting and maintenance of Saffron’s website, managing a public relations campaign for Saffron and managing Saffron’s direct mail efforts.

[9] Prior to entering into the Website Development Agreement and the Loan Facility Agreement, between October 2008 and March 2009, STN provided services to Saffron for which Saffron owed STN \$117,495 (\$111,900 plus GST) (the “Pre-March 2009 Debt”).

[10] Paragraph 7.1 of the Website Development Agreement provides as follows:

7.1 Immediately upon execution of the agreement [Saffron] shall pay STN the sum of \$111,900, which amount shall represent payment to STN for the services performed by it and received by [Saffron] and all expenses referred to in relation to section 3.1 above during the period from October 1, 2008 to the effective date.

[11] Saffron was unable to pay the Pre-March 2009 Debt to STN on March 26, 2009 as required by the terms of the Website Development Agreement. STN agreed to finance Saffron’s obligation to pay this amount on closing and added the Pre-March 2009 Debt to amounts payable under the Loan Facility Agreement.

[12] The Grid Promissory Note has been completed to include the Pre-March 2009 Debt.

[13] In March 2009, two additional loans were advanced by STN to Saffron in the amounts of U.S. \$100,000 and CDN \$450,000 (the “Additional Loans”) as evidenced by separate promissory notes (collectively, the “Promissory Notes”).

[14] Saffron’s obligation under the Grid Promissory Note, the Promissory Notes and the Website Development Agreement are secured by the GSA. The security interest of STN was perfected in accordance with the provisions of the PPSA. Security was also provided overall intellectual property of Saffron.

[15] Pursuant to the Loan Facility Agreement, STN agreed to extend additional revolving credit to assist Saffron in financing the services to be provided by STN to Saffron under the Website Development Agreement.

[16] STN alleges that it has performed services pursuant to the Website Development Agreement following March 26, 2009 and has rendered invoices to Saffron for those services (the “Post-March 2009 Debt”).

[17] The invoices comprising the Post-March 2009 Debt are disputed by Saffron. No portion of the Post-March 2009 Debt has been added to the Grid Promissory Note.

[18] On November 20, 2009, STN made an application for the appointment of a receiver pursuant to s. 243(1) of the BIA and s. 101 of the CJA (the “Receivership Application”). The Receivership Application was based on the non-payment by Saffron of the invoices rendered by STN for services allegedly performed by STN under the Website Development Agreement and comprising the Post-March 2009 Debt.

[19] On December 22, 2009, Hourigan J. dismissed the Receivership Application concluding that there was a *bona fide* dispute regarding the invoices rendered by STN under the Website Development Agreement. As such, it had not been established that there was an event of default which gave rise to the right to appoint a receiver.

[20] The endorsement of Hourigan J. contemplated that circumstances could change:

“Things may well change quite quickly in January 2010 when payments become due under the agreements between the parties. However, it is inappropriate to order the appointment of a receiver on the basis of a potential future default.”

[21] Under the terms of the Grid Promissory Note, the amounts payable thereunder were to be repaid in accordance with the terms of the Loan Facility Agreement, which requires a minimum payment of 8% of the outstanding amount of the loans evidenced by the Grid Promissory Note to be paid commencing January 31, 2010 and thereafter on the last business day of each month.

[22] Saffron failed to make payment on January 31, 2010. On February 1, 2010, Saffron was provided with written notice to cure its default as required by the terms of the Loan Facility Agreement.

[23] Pursuant to the terms of the Loan Facility Agreement, an event of default occurs in the event that Saffron fails to make any payment that is due and such failure to pay continues for a period of five days following written notice of default being delivered to Saffron. Upon the occurrence of an event of default, STN is entitled to accelerate payment of the loans under the Loan Facility Agreement.

[24] Saffron did not cure its payment default and, consequently, on February 9, 2010, STN declared an event of default to have occurred pursuant to the Loan Facility Agreement and

accelerated and demanded payment of the Initial \$100,000 Advance and the Pre-March 2009 Debt and issued a s. 244 BIA notice.

[25] STN did not demand payment of the Post-March 2009 Debt.

[26] Saffron failed to satisfy the demand for payment and after the expiration of the ten-day notice period, on February 20, 2010, STN appointed Deloitte as Receiver.

[27] Saffron refused to permit Deloitte to take possession of the collateral.

[28] Saffron takes the position that STN's application should be dismissed for several reasons.

[29] First, the application is nothing more than an attempt to re-litigate an issue already determined by Hourigan J. – namely, whether there is a dispute about the amounts under the parties' Website Development Services Agreement.

[30] Second, the appointment of a privately appointed receiver should not be confirmed where there are material facts in dispute. Saffron takes issue with all of the amounts owing under the Website Development Services Agreement, including the amounts that form the basis for the \$18,427.58 missed payment. Saffron asserts that the existence of a claim for damages from an alleged breach of the Loan Facility Agreement, and the negligence of STN, results in a set-off against any amounts that Saffron may otherwise owe to STN (the "Set-Off Defence").

[31] Saffron takes the position that on EBITDA basis, losses for February 2010 were reduced to \$7,694 whereas the previous 12 months (February 1, 2009 to January 31, 2010) showed average monthly losses of \$30,410.

[32] Further, Saffron takes the position that commencing in the middle of February 2010, the Binders began accruing \$100,000 of their combined annual salary of \$240,000 to assist with Saffron's cash flow and that this decision will further improve monthly profits which are anticipated to near break-even for 2010.

[33] Saffron also acknowledges that Mr. Binder has been actively engaged in trying to sell Saffron as a going concern in the past number of months.

[34] Third, the balance favours Saffron in the circumstances as Saffron would be seriously prejudiced if a privately appointed receiver is permitted to take over its business. Saffron takes the position that it is able to turn its business around and that business has improved in the past two months.

[35] Finally, and alternatively, Saffron takes the position that, if it is found that the \$18,427.58 payment is for an amount that is not in dispute, Saffron should be granted relief against forfeiture in the circumstances.

[36] From the standpoint of the Respondents, the issues on this application are:

- (a) Should the court confirm STN's appointment of a private receiver and manager in the face of the endorsement of Hourigan J.?
- (b) Should the court confirm the appointment in the face of the parties dispute regarding the amounts owing?
- (c) Does the balance favour STN or the Respondents?
- (d) In the alternative, should the court grant relief against Saffron's forfeiture?

[37] STN submits that Saffron's position cannot be accepted as:

- (a) No particulars of the damages arising from STN's alleged breach of the Loan Facility Agreement and alleged negligence, which Saffron claims is entitled to set-off against the Initial \$100,000 Advance and the Pre-March 2009 Debt have been provided.
- (b) The Grid Promissory Note provides that amounts owing under the Promissory Note shall not be subject to any rights of set-off.
- (c) The dispute resolution provisions of the Website Development Agreement have no application to the payment default under the Grid Promissory Note. The amounts for which payment have been demanded pursuant to the terms of the Grid Promissory Note and the Loan Facility Agreement are independent of amounts payable to Saffron for outstanding invoices pursuant to the Website Development Agreement and comprising the Post-March 2009 Debt. The Loan Facility Agreement and Grid Promissory Note do not contain a dispute resolution provision.
- (d) Mr. Binder, in his November affidavit, did not dispute Saffron's obligation to repay the Initial \$100,000 Advance.
- (e) On this application, STN seeks only the court's assistance in facilitating Deloitte as privately appointed Receiver to carry out its mandate including taking possession of STN's collateral. The evidence filed in support of this application is not the same evidence which was filed in support of the Receivership Application. STN has demanded payment of only those amounts due and payable to STN with respect to monies advanced by Saffron by way of loan. No demand was made for payment of invoices delivered for services rendered by STN pursuant to the website agreement subsequent to March 26, 2009.
- (f) At the time the Receivership Application was heard, default of amounts evidenced by the Grid Promissory Note payable in accordance with the terms of the Loan Facility Agreement had not occurred. An event of default has since occurred on February 5, 2010 and continues.
- (g) Relief from forfeiture does not apply. The Binders caused Saffron to default in making the payment due to STN under the Loan Facility Agreement and the Grid

Promissory Note and refused to permit Deloitte to take possession of the collateral yet all the while continued to cause Saffron to pay their monthly salary. STN is the only secured creditor of Saffron. STN is, in effect, the “banker” to Saffron. Saffron has no equity and is insolvent.

[38] STN also submits that issues being raised by Saffron with respect to the current financial position of Saffron are irrelevant to the issues on this application and that the disputes which Saffron has regarding services provided by STN are the subject matter of an arbitration proceeding between the parties.

[39] Simply put, STN takes the position that a portion of STN’s loans totalling \$225,544.82 (the “Indebtedness”) was due and payable, a demand for payment has been made and the time period to satisfy the demand has expired, as has the ten-day period under the BIA notice. As such, STN’s security is enforceable. A Receiver has been appointed and STN requests the assistance of the court in its enforcement of its security rights.

ANALYSIS

[40] Section 67 of the PPSA provides that the court may give directions regarding the exercise of the secured party’s rights and the discharge of the debtor’s obligations under Part V of the PPSA. The court may also make any order with respect to the receiver and manager, however appointed, “that it thinks fit in the exercise of its general jurisdiction over a receiver or receiver and manager”.

[41] Counsel to STN submits that a secured party need only establish that there is a debt owing, that the debt is secured and the security is enforceable and, in such circumstances, a court should not interfere in the proper exercise of a secured party’s contractual rights to appoint a receiver and to take possession of the collateral subject to its security: see *1003183 Ontario Ltd. v. Baker’s Dozen Donuts Corp.* 1994 CarswellOnt. 3309.

[42] Further, counsel submits that absent fraud or want of good faith, the courts will positively assist a secured creditor in the enforcement of its security interest in circumstances where a debtor purports to interfere with such rights: see *Uvalde Investment Co. v. 754223 Ontario Ltd.*, [1997] O.J. No. 711.

[43] Saffron and STN entered into the Loan Facility Agreement and Saffron signed the Grid Promissory Note. Counsel to STN submits that the obligations of Saffron are secured by the GSA and the security interest of STN has been perfected in accordance with the PPSA. An event of default has occurred and is continuing. Saffron has failed to satisfy the demand for payment of the Initial \$100,000 Advance and the Pre-March 2009 Debt and the ten-day BIA notice period has expired. Payment of amounts due under the Grid Promissory Note have now been accelerated and STN is entitled to the remedies provided for in the Loan Facility Agreement and the GSA.

[44] In essence, counsel to the STN submits that all required elements have been satisfied by STN and that the appointment of Deloitte should be confirmed.

[45] In my view, in the circumstances of this case, the inquiry has to be broader. Specifically, it is necessary to take into account that STN applied to court, unsuccessfully, for the appointment of a receiver.

[46] In my view, it is necessary to consider this motion in the context of whether circumstances are such that it would be appropriate to appoint a receiver, based on the criteria associated with applications under either s. 243 of the BIA or s. 101 of the CJA.

[47] In the circumstances of this case, it is my view that, had STN requested the appointment of a receiver, a receivership order would be granted. In the context of this application, it is therefore appropriate, to confirm the appointment of Deloitte as Receiver.

[48] I have reached this conclusion for the following reasons:

- (a) The Initial \$100,000 Advance and the Pre-March 2009 Debt are due and owing. These obligations were fixed at the time of the finalization of the Website Development Agreement. Saffron acknowledged these debts in the documents executed on March 26, 2009.
- (b) The amounts outstanding under the Grid Promissory Note are not subject to any rights of set-off, abatement or reduction. Even in instances where equitable set-off is claimed, equitable set-off requires that the opposing claims flow from the same transaction or relationship between the parties. That is not the case in this situation. The claims in respect of this application flow from the lending arrangement. The claims of Saffron flow from services provided under the Website Development Agreement. The claims of Saffron from set-off do not flow from the same transaction and relationship. Under the lending agreement, the relationship is that STN is lender and Saffron is borrower and the obligations are evidenced by the Grid Promissory Note. Under the services agreement, STN is service provider and Saffron is customer. Issues between them are subject to the dispute resolution process under the Website Development Agreement. In my view, equitable set-off is not applicable.
- (c) Justice Hourigan was of the view that Post-March 2009 Debt was disputed. The Post-March 2009 Debt is to be resolved pursuant to the dispute resolution provisions of the Website Development Agreement. The Post-March 2009 Debt has no application to the payment default under the Grid Promissory Note.

[49] The amounts demanded under the Grid Promissory Note and the Loan Facility Agreement are independent of any indebtedness owed under the Website Development Agreement. The Loan Facility Agreement and Grid Promissory Note do not contain a dispute resolution provision.

[50] Counsel to Saffron also raised the defence of abuse of process. In my view, the enforceability of the GSA, based on an event of default arising out of non-payment of the obligations evidenced by the Grid Promissory Note, was not considered or adjudicated by Hourigan J. In my view, abuse of process issues are not engaged. In addition, it seems clear that

Hourigan J. contemplated the possibility of changing circumstances and, in particular, payment default as of January 31, 2010. This, in fact, came to pass. The application is founded on such a payment default.

[51] Relief from forfeiture was also raised. I have been satisfied that this defence has no application in the current circumstances. Firstly, demand for payment was made. The relevant documents provided for a cure period. The cure period passed. The obligations were accelerated. The ten-day Notice was provided. The ten-day period expired without any payment. The remedy of appointing a receiver is not a penalty but rather a contractually agreed to remedy. The conduct of STN, in the circumstances, is reasonable.

[52] Furthermore, the issues raised by Saffron relating to its recently improved financial position have not persuaded me that the balance of convenience favours the Respondents. Taking into account the improved performance, EBITDA remains negative. The addition of interest can only make Saffron's financial position worse.

[53] In this case, the Applicant has established that there has been default that gives rise to a contractual ability to appoint a receiver. Further, the financial condition of the Respondents and the Respondents' acknowledgement that its assets are for sale, leads me to the conclusion that it is appropriate that the Applicant has input over the process in order to preserve and protect its position. Saffron is not precluded from pursuing a potential sale of assets and furthermore, the appointment of the Receiver need not preclude Saffron from continuing with the dispute resolution under the Website Development Agreement.

[54] The appointment of Deloitte is confirmed.

[55] However, I am of the view that it is appropriate for the court to have continuing supervision over the receivership. The Receiver is to report back to court within 30 days at which time it can provide its recommendations for a future course of action. The Receiver is also directed to engage independent counsel in respect of this matter. Saffron and the Binders are at liberty to continue with the dispute resolution under the Website Development Agreement.

[56] An order shall issue to give effect to the foregoing.

MORAWETZ J.

Date: May 26, 2010

Tab 25

CITATION: Daimler Truck Financial v. 9936726 Canada Inc. Inc. operating as Tiger Towing and Heavy Recovery, 2020 ONSC 6452
COURT FILE NO.: CV-20-644392
DATE: 20201022

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DAIMLER TRUCK FINANCIAL,	)	
a business unit of Mercedes-Benz	)	<i>Elaine Gray and Matthew Bradley, for the</i>
Financial Services Canada	)	Applicant
Corporation	)	
	)	
Applicant	)	
– and –	)	<i>Yuvraj S. Chhina, for the Respondents</i>
	)	9936726 Canada Inc. operating as Tiger
9936726 CANADA INC. operating	)	Towing and Heavy Recovery, and Tiger
as TIGER TOWING AND	)	Towing and Heavy Recovery operating as a
HEAVY RECOVERY, TIGER	)	Sole Proprietorship of Balwant Singh Sran
TOWING AND HEAVY	)	
RECOVERY operating as a Sole	)	No one appearing for the Respondent
Proprietorship of BALWANT	)	Rudraksha Transport Ltd., although on
SINGH SRAN, and	)	notice of the proceeding
RUDRAKSHA TRANSPORT	)	
LTD.	)	
	)	
Respondents	)	
	)	
	)	
	)	
	)	HEARD: August 17, 2020 (Decided August
	)	28, 2020; Supplemented by written
	)	submissions on costs filed September 18 and
	)	25, 2020)

KIMMEL J.

REASONS FOR DECISION REGARDING COSTS

The Result of the Application and of This Costs Decision

[1] This urgent application was heard on August 17, 2020 and decided by reasons released August 28, 2020. The applicant, Daimler Truck Financial, a business unit of Mercedes-Benz

Financial Services Canada Corporation (“MBFS”) was granted an order pursuant to s. 23 of the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25 (the “RSLA”) and s. 67(1) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“PPSA”) for immediate and permanent possession of four freightliner trucks identified as #1941, #0085, #0517 and #3987 valued at approximately \$280,000.00 (the “Trucks”). My decision:

- a. Granted MBFS immediate and permanent possession of the four Trucks;
- b. Declared that Tiger Towing had no lien against the Trucks under the RSLA;
- c. Declared that Tiger Towing had no right to seize and did not have the right to sell the four Trucks in May of 2020.

[2] The Trucks, owned by MBFS, were leased to Rudraksha Transport Ltd. (“RTL” or the “lessee”). RTL went into default of its lease payments. RTL did not participate directly in this proceeding. The Trucks were in the possession of the respondent 9936726 Canada Inc., operating as Tiger Towing and Heavy Recovery (“Tiger Towing”), which claimed a repairer’s or storer’s lien under the RSLA over the Trucks. I found against Tiger Towing and in favour of MBFS in all aspects of their opposing positions.

[3] I afforded the parties the opportunity to make written submissions on costs if they could not reach an agreement after the release of my decision. No agreement was reached. I received cost submissions from the applicant on September 18, 2020 and from the respondent on September 25, 2020. These are the reasons for my decision to award the applicant its partial indemnity costs in the amount of \$36,658.08 for fees, plus applicable taxes and claimed disbursements.

Guiding Principles

[4] Costs are within the discretion of the court to award under s. 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C-43 (“CJA”). The factors to consider in the exercise of that discretion are set out in Rule 57.01 and include:

- a. The principle of indemnity under Rule 57.01(0.a), including the experience of the lawyer for the party entitled to costs as well as the rates charged and the hours spent by that lawyer;
- b. Under Rule 57.01(0.b), the amount of costs that the unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- c. The amount at issue in the proceeding (Rule 57.01(a));
- d. The complexity of the proceeding (Rule 57.01(c));
- e. The importance of the issues (Rule 57.01(d));

- f. The conduct of a party that unduly lengthened or complicated a proceeding (Rule 57.01(e), (f) and (g);
- g. Any other matter relevant to the question of costs (Rule 57.01(i)).

[5] Offers to Settle, whether they fall strictly within Rule 49.10 or not, are also a relevant consideration for awarding costs.

[6] It is commonly understood, as this court reiterated in *Tesla Motors Canada ULC v. Ontario (Ministry of Transportation)*, 2018 ONSC 5062, 144 O.R. (3d) 701, at para. 67, that:

Overall, the court is required to consider what is “fair and reasonable” in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v. Public Accountants Council (Ontario)*, 71 O.R. (3d) 291 (Ont. C.A.), at paras 26, 37.

[7] This engages the consideration of both the principle of indemnity for the successful party (57.01(1)(0.a)) and the expectations of the unsuccessful party (57.01(1)(0.b)).

Positions of the Parties on Costs

The Applicant’s Position

[8] The applicant was consistent in its position that Tiger Towing had failed to produce evidence that it was a “repairer” or a “storer” of the Trucks within the meaning of the RSLA; therefore, the applicant maintained that Tiger Towing could have no possessory lien pursuant to either s. 3 or s. 4 of the RSLA. The applicant was also consistent in its position that, once Tiger Towing gave up possession of the Trucks to RTL, in order to enforce a non-possessory lien pursuant to s. 7(5) of the RSLA, Tiger Towing needed written proof of RTL’s acknowledgement of the indebtedness represented by the invoices issued for towing services, which Tiger Towing did not initially produce and then produced in a piecemeal way without clear or persuasive evidence to support the acknowledgement having been provided.

[9] Nor was Tiger Towing able to demonstrate that it provided any services in respect of the Trucks that resulted in any improvement or betterment of the Trucks that would enrich or benefit the applicant.

[10] The applicant says it acted reasonably throughout. It asked for the evidence of any possessory or non-possessory lien claims that Tiger Towing was relying on and by making an offer to settle the application, early on in the process, by which the application would be dismissed without costs in exchange for the return of the Trucks, a disclaimer of Tiger Towing’s interest and a release when that evidence was not forthcoming.

[11] The applicant seeks substantial indemnity costs throughout, based on what it seeks to have the court characterize as “egregious or high-handed” conduct of Tiger Towing warranting the expression of the court’s disapproval. It relies upon the case of *Jack Ganz Consulting Ltd. v.*

Recipe Unlimited Corporation, 2020 ONSC 5307. The alleged misconduct by the respondents is primarily tied to the manner in which the responding evidence was disclosed concerning the alleged signed acknowledgements from RTL of the indebtedness, which the court ultimately did not accept.

[12] The applicant claims that its substantial indemnity costs throughout total \$67,388.59 (inclusive of all fees, disbursements and applicable taxes). This includes the sum of \$4,400.00 in fees attributable to legal professional time spent on the application, but that was not charged to the client (applicant), which the applicant claims should nonetheless be paid by the respondents.

[13] The applicant also relies on the July 28, 2020 Offer to Settle it made, which it claims qualifies for the advantageous cost consequences under Rule 49, entitling the applicant to partial indemnity costs up to the date of the offer and substantial indemnity costs thereafter. No breakdown is provided for precisely how those costs would be calculated.

[14] The applicant seeks an order that the respondents (unspecified, so I assume they mean all of them, including RTL) are jointly and severally liable for any costs awarded.

The Position of the Participating Respondents

[15] The Respondents 9936726 Canada Inc., operating as Tiger Towing and Heavy Recovery, and Tiger Towing and Heavy Recovery operating as a Sole Proprietorship of Balwant Singh Sran were represented and responded to this proceeding. It was acknowledged early on that only the numbered company defined as “Tiger Towing” could have a claim to a lien under the RSLA and only that entity asserted the lien claims.

[16] I found that the Trucks had been towed by Tiger Towing prior to May of 2020, even though I was not satisfied that the precise dates and towing fees were not established. Tiger Towing claims to have outstanding invoices for its towing services in the approximate aggregate amount of \$61,000.00. It claims to have acted reasonably in opposing the application to protect its interests, even though it was ultimately unsuccessful. It claims to have acted reasonably by offering to return the Trucks and providing a release if its fees for towing services were paid.

[17] Tiger Towing also points to the fact that it provided undertakings to the court with respect to the preservation of the Trucks and keeping them in Ontario, when requested to do so, and provided the applicant with the location of the Trucks immediately following the hearing.

[18] The respondents dispute that their conduct rose to the level of “high-handed or egregious” warranting the court’s disapproval by an award of substantial indemnity costs. They contend that their opposition was reasonable, including their offer to return the Trucks and provide a release if their towing fees were paid.

[19] They rely on *Jennings v. Latendresse*, 2013 ONSC 1017 (at paras. 7-8), and argue that their conduct was consistent with what would be expected in an application of this nature. Just because it was not proven and they ultimately lost does not mean that their positions were so egregious as to warrant a punitive costs award on a substantial indemnity scale.

[20] They accept that there may be a cost consequence to having lost the application, but do not agree that there should be an award of substantial indemnity costs. They ask the court to be fair and reasonable in any award of costs that is made. While they suggest an award of no costs, their primary argument is that the court should award less than what the applicant is asking for.

Costs Analysis

[21] There can be no serious dispute as to the applicant's entitlement to costs. Costs should follow the event in most cases, and this is no exception. The applicant is entitled to an award of costs as the successful party on this application. The issues I need to decide are the scale and quantum of the applicant's costs.

Scale of Costs

[22] Having considered the submissions of the parties and having regard to the Rule 57.01 factors that are to guide the exercise of my discretion in awarding costs under s. 131 of the CJA, I am awarding the applicant its partial indemnity costs of this application. The conduct of the respondents is no more extreme in this case than that which was considered by the court in the *Ganz* case relied upon by the applicant in support of its request for substantial indemnity costs. The court stated in that case (at para. 6) as follows:

In addition, the Plaintiff did not engage in egregious, malicious or high-handed conduct, in the proceeding or otherwise, that would warrant an award of substantial indemnity costs. While the Plaintiff's shifting theories of liability and conduct of the proceeding delayed the matter and put the Defendant to additional legal costs, there is no basis upon which to find that it was malicious. This is not a rare or exceptional case of reprehensible conduct on the part of the Plaintiff. Moreover, the Defendant was awarded costs thrown away when the summary judgment hearing was adjourned.

[23] I do not find that the respondents' conduct rises to a level that warrants the court's sanction or disapproval through an award of substantial indemnity costs. My concerns expressed about the timing and sufficiency of the evidence they put forward in the course of responding to this application do not render this an exceptional case of reprehensible conduct.

[24] The principle of indemnity, which is a relevant consideration under Rule 57.01(0.a), does not translate into an award of full or even substantial indemnity costs in most cases. Those are the exceptions; the norm is partial indemnity costs, barring exceptional circumstances which have not been demonstrated in this case. The respondents refer to the case of *Laczko v. Alexander*, 2012 ONCA 872, for this proposition, which is not controversial.

[25] An award of the applicant's claimed partial indemnity costs strikes the right balance in this case. While the respondents' conduct has not been found to be so reprehensible as to entitle the applicant to be fully or even substantially indemnified, the applicant should also not find itself to

be too far out of pocket for having been put to the trouble of hiring a lawyer and bringing this application to enforce its legal rights.

[26] Awarding the applicant its claimed partial indemnity costs leads to a fair and reasonable outcome in the circumstances of this case, even though it leaves the participating respondents with not only their unpaid invoices for towing services but also an obligation to pay costs to the applicant for their unsuccessful opposition to this application.

[27] The costs consequences of Rule 49.10 are not easy to apply to a situation such as this where one of the terms of the applicant's Rule 49 offer was a requirement for a release from the respondents, including RTL who was not represented and did not participate in the proceeding, and over whom the participating respondents presumably could not exercise any control. The court cannot order that release. The parties did not argue the question of what the implications of a requirement for a release have on a Rule 49 offer and its cost consequences, and I expect that there is law on this point.

[28] However, because of the involvement of this third party, I do not consider it fair and reasonable in this case to order the participating respondents to be ordered to pay substantial indemnity costs based strictly on Rule 49.10 and I decline to exercise my discretion to make such an order in the circumstances of this case.

Quantum of Costs

[29] The bill of costs of the applicant indicates \$36,658.08 for fees on a partial indemnity scale. It is noted that the actual fees were \$61,096.80 and that the client received a reduction of \$4,400.00 from those fees on its bill, so the client was only charged \$56,696.80 in fees corresponding to the work outlined in the applicant's bill of costs. These fees do not include the applicable HST. The claimed disbursements are \$5,253.14 (inclusive of HST).

[30] The participating respondents' bill of costs indicates their partial indemnity costs to be \$39,210.80 (before applicable taxes) and disbursements of \$3,081.83 (including taxes). Their fees on all scales are higher than the applicant's. Their lower disbursements are accounted for primarily by lower transcript costs.

[31] The bill of costs of the unsuccessful parties is one data point to consider in assessing their expectations. In this case, the higher claimed fees of the respondents are indicative that the amounts claimed by the applicant are reasonable. Consistent with that, no specific criticism or complaint was made about the amounts claimed by the applicant. Furthermore, I consider the rates and applied percentages, as well as the number of hours billed, to calculate the applicant's partial indemnity costs to be reasonable in the circumstances.

[32] The exercise of discretion in fixing costs includes an overall assessment of fairness and reasonableness. This was an urgent proceeding pertaining to Trucks owned by the applicant and valued at approximately \$280,000.00 that the applicant was seeking to locate and recover possession of. The participating respondents aggressively opposed the relief sought and were not immediately forthcoming with information concerning the whereabouts of the Trucks. Overall, I consider it to be fair and reasonable that the applicant be awarded its all-inclusive partial indemnity

costs fixed in the amount of \$36,658.08 for fees (plus applicable taxes), plus disbursements of \$5,253.14 (inclusive of HST).

[33] I find that the respondents should not enjoy the benefit of any discount against the costs awarded for the reduction that the applicant received from its counsel. The partial indemnity fee costs awarded are far below the actual costs the applicant incurred. Further, the applicant did make a settlement offer which in spirit was reasonable and could have avoided the proceedings, even though I have decided not to strictly apply the cost consequences of Rule 49.10.

Order and Implementation

[34] In the exercise of my discretion under s. 131 of the CJA and having regard to the factors in Rule 57.01, I am ordering that the respondents Tiger Towing and RTL jointly and severally pay the applicant its partial indemnity costs in the amounts indicated above, within 30 days. RTL is equally responsible for what transpired in connection with the Trucks, even though it chose not to participate in this application directly.

[35] Notwithstanding Rule 59.05, this costs decision is effective from the date hereof and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Order need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this decision may nonetheless submit a formal Order for original signing, entry and filing when the court returns to regular operations.

Kimmel J.

Released: October 22, 2020

CITATION: Daimler Truck Financial v. 9936726 Canada Inc. Inc. operating as Tiger Towing
and Heavy Recovery, 2020 ONSC 6452
COURT FILE NO.: CV-20-644392
DATE: 20201022

BETWEEN:

**DAIMLER TRUCK FINANCIAL, a business
unit of Mercedes-Benz Financial Services
Canada Corporation**

Applicant

– and –

**9936726 CANADA INC. operating as TIGER
TOWING AND HEAVY RECOVERY,
TIGER TOWING AND HEAVY
RECOVERY operating as a Sole
Proprietorship of BALWANT SINGH SRAN,
and RUDRAKSHA TRANSPORT LTD.**

Respondents

REASONS FOR DECISION

REGARDING COSTS

Released: October 22, 2020

Tab 26

CITATION: Urbancorp, 2020 ONSC 7920
COURT FILE NO.: CV-18-600624-00CL
DATE: 12-23-20

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

RE: KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC., Applicant

AND:

URBANCORP RENEWABLE POWER INC., Respondent

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robin Schwill, Robert Nicholls and Shane Freedman*, for KSV Restructuring Inc. (formerly KSV Kofman Inc.), the Monitor and Receiver

Neil Rabinovitch, for Adv. Guy Gissin, the Israeli Functionary

Suzanne Murphy, Heather Meredith and Alex Steele, for Enwave Geo Communications LP, the Purchaser

Jeffrey Larry, for King Towns North Inc.

Scott Bomhof, for First Capital Realty

Robert Drake and Mario Forte, for The Fuller Landau Group Inc., Monitor of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc. and Westside Gallery Lofts Inc.

Maria Dimakas, for the Condominium Corporations

HEARD VIA ZOOM: December 11, 2020

RELEASED: December 23, 2020

ENDORSEMENT

Introduction

[1] KSV Restructuring Inc. (formerly KSV Kofman Inc.), Court-appointed receiver (the “Receiver”) of Urbancorp Renewable Power Inc. (“URPI”) and as Court-appointed Monitor of Urbancorp Cumberland 1 LP (“Cumberland LP”), Urbancorp Cumberland 1 GP Inc., and certain related entities (the “Monitor”, and as Receiver and Monitor, the “Court Officer”) for and on behalf of Urbancorp New Kings Inc. (“UNKI”), Vestaco Homes Inc. (“VHI”) and 228 Queen’s

Quay West Limited (“QQW”) seeks, among other things, approval of the sale of certain assets (the “Transaction”) contemplated by an agreement of purchase and sale (the “Sale Agreement”) between the Receiver and Monitor (together, also referred to as the “Vendor”), and Enwave Geo Communities LP, by way of assignment from Enwave Energy Corporation (the “Purchaser”) dated November 2, 2020 and appended to the Fifth Report of the Receiver and Forty-Third Report of the Monitor dated November 30, 2020 (the “Report”), and vesting in the Purchaser URPI’s, Cumberland LP’s, UNKI’s, VHI’s and QQW’s (collectively, the “Urbancorp Entities”) respective rights, title and interest in and to the assets described in the Sale Agreement (the “Purchased Assets”). The geothermal assets located at three condominiums developed by entities in the Urbancorp Group of Companies (the “Geothermal Assets”) make up the vast majority of the Purchased Assets.

[2] The Receiver also seeks an Order sealing the Confidential Appendix to the Report (the “Sealing Order”) pending further order of the Court.

[3] Finally, the Receiver seeks an Order (the “Assignment Order”) compelling the assignment to the Purchaser of the rights and obligations of VHI and URPI as tenants (the “Tenants”), under a lease dated July 10, 2010 (the “Berm Lease”) with King Towns North Inc. (“KTNI”) as landlord.

[4] The Receiver recommends approval of the Transaction. Gus Gissen, First Capital Realty, The Fuller Landau Group Inc., the Condominium Corporations and the Purchasers support the Receiver.

[5] KTNI is opposed to the Assignment Order.

[6] The background to this matter is set out in the Report. All capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Report. The following is a summary of some of the facts central to this motion.

[7] Pursuant to an order issued on December 10, 2019, the Receiver was authorized to commence a sale process (the “Sale Process”) for the Geothermal Assets (the “Sale Process Order”). The bid deadline under the Sale Process was October 20, 2020 (the “Bid Deadline”).

[8] Following the Bid Deadline, the Sale Agreement was executed on November 2, 2020. The Purchase Price, subject to adjustments which are expected to be immaterial, is \$24,000,000.

[9] KTNI owns land adjacent to the condominium development. The Tenants own and operate the geothermal system.

[10] KTNI entered into a long-term lease (the “Berm Lease”) with the Tenants and VHI for the lease of the Berm Lands. The Berm Lease was designed to allow the Tenants to use the 82 geothermal wells on the Berm Lands for the Geothermal System.

[11] The Berm Lease provides for a 50-year term (of which some 40 years remain). The Berm Lease further provides that the Tenants have a unilateral right to extend the term of the lease on

the same terms and conditions (i.e., for the same \$100 annual rent) in the event that the Tenants' Geothermal Supply Contracts are extended.

[12] When KTNI entered into the lease, each of KTNI, URPI, and VHI was owned and controlled by Saskin family entities. KTNI takes the position that the parties were indifferent about the nominal rent that was below the fair market value for use of the lands.

[13] The Berm Lease contains an assignment clause which provides that KTNI must consent to any assignment or transfer of the Berm Lease by the Tenants, and that KTNI may unreasonably withhold consent to any assignment or transfer of the Berm Lease.

[14] KTNI claims its consent has not been sought.

[15] The Receiver claims that issues relating to the assignment in the context of a transaction were raised a year ago and KTNI was not prepared to consent to the assignment of the Berm Lease.

[16] The Purchaser has allocated \$2.049 million of the Purchase Price to the Berm Lease (although KTNI does not agree with this allocation).

Law and Analysis

[17] All parties agree that the Sale Process was properly conducted and produced a Purchase Price that is commercially reasonable in the circumstances. For this reason, it is not necessary, in my view, to review the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), at para. 16 concerning sales by a receiver.

[18] There is, however, opposition from KTNI as to whether the Assignment Order, which is critical to the Transaction, should be granted.

[19] KTNI submits that since URPI, one of the Tenants, is in receivership, the Court Officer, in its capacity as Receiver, has no statutory authority to seek the Assignment Order.

[20] In support of its argument that the Assignment Order should not be granted, KTNI references s. 84.1 of the *Bankruptcy and Insolvency Act* ("BIA") and s. 11.3 of the *Companies' Creditors Arrangement Act* ("CCAA") which provide the court, in bankruptcy and CCAA proceedings, with statutory jurisdiction to make an order assigning a debtor company's rights and obligations under an agreement, on notice to every party to the agreement and to the court officer.

[21] Since there is no corresponding provision in Part XI of the BIA dealing with Secured Creditors and Receivers, KTNI submits there is no jurisdiction to grant the Receiver's request for the Assignment Order.

[22] In addition, KTNI submits it is not "appropriate" to grant the Assignment Orders as:

- a. KTNI is not being treated fairly and equitably, and
- b. KTNI's consent has not been sought.

[23] In response, counsel to the Receiver submits that Canadian courts have repeatedly stated that the BIA and the CCAA are to be interpreted harmoniously. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60. While s. 84.1 of the BIA does not specifically refer to receivers, upon a purposive analysis, this policy and its underlying principles suggest an application to receivers. While the BIA is silent on when a receiver can apply for an order assigning a debtor contract, if both a trustee and a monitor may apply for such an order, the only purposive interpretation which harmonizes the Canadian insolvency regimes and prevents the loss of value from the estate of the debtor is the application of section 84.1 of the BIA to receivers.

[24] The Supreme Court recently confirmed in 9354-9186 *Quebec Inc. v. Callidus Capital Corp.* 2020 SCC 10 at para. 40 that the remedial objectives of Canadian insolvency laws are to provide timely, efficient and impartial resolution of a debtor's insolvency, to preserve and maximize the value of a debtor's assets, to ensure fair and equitable treatment of the claims against a debtor, to protect the public interest, and to balance the costs and benefits of restructuring or liquidating the debtor company.

[25] In *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16, at para. 46, in determining the scope of the Court's authority to authorize the actions of the receiver, the Court held that "insisting on a purposive analysis... helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court."

[26] Counsel to the Receiver also submitted that an order compelling the assignment of contracts is only required where the counterparty to such contract declines to provide their consent to the assignment. The Court held in *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302, at paras. 22-23 (Sup. Ct. J.), that it had the discretion to issue an assignment order even if consent to assignment was reasonably withheld by the counterparty. While Playdium is a pre-2009 amendment example of a forced-assignment, the Receiver submits that it continues to inform courts' analyses in post-amendment cases.

[27] In my view, it is necessary to take into consideration that the Purchase Price is \$24,000,000. If the Transaction flounders as a result of the inability to assign the Berm Lease, the result would clearly be harmful to creditors. It is also necessary to take into account that an alternative route is available to the Receiver, specifically to take steps to bankrupt URPI and then rely on s. 84.1 of the BIA as the basis to seek the Assignment Order.

[28] If the Receiver is required to take this alternative approach, it would only result in a delay in completing the Transaction and would increase the cost of completing the Transaction. This is not a desirable outcome.

[29] Rather, it is preferable in my view to insist on a purposive approach to accomplish the objectives of Canadian insolvency laws.

[30] Section 243(1)(c) of the BIA provides:

243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

...

(c) take any other action that the court considers advisable.

[31] This subsection, in conjunction with the provisions of s. 100 of the *Courts of Justice Act (Ontario)* (“CJA”) is broad enough to form the basis of the Receiver’s request for the Assignment Order and for the court to make such order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context.

[32] An alternative approach is to resort to the inherent jurisdiction of the court.

[33] I recently commented on this subject in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552.

[65] There is also scope to grant the requested relief using the inherent jurisdiction of the court. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. It has been said that inherent jurisdiction is a power that is exercisable “in any situation where the requirements of justice demands it” (*Gillespie v. Manitoba (Atty. Gen.)*, 2000 MBCA 1, at para. 92), and that “nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which is specifically appears to be so” (*Board v. Board* [1919] A. C. 956 at pp. 17-18, per Viscount Haldane).

[66] Recently, the Supreme Court of Canada reviewed the inherent jurisdiction of superior courts in *Endean v. British Columbia*, 2016 SCC 42, and described it as follows:

[23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a “reserve or fund of powers” or a “residual source of powers”, which a superior court “may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them”: I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R.

78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-31. The Supreme Court acknowledges that the doctrine of inherent jurisdiction is amorphous in nature: *Ontario v. Ontario Criminal Lawyers Association of Ontario*, 2013 SCC 43, at para. 22. As a result, the parameters of what a Superior Court judge may do or not do under the power of inherent jurisdiction are unknown.

...

[68] In the oft-cited *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), the Court of Appeal for Ontario held that except where provided specifically to the contrary, the court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters." The Court of Appeal set out the jurisprudential basis for this holding:

In *Re-Michie Estate and City of Toronto et al.* [1968] 1 O.R. 266 at pp. 268 – 9, Stark J, after considering the relevant provisions of the Judicature Act and the authorities, said:

It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantial law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* [1667], 1 Wms. Sound. 73 at p. 74, 85 E.R.84:

... And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

[69] However, the doctrine is not unlimited: it is subject to both statutory and purposive limitations. The doctrine cannot be exercised so as to contradict a statute or rule. Inherent jurisdiction is also limited to exercises that fulfil the underlying purpose of the doctrine, being to regularize and protect the administration of justice. Inherent jurisdiction should be exercised "sparingly and with caution:" *R c. Caron*, 2011 SCC 5, at para. 28.

[70] In *Endean*, the Supreme Court set out that before exercising the court's inherent jurisdiction, a justice should first determine the scope of express grants of statutory powers before dipping into this "important but murky pool of residual authority" (*Endean*, at para. 24). Having done so, in my view, it is both necessary and appropriate to exercise inherent jurisdiction in responding to this motion.

[34] There is no statutory provision in the BIA that prohibits a superior court from granting the requested relief. In these circumstances, I am of the view that if s. 243(1)(c) of the BIA, in conjunction of s. 100 of the CJA, does not provide the basis for considering the Assignment Order, then it is appropriate to resort to the inherent jurisdiction of the Superior Court.

[35] Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, it is necessary to review the criteria the Court will consider in determining whether to order an assignment. The criteria referenced in s. 84.1(4) of the BIA and s. 11.3 of the CCAA informs the analysis for an assignment by the Receiver. The criteria are as follows:

- (a) whether the monitor approved the proposed assignment (only relevant to CCAA proceedings);
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

[36] KTNI accepts that the first two factors have been established in that the Monitor has approved of the assignment and the financial obligations of the proposed assignee are nominal.

[37] The remaining issue is whether it would be appropriate to assign the rights and obligations to that person.

[38] The Receiver submits that it is appropriate to assign the rights and obligations of the Tenants under the Berm Lease to the Purchaser for the following reasons:

- (a) the Sale Process was approved by the Court;
- (b) the assignment of the Berm Lease does not preclude KTNI from asserting a claim as to an allocation of a portion of the Sale Proceeds based on the value inherent in the Berm Lease;
- (c) there is no prejudice to KTNI from the assignment since no amendments are being sought by the Purchaser in respect of the Berm Lease. KTNI's rights under the Berm Lease will be unaffected as a result; and
- (d) the 82 boreholes located on the Berm Lands are an integral part of the Purchased Assets.

[39] Further, the Receiver submits that the proposed assignment meets the "twin goals" of assisting the reorganization process by providing valuable liquidity to the estate of the Urbancorp Entities, while treating the counterparty fairly and equitably, as KTNI will be unaffected by the assignment without any prejudice to KTNI claiming that the value allocated to the Berm Lease ought to be directed to it rather than remain in the estate.

[40] KTNI previously advised the Court Officer that it would not consent to the assignment of the Berm Lease without receiving a portion of the proceeds from the sale of the Geothermal Assets prior to closing. The Court Officer states that it has been unable to obtain the consent of KTNI to the assignment of the Tenants' interests under the Berm Lease, without prejudice to KTNI's rights to subsequently advocate for its allocation entitlements, if any.

[41] The Receiver also submits that if the Court has the jurisdiction to assign a contract where the counterparty reasonably withholds its consent and notwithstanding any provision to the contrary in the agreement, then this Court has the requisite jurisdiction to issue the Assignment Order, notwithstanding that KTNI has unreasonably withheld consent, as permitted under the Berm Lease.

[42] KTNI takes issue with the Receiver's submission.

[43] KTNI submits that s. 11.3 of the CCAA is designed to protect parties in KTNI's exact position. This is why it is necessary to treat KTNI differently from "other creditors" who are not afforded the protections under s. 11.3 of the CCAA. KTNI references *Dundee Oil & Gas Limited (Re)*, 2018 ONSC 3678 at para. 27:

Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page. [Emphasis added.]

[44] In my view, KTNI's reliance on the foregoing passage is misdirected. The passage concerns the credit-risk of the assignee. In this case, the credit risk is for annual rent minimal. Issues relating to the environmental indemnity are addressed at [52] and [53] below.

[45] KTNI also submits that the application should fail, however, on the third factor to consider — whether it is "appropriate" to assign the rights and obligations in this case. Section 11.3(3)(c) of the CCAA provides that in deciding whether to make an order, the court must consider whether it would be appropriate to assign the rights and obligations to the assignee.

[46] In this case, KTNI submits that forcing an assignment of the Berm Lease, without modification of the commercially unreasonable rent or the payment of consideration to KTNI, does not treat KTNI fairly and equitably.

[47] If the assignment of the Berm Lease is approved, KTNI submits that it would be stripped of the very protection that it bargained for while diverting the entire value of the Berm Lands away from KTNI. This is not a fair, equitable or appropriate result in the circumstances.

[48] In my view, the arguments presented by KTNI have been addressed by the Receiver. Allocation entitlements will be addressed at a future date. As noted, the Purchaser has allocated \$2.049 million for the Berm Lease, an amount that KTNI disputes. The Purchaser is clearly of the view that the Berm Lease has value.

[49] KTNI is also of the view that it is not appropriate to force the assignment of the Berm Lease where KTNI's consent has not even been sought.

[50] In response to this submission, I accept the explanations put forth by the Receiver at [15] and [40]. A transaction involving the Geothermal Assets has been contemplated for a considerable period of time and comes as no surprise to KTNI. The Receiver and KTNI have not been able to agree on terms and, as a result, no consent has been forthcoming.

[51] Finally, in oral argument, counsel to KTNI referenced that the Sale Agreement had recently been assigned by Enwave Energy Corporation to Enwave Geo Communications LP. While KTNI was satisfied as to the financial capability of the assignor, it has no financial information about the assignee.

[52] Although the annual rent is nominal, KTNI raised the subject of the Environmental Indemnity in s. 7.3 of the of the Berm Lease.

[53] In my view, the existence of the Environmental Indemnity does not result in a reason to not approve the Transaction. The Sales Agreement provides for an assignment by the purchaser and there is no evidence of any environmental concerns having been raised in the first ten years of the term. The Geothermal System provides heating and air conditioning to hundreds of condominium units and consequently, the proposed Tenants have an incentive to maintain the system in proper working condition. Finally, KTNI can raise this as an allocation issue.

[54] Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, I conclude that, in these circumstances, the Transaction should be approved and that the Assignment Order should be granted.

[55] The Court Officer also requests an order sealing the Confidential Appendix to the Report pending the closing of the Transaction. No party raised an objection to this request.

[56] In my view, the Confidential Appendix contains highly sensitive commercial information including the Offer Summary, which, if made public, could detrimentally affect the price that could be obtained on a subsequent sale of the Purchased Assets should the Transaction not close.

[57] Having considered the guidance set out by the Supreme Court of Canada in *Sierra Club of Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, at para. 53, I am satisfied that the Confidential Appendix should be sealed.

Disposition

[58] In the result, I am satisfied that it is both just and convenient to grant this motion and approve the Transaction and also grant the Sealing Order and the Assignment Order.

Chief Justice G.B. Morawetz

Date: December 23, 2020

Tab 27

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.

MONDAY, THE 14TH

JUSTICE HAINEY

DAY OF SEPTEMBER, 2020



IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT*
ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF BROOKS BROTHERS GROUP, INC.,
BROOKS BROTHERS FAR EAST LIMITED, BBD HOLDING 1, LLC,
BBD HOLDING 2, LLC, BBDI, LLC, BROOKS BROTHERS
INTERNATIONAL, LLC, BROOKS BROTHERS RESTAURANT, LLC,
DECONIC GROUP LLC, GOLDEN FLEECE MANUFACTURING
GROUP, LLC, RBA WHOLESALE, LLC, RETAIL BRAND ALLIANCE
GIFT CARD SERVICES, LLC, RETAIL BRAND ALLIANCE OF
PUERTO RICO, INC., 696 WHITE PLAINS ROAD, LLC, AND BROOKS
BROTHERS CANADA LTD.

APPLICATION OF BROOKS BROTHERS GROUP, INC. UNDER
SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)

THIS APPLICATION, made by Brooks Brothers Group, Inc. ("BBGI") in its capacity as the foreign representative (the "Foreign Representative") of BBGI, Brooks Brothers Far East Limited, BBD Holding 1, LLC, BBD Holding 2, LLC, BBDI, LLC, Brooks Brothers International, LLC, Brooks Brothers Restaurant, LLC, Deconic Group LLC, Golden Fleece Manufacturing Group, LLC, RBA Wholesale, LLC, Retail Brand Alliance Gift Card Services, LLC, Retail Brand Alliance of Puerto Rico, Inc., 696 White Plains Road, LLC, and Brooks Brothers Canada Ltd. (collectively, the "Chapter 11 Debtors"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") for an Order

substantially in the form enclosed in the Application Record, was heard this day by judicial videoconference via Zoom at Toronto, Ontario due to the COVID-19 crisis.

ON READING the Notice of Application, the affidavit of Stephen Marotta affirmed September 13, 2020 (the "Marotta Affidavit"), filed,

AND UPON HEARING the submissions of counsel for the Foreign Representative and counsel for Alvarez & Marsal Canada Inc. ("A&M"), in its capacity as proposed information officer, and those other parties present, no one else appearing although duly served as appears from the affidavit of service of Mark Sheeley affirmed September 14, 2020:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.
2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meaning given to them in the Marotta Affidavit.

INITIAL RECOGNITION ORDER

3. **THIS COURT ORDERS** that the provisions of this Order shall be interpreted in a manner complementary and supplementary to the provisions of the Initial Recognition Order (Foreign Main Proceeding) dated as of September 14, 2020 (the "Recognition Order"), provided that in the event of a conflict between the provisions of this Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. **THIS COURT ORDERS** that the following orders of the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court") made in the Foreign Proceeding (as defined in the Recognition Order) (the "Foreign Orders") are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to section 49 of the CCAA:

- (a) *Order Authorizing Brooks Brothers Group, Inc. to Act as Foreign Representative on Behalf of the Debtors' Estates Pursuant to 11 U.S.C. § 1505* (the "Foreign Representative Order", a copy of which is attached as Schedule "A" hereto); and
- (b) *Order Directing the Joint Administration of Brooks Brothers Canada Ltd.'s Chapter 11 Case with the Original Debtors' Chapter 11 Cases* (the "Second Joint Administration Order", a copy of which is attached as Schedule "B" hereto).

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to Property (as defined below) in Canada.

APPOINTMENT OF INFORMATION OFFICER

5. **THIS COURT ORDERS** that A&M is hereby appointed as an officer of this Court (the "Information Officer"), with the powers and duties set out herein.

NO PROCEEDINGS AGAINST THE CHAPTER 11 DEBTORS OR THE PROPERTY

6. **THIS COURT ORDERS** that until such date as this Court may order (the "Stay Period") no proceeding or enforcement process in any court or tribunal in Canada (each, a "Proceeding") shall be commenced or continued against or in respect of the Chapter 11 Debtors, or their employees or representatives acting in such capacities, or affecting their business (the "Business") or their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"), except with the written consent of the Chapter 11 Debtors or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Chapter 11 Debtors or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

7. **THIS COURT ORDERS** that, without limiting the stay of proceedings provided for in the Recognition Order, during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively

being "Persons" and each being a "Person") against or in respect of the Chapter 11 Debtors or their employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Chapter 11 Debtors or leave of this Court, provided that nothing in this Order shall (a) prevent the assertion of or the exercise of rights and remedies outside of Canada, (b) empower any of the Chapter 11 Debtors to carry on any business in Canada which that Chapter 11 Debtor is not lawfully entitled to carry on, (c) affect such investigations or Proceedings by a regulatory body as are permitted by section 11.1 of the CCAA, (d) prevent the filing of any registration to preserve or perfect a security interest, or (e) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

8. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Chapter 11 Debtors and affecting the Business in Canada, except with leave of this Court.

ADDITIONAL PROTECTIONS

9. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Chapter 11 Debtors or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services provided in respect of the Property or Business of the Chapter 11 Debtors, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Chapter 11 Debtors, and that the Chapter 11 Debtors shall be entitled to the continued use in Canada of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names.

10. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Chapter 11 Debtors with respect to any

claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Chapter 11 Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

11. **THIS COURT ORDERS** that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO INFORMATION OFFICER

12. **THIS COURT ORDERS** that the Information Officer:

- (a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;
- (b) shall report to this Court periodically with respect to the status of these proceedings and the status of the Foreign Proceeding, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;
- (c) in addition to the periodic reports referred to in paragraph 12(b) above, the Information Officer may report to this Court at such other times and intervals as the Information Officer may deem appropriate with respect to any of the matters referred to in paragraph 12(b) above;
- (d) shall have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of

the Chapter 11 Debtors, to the extent that is necessary to perform its duties arising under this Order; and

- (e) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

13. **THIS COURT ORDERS** that the Chapter 11 Debtors and the Foreign Representative shall (a) advise the Information Officer of all material steps taken by the Chapter 11 Debtors or the Foreign Representative in these proceedings or in the Foreign Proceeding, (b) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (c) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

14. **THIS COURT ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

15. **THIS COURT ORDERS** that the Information Officer (a) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (b) may post on its website any other materials that the Information Officer deems appropriate.

16. **THIS COURT ORDERS** that the Information Officer may provide any creditor of a Chapter 11 Debtor with information provided by the Chapter 11 Debtors in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Chapter 11 Debtors is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative and the relevant Chapter 11 Debtors may agree.

17. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall be paid by the Chapter 11 Debtors their reasonable fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The Chapter 11 Debtors are hereby authorized and directed to pay the accounts of the Information Officer and counsel for the Information Officer on a weekly basis or on such other terms as such parties may agree, and, in addition, the Chapter 11 Debtors are hereby authorized to pay the Information Officer and counsel to the Information Officer retainers in the amounts of US\$100,000 and US\$75,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

18. **THIS COURT ORDERS** that the Information Officer and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice, and the accounts of the Information Officer and its counsel shall not be subject to approval in the Foreign Proceeding.

19. **THIS COURT ORDERS** that Canadian counsel to the Chapter 11 Debtors, the Information Officer and counsel to the Information Officer, shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property in Canada, which charge shall not exceed an aggregate amount of C\$350,000 as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 23 and 25 hereof.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

20. **THIS COURT ORDERS** that the Chapter 11 Debtors shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Chapter 11 Debtors in connection with the Business in Canada after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

21. **THIS COURT ORDERS** that the directors and officers of the Chapter 11 Debtors shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property in Canada, which charge shall not exceed an aggregate amount of C\$200,000, as security for the indemnity provided in paragraph 20 of this Order. The Directors' Charge shall have the priority set out in paragraphs 23 and 25 hereof.

22. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Chapter 11 Debtors' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 20 of this Order.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

23. **THIS COURT ORDERS** that the priorities of the Administration Charge and the Directors' Charge (collectively, the "Charges"), as among them, shall be as follows:

- (a) First – Administration Charge (to the maximum of C\$350,000); and
- (b) Second – Directors' Charge (to the maximum amount of C\$200,000).

24. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect the Charges.

25. **THIS COURT ORDERS** that the Charges (as constituted and defined herein) shall constitute a charge on the Property in Canada and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "Encumbrances") in favour of any Person.

26. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Chapter 11 Debtors shall not grant any Encumbrances over

any Property in Canada that rank in priority to, or *pari passu* with, the Charges, unless the Chapter 11 Debtors also obtain the prior written consent of the Information Officer.

27. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "Chargees") shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "BIA"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds any Chapter 11 Debtor, and notwithstanding any provision to the contrary in any Agreement:

- (i) the creation of the Charges shall not create or be deemed to constitute a breach by a Chapter 11 Debtor of any Agreement to which it is a party;
- (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
- (iii) the payments made by the Chapter 11 Debtors to the Chargees pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

28. **THIS COURT ORDERS** that the Charges created by this Order over leases of real property in Canada shall only be a Charge in the applicable Chapter 11 Debtors' interest in such real property leases.

SERVICE AND NOTICE

29. **THIS COURT ORDERS** that any employee of any of the Chapter 11 Debtors who is sent a notice of termination of employment shall be deemed to have received such notice by no

later than 8:00 a.m. Eastern Standard/Daylight Time on the fourth day following the date any such notice is sent, if such notice is sent by ordinary mail, expedited parcel or registered mail to the individual's address as reflected in the Chapter 11 Debtors' books and records; provided, however, that any notice of termination of employment that is sent to an employee of a Chapter 11 Debtor by electronic message to the individual's email address as last shown in the Chapter 11 Debtors' books and records shall be deemed to have been received 24 hours after the time such electronic message was sent, notwithstanding the mailing of any notices of termination of employment.

30. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: <http://www.alvarezandmarsal.com/brooksbrotherscanada>.

31. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol or the CCAA and the regulations thereunder is not practicable (including as a result of COVID-19), the Chapter 11 Debtors, the Foreign Representative and the Information Officer are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or electronic transmission to the Chapter 11 Debtors' creditors or other interested parties at their respective addresses (including e-mail addresses) as last shown on the books and records of the Chapter 11 Debtors and that any such service or distribution shall be deemed to be received on the earlier of (a) the date of forwarding thereof, if sent by electronic message on or prior to 5:00 p.m. Eastern Standard/Daylight Time (or on the next business day following the date of forwarding thereof if sent on a non-business day); (b) the next business day following the date of forwarding thereof.

if sent by courier, personal delivery, facsimile transmission or electronic message sent after 5:00 p.m. Eastern Standard/Daylight Time; or (c) on the third business day following the date of forwarding thereof, if sent by ordinary mail.

32. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Chapter 11 Debtors' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

33. **THIS COURT ORDERS** that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

34. **THIS COURT ORDERS** that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, a monitor, a proposal trustee, or a trustee in bankruptcy of any Chapter 11 Debtor, the Business or the Property.

35. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective counsel and agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11 Debtors, the Foreign Representative and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective counsel and agents in carrying out the terms of this Order.

36. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

37. **THIS COURT ORDERS** that the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters issued by the Judicial Insolvency Network and adopted by this Court and the U.S. Bankruptcy Court and attached as Schedule "C" hereto (the "JIN Guidelines"), are hereby adopted by this Court for the purposes of these recognition proceedings.

38. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days' notice to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

39. **THIS COURT ORDERS** that this Order shall be effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

A large, stylized handwritten signature in black ink, appearing to read "Haring", is written over a horizontal line.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

SEP 17 2020

PER / PAR:

A small, stylized handwritten signature in blue ink, appearing to be a monogram or initials, is written next to the "PER / PAR:" label.

SCHEDULE "A"
FOREIGN REPRESENTATIVE ORDER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

	x	
	:	
In re	:	Chapter 11
	:	
BROOKS BROTHERS GROUP, INC., et al.,	:	Case No. 20-11785 (CSS)
	:	
Debtors. ¹	:	(Jointly Administered)
	:	
	:	Re: D.I. 570
	x	

**ORDER AUTHORIZING BROOKS BROTHERS GROUP, INC.
TO ACT AS FOREIGN REPRESENTATIVE ON BEHALF
OF THE DEBTORS' ESTATES PURSUANT TO 11 U.S.C. § 1505**

Upon the motion (the "Motion")² of Brook Brothers Group, Inc. ("Brooks Brothers") and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), for entry of an order authorizing Brooks Brothers to act as Foreign Representative on behalf of the Debtors' estates in the Canadian Recognition Proceeding, all as more fully set forth in the Motion; and this Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157(a)-(b) and 1334(b), and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Brooks Brothers Group, Inc. (8883); Brooks Brothers Far East Limited (N/A); BBD Holding 1, LLC (N/A); BBD Holding 2, LLC (N/A); BBDI, LLC (N/A); Brooks Brothers International, LLC (N/A); Brooks Brothers Restaurant, LLC (3846); Deconic Group LLC (0969); Golden Fleece Manufacturing Group, LLC (5649); RBA Wholesale, LLC (0986); Retail Brand Alliance Gift Card Services, LLC (1916); Retail Brand Alliance of Puerto Rico, Inc. (2147); 696 White Plains Road, LLC (7265); and Brooks Brothers Canada Ltd. (N/A). The Debtors' corporate headquarters and service address is 100 Phoenix Ave., Enfield, CT 06082.

² Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Motion.

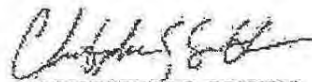
pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided, and it appearing that no other or further notice need be provided; and this Court having held a hearing to consider the relief requested in the Motion, if necessary; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. The Motion is granted as set forth herein.
2. Brooks Brothers is authorized, pursuant to section 1505 of the Bankruptcy Code, to act as the Foreign Representative on behalf of the Debtors' estates in the Canadian Recognition Proceeding. As Foreign Representative, Brooks Brothers shall be authorized and have the power to act in any way permitted by applicable foreign law, including, but not limited to (i) seeking recognition of these chapter 11 cases and this Court's orders in the Canadian Recognition Proceeding, (ii) requesting that the Canadian Court lend assistance to this Court in protecting the property of the Debtors' estates, and (iii) seeking any other appropriate relief from the Canadian Court that Brooks Brothers deems just and proper in the furtherance of the protection of the Debtors' estates.
3. This Court requests the aid and assistance of the Canadian Court to recognize these chapter 11 cases as a "foreign main proceeding" and Brooks Brothers as a "foreign representative" pursuant to the CCAA, and to recognize and give full force and effect in all provinces and territories of Canada to this Order and any other orders for which recognition is sought.
4. The Debtors are authorized to take all action necessary to effectuate the relief granted in this Order.

5. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order.

Dated: September 11th, 2020
Wilmington, Delaware



CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "B"
SECOND JOINT ADMINISTRATION ORDER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	Chapter 11
BROOKS BROTHERS GROUP, INC., <i>et al.</i> ,	:	Case No. 20-11785 (CSS)
Debtors. ¹	:	(Jointly Administered)
	:	
In re	:	Chapter 11
BROOKS BROTHERS CANADA LTD.,	:	Case No. 20-12112 (CSS)
Debtor. ²	:	
Tax I.D. No.: N/A	:	Re: D.I. 574

**ORDER DIRECTING THE JOINT ADMINISTRATION OF
BROOKS BROTHERS CANADA LTD.'S CHAPTER 11 CASE
WITH THE ORIGINAL DEBTORS' CHAPTER 11 CASES**

Upon the motion (the "Motion")³ of Brooks Brothers Canada Ltd. ("BB Canada"), for entry of an order directing the joint administration of BB Canada's chapter 11 case, for procedural purposes only, with the jointly-administered cases of the Original Debtors, all as more fully set forth in the Motion; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157(a)-(b) and § 1334; and the *Amended Standing*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Brooks Brothers Group, Inc. (8883); Brooks Brothers Far East Limited (N/A); BBD Holding 1, LLC (N/A); BBD Holding 2, LLC (N/A); BBDI, LLC (N/A); Brooks Brothers International, LLC (N/A); Brooks Brothers Restaurant, LLC (3846); Deconic Group LLC (0969); Golden Fleece Manufacturing Group, LLC (5649); RBA Wholesale, LLC (0986); Retail Brand Alliance Gift Card Services, LLC (1916); Retail Brand Alliance of Puerto Rico, Inc. (2147); and 696 White Plains Road, LLC (7265). The Debtors' corporate headquarters and service address is 346 Madison Avenue, New York, New York 10017.

² The Debtor in this chapter 11 case does not have a federal tax identification number. The Debtor's corporate headquarters and service address is 100 Phoenix Ave., Enfield, CT 06082.

³ Capitalized terms used but not otherwise defined herein shall have the respective meanings ascribed to such terms in the Motion.

Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012; and consideration of the Motion and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to the Notice Parties; and such notice having been adequate and appropriate under the circumstances, and it appearing that no other or further notice need be provided; and this Court having reviewed the Motion; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT

1. The Motion is granted to the extent set forth herein.
2. The above-captioned chapter 11 cases are consolidated for procedural purposes only and shall be jointly administered by this Court under Case No. 20-11785 (CSS).
3. Nothing contained in the Motion or this Order shall be deemed or construed as directing or otherwise effecting a substantive consolidation of these chapter 11 cases and this Order shall be without prejudice to the rights of the Debtors to seek entry of an order substantively consolidating their respective estates.
4. The caption of the jointly administered cases shall read as follows:

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

_____	X	
In re:	:	Chapter 11
	:	
BROOKS BROTHERS GROUP, INC., <i>et al.</i> ,	:	Case No. 20 -11785 (CSS)
	:	
Debtors. ¹	:	(Jointly Administered)
	:	
_____	X	

The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are Brooks Brothers Group, Inc. (8883); Brooks Brothers Far East Limited (N/A); BBD Holding 1, LLC (N/A); BBD Holding 2, LLC (N/A); BBDI, LLC (N/A); Brooks Brothers International, LLC (N/A); Brooks Brothers Restaurant, LLC (3846); Deconic Group LLC (0969); Golden Fleece Manufacturing Group, LLC (5649); RBA Wholesale, LLC (0986); Retail Brand Alliance Gift Card Services, LLC (1916); Retail Brand Alliance of Puerto Rico, Inc. (2147); 696 White Plains Road, LLC (7265); and Brooks Brothers Canada Ltd. (N/A). The Debtors' corporate headquarters and service address is 100 Phoenix Ave., Enfield, CT 06082.

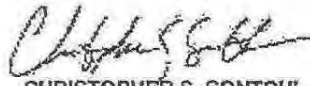
5. A docket entry shall be made in BB Canada's chapter 11 case substantially as follows:

An order has been entered in this case directing the procedural consolidation and joint administration of the chapter 11 cases of Brooks Brothers Group, Inc.; Brooks Brothers Far East Limited; BBD Holding 1, LLC; BBD Holding 2, LLC; BBDI, LLC; Brooks Brothers International, LLC; Brooks Brothers Restaurant, LLC; Deconic Group LLC; Golden Fleece Manufacturing Group, LLC; RBA Wholesale, LLC; Retail Brand Alliance Gift Card Services, LLC; Retail Brand Alliance of Puerto Rico, Inc.; 696 White Plains Road, LLC; and Brooks Brothers Canada, Ltd. The docket in Brooks Brothers Group, Inc., Case No. 20-11785 (CSS) should be consulted for all matters affecting this case.

6. The Debtors are authorized to take all reasonable actions necessary or appropriate to implement the relief granted in this Order.

7. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: September 11th, 2020
Wilmington, Delaware


CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

SCHEDULE "C" – JIN GUIDELINES

GUIDELINES FOR COMMUNICATION AND COOPERATION BETWEEN COURTS IN CROSS-BORDER INSOLVENCY MATTERS

INTRODUCTION

- A. The overarching objective of these Guidelines is to improve in the interests of all stakeholders the efficiency and effectiveness of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction ("Parallel Proceedings") by enhancing coordination and cooperation amongst courts under whose supervision such proceedings are being conducted. These Guidelines represent best practice for dealing with Parallel Proceedings.
- B. In all Parallel Proceedings, these Guidelines should be considered at the earliest practicable opportunity.
- C. In particular, these Guidelines aim to promote:
- (i) the efficient and timely coordination and administration of Parallel Proceedings;
 - (ii) the administration of Parallel Proceedings with a view to ensuring relevant stakeholders' interests are respected;
 - (iii) the identification, preservation, and maximisation of the value of the debtor's assets, including the debtor's business;
 - (iv) the management of the debtor's estate in ways that are proportionate to the amount of money involved, the nature of the case, the complexity of the issues, the number of creditors, and the number of jurisdictions involved in Parallel Proceedings;
 - (v) the sharing of information in order to reduce costs; and
 - (vi) the avoidance or minimisation of litigation, costs, and inconvenience to the parties¹ in Parallel Proceedings.
- D. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit.²
- E. These Guidelines are not intended to be exhaustive and in each case consideration ought to be given to the special requirements in that case.
- F. Courts should consider in all cases involving Parallel Proceedings whether and how to implement these Guidelines. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the court to facilitate such implementation by a protocol or order derived from these Guidelines, and encourage them to act so as to promote the objectives and aims of these Guidelines wherever possible.

¹ The term "parties" when used in these Guidelines shall be interpreted broadly.

² Possible modalities for the implementation of these Guidelines include practice directions and commercial guides.

ADOPTION & INTERPRETATION

Guideline 1: In furtherance of paragraph F above, the courts should encourage administrators in Parallel Proceedings to cooperate in all aspects of the case, including the necessity of notifying the courts at the earliest practicable opportunity of issues present and potential that may (a) affect those proceedings; and (b) benefit from communication and coordination between the courts. For the purpose of these Guidelines, "administrator" includes a liquidator, trustee, judicial manager, administrator in administration proceedings, debtor-in-possession in a reorganisation or scheme of arrangement, or any fiduciary of the estate or person appointed by the court.

Guideline 2: Where a court intends to apply these Guidelines (whether in whole or in part and with or without modification) in particular Parallel Proceedings, it will need to do so by a protocol or an order,³ following an application by the parties or pursuant to a direction of the court if the court has the power to do so.

Guideline 3: Such protocol or order should promote the efficient and timely administration of Parallel Proceedings. It should address the coordination of requests for court approvals of related decisions and actions when required and communication with creditors and other parties. To the extent possible, it should also provide for timesaving procedures to avoid unnecessary and costly court hearings and other proceedings.

Guideline 4: These Guidelines when implemented are not intended to:

- (i) interfere with or derogate from the jurisdiction or the exercise of jurisdiction by a court in any proceedings including its authority or supervision over an administrator in those proceedings;
- (ii) interfere with or derogate from the rules or ethical principles by which an administrator is bound according to any applicable law and professional rules;
- (iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction; or
- (iv) confer or change jurisdiction, alter substantive rights, interfere with any function or duty arising out of any applicable law, or encroach upon any applicable law.

Guideline 5: For the avoidance of doubt, a protocol or order under these Guidelines is procedural in nature. It should not constitute a limitation on or waiver by the court of any powers, responsibilities, or authority or a substantive determination of any matter in controversy before the court or before the other court or a waiver by any of the parties of any of their substantive rights and claims.

Guideline 6: In the interpretation of these Guidelines or any protocol or order under these Guidelines, due regard shall be given to their international origin and to the need to promote good faith and uniformity in their application.

³ In the normal case, the parties will agree on a protocol derived from these Guidelines and obtain the approval of each court in which the protocol is to apply.

COMMUNICATION BETWEEN COURTS

Guideline 7: A court may receive communications from a foreign court and may respond directly to them. Such communications may occur for the purpose of the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to any joint hearing where Annex A is applicable. Such communications may take place through the following methods or such other method as may be agreed by the two courts in a specific case:

- (i) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.
- (ii) Directing counsel or other appropriate person to transmit or deliver copies of documents, pleadings, affidavits, briefs or other documents that are filed or to be filed with the court to the other court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate.
- (iii) Participating in two-way communications with the other court, by telephone or video conference call or other electronic means, in which case Guideline 8 should be considered.

Guideline 8: In the event of communications between courts, other than on administrative matters, unless otherwise directed by any court involved in the communications whether on an *ex parte* basis or otherwise, or permitted by a protocol, the following shall apply:

- (i) In the normal case, parties may be present.
- (ii) If the parties are entitled to be present, advance notice of the communications shall be given to all parties in accordance with the rules of procedure applicable in each of the courts to be involved in the communications.
- (iii) The communications between the courts shall be recorded and may be transcribed. A written transcript may be prepared from a recording of the communications that, with the approval of each court involved in the communications, may be treated as the official transcript of the communications.
- (iv) Copies of any recording of the communications, of any transcript of the communications prepared pursuant to any direction of any court involved in the communications, and of any official transcript prepared from a recording may be filed as part of the record in the proceedings and made available to the parties and subject to such directions as to confidentiality as any court may consider appropriate.
- (v) The time and place for communications between the courts shall be as directed by the courts. Personnel other than judges in each court may communicate with each other to establish appropriate arrangements for the communications without the presence of the parties.

Guideline 9: A court may direct that notice of its proceedings be given to parties in proceedings in another jurisdiction. All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to be provided to such other parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court in accordance with the procedures applicable in the court.

APPEARANCE IN COURT

Guideline 10: A court may authorise a party, or an appropriate person, to appear before and be heard by a foreign court, subject to approval of the foreign court to such appearance.

Guideline 11: If permitted by its law and otherwise appropriate, a court may authorise a party to a foreign proceeding, or an appropriate person, to appear and be heard by it without thereby becoming subject to its jurisdiction.

CONSEQUENTIAL PROVISIONS

Guideline 12: A court shall, except on proper objection on valid grounds and then only to the extent of such objection, recognise and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in other jurisdictions without further proof. For the avoidance of doubt, such recognition and acceptance does not constitute recognition or acceptance of their legal effect or implications.

Guideline 13: A court shall, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in other jurisdictions were duly and properly made or entered on their respective dates and accept that such orders require no further proof for purposes of the proceedings before it, subject to its law and all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders. Notice of any amendments, modifications, extensions, or appellate decisions with respect to such orders shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

Guideline 14: A protocol, order or directions made by a court under these Guidelines is subject to such amendments, modifications, and extensions as may be considered appropriate by the court, and to reflect the changes and developments from time to time in any Parallel Proceedings. Notice of such amendments, modifications, or extensions shall be made to the other court(s) involved in Parallel Proceedings, as soon as it is practicable to do so.

ANNEX A (JOINT HEARINGS)

Annex A to these Guidelines relates to guidelines on the conduct of joint hearings. Annex A shall be applicable to, and shall form a part of these Guidelines, with respect to courts that may signify their assent to Annex A from time to time. Parties are encouraged to address the matters set out in Annex A in a protocol or order.

ANNEX A: JOINT HEARINGS

A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following shall apply, or where relevant, be considered for inclusion in a protocol or order:

- (i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.
- (ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings and the hearing and determination of matters arising in its proceedings.
- (iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.
- (iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.
- (v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.
- (vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.
- (vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Court File No: CV-20-00647463-00CL

AND IN THE MATTER OF BROOKS BROTHERS GROUP, INC., BROOKS BROTHERS FAR EAST LIMITED, BBD HOLDING 1, LLC, BBD HOLDING 2, LLC, BBD1, LLC, BROOKS BROTHERS INTERNATIONAL, LLC, BROOKS BROTHERS RESTAURANT, LLC, DECONIC GROUP LLC, GOLDEN FLEECE MANUFACTURING GROUP, LLC, RBA WHOLESALE, LLC, RETAIL BRAND ALLIANCE GIFT CARD SERVICES, LLC, RETAIL BRAND ALLIANCE OF PUERTO RICO, INC., 696 WHITE PLAINS ROAD, LLC, AND BROOKS BROTHERS CANADA LTD.

APPLICATION OF BROOKS BROTHERS GROUP, INC. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Applicant

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)

OSLER, HOSKIN & HARCOURT, LLP
P.O. Box 50, 1 First Canadian Place
Toronto, ON M5X 1B8

Tracy Sandler (LSO# 32443N)
Tel: 416.862.5890
tsandler@osler.com

Shawn Irving (LSO# 50035U)
Tel: 416.862.4733
sirving@osler.com

Martino Calvaruso (LSO# 57359Q)
Tel: 416.862.6665
mcalvaruso@osler.com

Fax: 416.862.6666

Lawyers for the Applicant

Tab 28

CITATION: Hollander Sleep Products, LLC et al., Re, 2019 ONSC 3238
COURT FILE NO.: CV-19-620484-00CL
DATE: 2019/05/30

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND:

AND IN THE MATTER OF HOLLANDER SLEEP PRODUCTS, LLC,
HOLLANDER SLEEP PRODUCTS CANADA LIMITED, DREAM II
HOLDINGS, LLC, HOLLANDER HOME FASHIONS HOLDINGS, LLC,
PACIFIC COAST FEATHER, LLC, HOLLANDER SLEEP PRODUCTS
KENTUCKY, LLC, AND PACIFIC COAST FEATHER CUSHION, LLC

APPLICATION OF HOLLANDER SLEEP PRODUCTS, LLC UNDER
SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: HAINEY J.

COUNSEL: *Shawn Irving and Marc Wasserman*, for the Applicant

Virginie Gauthier, for KSV Kofman Inc.

L. Joseph Latham, for Wells Fargo

Milly Chow and Kelly Bourassa, for Barings Finance LLC

HEARD: May 23, 2019

ENDORSEMENT

BACKGROUND

[1] On May 23, 2019 I granted the application brought by Hollander Sleep Products, LLC ("Hollander Sleep Products"), for orders pursuant to Section 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"). I made the following orders:

- a) Recognition of the Chapter 11 Cases as foreign main proceedings pursuant to *Part IV of the CCAA*;
- b) Recognition of certain First Day Orders;

- c) Appointment of KSV Kofman Inc. (“KSV”) as Information Officer;
- d) Granting of the DIP ABL Charge; and
- e) Granting of the Administration Charge.

[2] I indicated in my endorsement that written reasons would follow. These are my written reasons.

[3] Hollander Sleep Products brings this application in its capacity as the foreign representative (the “Foreign Representative”) of itself and Hollander Sleep Products Canada Limited (“Hollander Canada”), Dream II Holdings, LLC, Hollander Home Fashions Holdings, LLC, Pacific Coast Feather, LLC, Hollander Sleep Products Kentucky, LLC, and Pacific Coast Feather Cushion, LLC (collectively, the “Chapter 11 Debtors”, and with their other non-debtor affiliates, “Hollander”).

FACTS

[4] Hollander is an industry leader in the bedding products market. Hollander manufactures bedding products including pillows, comforters and mattress pads for well-known licensed brands. Hollander also owns and manufactures bedding products under several of its own proprietary brands and also partners with major retailers and hotel chains.

[5] Hollander’s corporate headquarters is in Boca Raton, Florida. Hollander has 13 manufacturing facilities located across North America – 11 in the United States and 2 in Canada -- and a primary show room in New York City. Most of Hollander’s sales come from wholesale distribution.

Chapter 11 Cases

[6] On May 19, 2019 (the “Petition Date”) each of the Chapter 11 Debtors filed voluntary petitions for relief pursuant to Chapter 11 of the *U.S. Bankruptcy Code* (the “Chapter 11 Cases”) with the United States Bankruptcy Court for the Southern District of New York (the “U.S. Court”). Certain first day motions (the “First Day Motions”) were also filed on May 19, 2019. On May 21, 2019, the U.S. Court heard several of the First Day Motions, and on May 22 and 23, 2019 the court entered various interim or final orders in respect of these motions (the “First Day Orders”).

Chapter 11 Debtors

[7] The Chapter 11 Debtors operate on an integrated basis and are incorporated or established under the laws of the United States except for Hollander Canada, which is incorporated under the laws of British Columbia. Each of the Chapter 11 Debtors, including Hollander Canada, is a direct or indirect wholly-owned subsidiary of Dream II Holdings, LLC.

Hollander Canada

[8] Hollander Canada is a fully integrated subsidiary of Hollander. Hollander Canada operates one manufacturing facility in Toronto, one manufacturing facility in Montreal, and maintains a sales office in Toronto.

[9] Hollander Canada employs approximately 240 employees, all of whom are located in Canada. Hollander Canada's workforce is not unionized and it does not maintain any registered pension plans. Its primary stakeholders include employees, lenders, customers, landlords, creditors, and trade-suppliers.

[10] On a standalone basis, Hollander Canada is not profitable. Its 2018 financial statement reflects a net loss of approximately \$2.6 million after allocation of selling, general and administrative expenses, including royalties and procurement fees, incurred by the U.S. Chapter 11 Debtors and allocated across the manufacturing facilities for which it provides these and other shared services (the "U.S. Shared Services"). Losses have continued for the four-month period ended April 30, 2019. Currently, approximately \$7.2 million of Hollander Canada's \$9 million of accounts payable is past due. If the amount owing to Hollander Canada from the U.S. Chapter 11 Debtors was written down to its realizable value and Hollander Canada's allocation of U.S. Shared Services was recorded for the four months ended April 30, 2019, Hollander Canada's shareholder equity would be entirely eroded.

[11] Hollander Canada is entirely dependent on Hollander's U.S. head office for managerial, administrative, IT, strategic services and decisions, and it uses intellectual property almost wholly owned by U.S. Hollander entities. Hollander Canada is also entirely reliant on supply arrangements and relationships of the Hollander enterprise.

Principal Indebtedness

[12] The Chapter 11 Debtors' principal pre-petition indebtedness consists of the following:

- a) **Prepetition ABL Facility** – a \$125 million senior revolving asset-based credit facility (the "ABL Facility") under which all the Chapter 11 Debtors, including Hollander Canada, are obligors. Hollander Canada may borrow a maximum of \$40 million from this facility. Hollander Canada is not jointly or severally liable for the obligations of the U.S. Chapter 11 Debtors under the ABL Facility; however, the U.S. Chapter 11 Debtors are liable for Hollander Canada's borrowings under the ABL Facility. As of the Petition Date, approximately \$61 million remains outstanding against the ABL Facility, not including approximately \$5 million in letters of credit (the "Prepetition ABL Obligations"). The Prepetition ABL Obligations include approximately \$6 million of borrowings by Hollander Canada.
- b) **Prepetition Term Loan** – a \$190 million senior secured term loan facility (the "Term Loan Facility"). Each Chapter 11 Debtor except Hollander Canada is an obligor under this facility. Hollander Canada is not a borrower or a guarantor of

the Term Loan Facility. As of the Petition Date, approximately \$166.5 million remains outstanding against the Term Loan Facility.

Recent Events and Proposed Restructuring

[13] Recent substantial price increases on materials have significantly reduced Hollander's already low profit margins for many products. In addition, Hollander acquired one of its major competitors in June 2017. This necessitated the expenditure of additional capital. With approximately \$233 million of outstanding indebtedness and limited access to credit, Hollander is facing severe liquidity constraints.

[14] These circumstances necessitated comprehensive restructuring negotiations with the Chapter 11 Debtors' primary constituency groups. The Chapter 11 Debtors recently agreed with their secured lenders and their majority equity-holder, Sentinel, on a comprehensive restructuring process to ensure the viability of the business. The Chapter 11 Debtors, 100% of the Term Loan Lenders, and Sentinel entered into a restructuring support agreement dated May 19, 2019 (the "RSA"). The RSA contemplates, and the Chapter 11 Debtors have filed, a comprehensive Chapter 11 restructuring plan (the "Plan").

[15] In connection with the RSA, Hollander's asset-based secured lenders have agreed to provide a \$90 million debtor-in-possession asset-based loan facility (the "DIP ABL Facility") and certain Term Loan Lenders have agreed to provide an additional \$28 million term loan facility (the "DIP Term Loan Facility" and together with the DIP ABL Facility, the "DIP Facilities") to fund the administration of the Chapter 11 Cases.

[16] I am not, at this time, being asked to approve or grant any relief in connection with the Plan. However, the Chapter 11 Debtors have negotiated and incorporated certain protections into the Plan to mitigate against any prejudice to current creditors of Hollander Canada that might result incidentally from a global restructuring. I am satisfied that the Plan represents the Chapter 11 Debtors' best prospect of reorganizing their business operations and emerging as a healthy going-concern enterprise, maximizing recoveries for all stakeholders.

[17] If the Chapter 11 Debtors do not obtain the relief requested on this application, including post-petition financing, they will be unable to restructure pursuant to the Plan. In such a case, a liquidation of the business and assets of the Chapter 11 Debtors, including Hollander Canada, will be the likely result. In a liquidation scenario, there will be a nominal recovery, if any, available for Hollander Canada's unsecured creditors.

Proposed Postpetition Financing

[18] On May 21, 2019, the U.S. Court heard certain of the First Day Motions, including the DIP Motion. At the hearing, the U.S. Court requested certain changes to the DIP Order, which were subsequently made by the Chapter 11 Debtors in consultation with the DIP Lenders. Access to the DIP Facilities is vital to the preservation and maintenance of the going-concern value of Hollander and the Chapter 11 Debtors' successful reorganization.

[19] The \$90 million DIP ABL Facility is the critical facility from the perspective of Hollander Canada. Hollander Canada is neither a borrower nor a guarantor of the DIP Term Loan Facility. The DIP ABL Facility is a senior secured credit facility for which all the Chapter 11 Debtors, including Hollander Canada, are borrowers. The DIP ABL Facility provides for an initial “creeping (or gradual) roll-up” whereby the Chapter 11 Debtors will use receipts from the Chapter 11 Debtors’ operations to pay down pre-filing obligations pending the issuance of the Final DIP Order, whereupon there will be a deemed draw on the DIP ABL Facility to satisfy the then outstanding prepetition debt, if any, under the ABL Facility. Hollander Canada is entitled to borrow up to \$20 million under the DIP ABL Facility, less the amount of Hollander Canada’s prepetition obligations under the ABL Facility that are to be rolled-up into the DIP ABL Facility.

[20] With respect to prepetition debt under the ABL Facility, Hollander Canada is not jointly or severally liable for amounts drawn down by the U.S. Chapter 11 Debtors. However, Hollander Canada will be jointly and severally liable with the other Chapter 11 Debtors in respect of borrowings under the DIP ABL Facility, including borrowings to repay amounts drawn down under the prepetition ABL Facility by the U.S. Chapter 11 Debtors. The DIP ABL Lenders have indicated they are unwilling to enter into the DIP ABL Facility unless Hollander Canada is jointly and severally liable for all obligations under the DIP ABL Facility, including those incurred by the U.S. borrowers.

[21] It is a condition of the DIP Facilities that the Chapter 11 Debtors obtain an order from this Court recognizing the DIP Order within three business days of when the DIP Order was issued by the U.S. Court. The DIP ABL Facility requires that the DIP Order be recognized by this Court before any borrowing by Hollander Canada will be permitted under the DIP ABL Facility.

[22] I have concluded that the ability of the Chapter 11 Debtors, including Hollander Canada, to maintain business relationships with their vendors, suppliers and customers, to pay their employees and otherwise finance their operations requires the availability of working capital from the DIP Facilities. The Chapter 11 Debtors, including Hollander Canada on a standalone basis, do not have sufficient available sources of working capital and financing to operate their businesses without immediate access to the DIP Facilities.

ISSUES

[23] I must decide the following issues:

- a) Are the Chapter 11 Cases “foreign main proceedings” pursuant to Part IV of the CCAA?
- b) If so, are the Chapter 11 Debtors entitled to the relief sought in the Initial Recognition Order and Supplemental Order, including,
 - (i) Granting the Stay of Proceedings;
 - (ii) Recognition of the First Day Orders;

- (iii) Granting the DIP ABL Charge;
- (iv) Appointing KSV as Information Officer; and
- (v) Granting the Administration Charge?

ANALYSIS

Are the Chapter 11 Cases Foreign Main Proceedings?

Are the Chapter 11 Cases Foreign Proceedings?

[24] I must first determine if the Chapter 11 Cases are foreign proceedings. It is important to note that the purpose of Part IV of the CCAA is to facilitate the administration of cross-border insolvencies and create a system under which foreign insolvency proceedings can be recognized in Canada. Section 44 of the CCAA provides as follows:

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross- border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;
- (d) the protection and the maximization of the value of debtor company's property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

[25] Pursuant to S. 46(1) of the CCAA, a person who is a foreign representative may apply to the court for recognition of a foreign proceeding in respect of which that person is a foreign representative. Pursuant to S. 47 of the CCAA, the two following requirements must be met for an order recognizing a foreign proceeding:

- a) the proceeding is a "foreign proceeding"; and
- b) the applicant is a "foreign representative" in respect of that foreign proceeding.

[26] In the Chapter 11 Cases, an order was made appointing Hollander Sleep Products as foreign representative by the U.S. Court on May 23, 2019. (the "Foreign Representative Order").

[27] Section 45(1) of the CCAA defines a "foreign proceeding" as any judicial proceeding in a jurisdiction outside of Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization. Courts

have consistently recognized proceedings under Chapter 11 of the United States Bankruptcy Code to be foreign proceedings for the purposes of the CCAA.

[28] Because Hollander Sleep Products has been appointed a “foreign representative” by the U.S. Court in the Chapter 11 Cases, I am satisfied that the Chapter 11 cases should be recognized as a “foreign proceeding” pursuant to S. 47(1) of the CCAA.

Are the Chapter 11 Cases Foreign Main Proceedings?

[29] Once I have determined that a proceeding is a “foreign proceeding”, I am required, pursuant to Section 47(2) of the CCAA, to specify in my order whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding.” A “foreign main proceeding” is defined as a “foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests” (“COMI”).

[30] The CCAA does not provide a definition of COMI. Section 45(2) of the CCAA establishes a rebuttable presumption that, in the absence of proof to the contrary, the location of a debtor company’s registered office is deemed to be its COMI. Evidence regarding the debtor company’s operations can rebut this presumption. Part IV of the CCAA does not specifically consider the circumstances facing corporate groups. It is therefore necessary to conduct the COMI analysis on an entity-by-entity basis.

[31] In this case the registered offices of all of the Chapter 11 Debtors except for Hollander Canada, are situated in the United States. Therefore, the presumption in s. 45(2) of the CCAA deems the COMI of each of those entities to be in the United States.

[32] Hollander Canada’s registered head office is in Vancouver. Where a Canadian entity is operating as part of a larger corporate group, several Canadian authorities have considered how COMI should be determined. In *Angiotech*¹, the Court considered the following factors:

- a) the location where corporate decisions are made;
- b) the location of employee administrations, including human resource functions;
- c) the location of the company's marketing and communication functions;
- d) whether the enterprise is managed on a consolidated basis;
- e) the extent of integration of an enterprise's international operations;
- f) the centre of an enterprise's corporate, banking, strategic and management functions;
- g) the existence of shared management within entities and in an organization;
- h) the location where cash management and accounting functions are overseen;

¹ *Angiotech Pharmaceuticals Inc. (Re)*, 2011 BCSC 115 at para 7.

- i) the location where pricing decisions and new business development initiatives are created; and
- j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

[33] In *Elephant & Castle*², Morawetz J. (as he then was) recognized the *Angiotech* factors listed above and identified what he considered to be the most significant factors as follows:

However, it seems to me, in interpreting COMI, the following factors are usually significant:

- (a) the location of the debtor's headquarters or head office functions or nerve centre;
- (b) the location of the debtor's management; and
- (c) the location which significant creditors recognize as being the centre of the company's operations.

[34] The jurisprudence is clear that where a Canadian debtor company is the only Canadian entity among a number of other Chapter 11 debtors that are all incorporated in the United States, the COMI for the Canadian debtor company is the United States.

[35] I have concluded for the following reasons that Hollander Canada's COMI is in the United States:

- a) Hollander Canada's business is closely integrated into Hollander's business in the U.S. and its registered office is listed in Canada only for corporate purposes;
- b) Managerial functions for Hollander Canada, including finance, buying, logistics, marketing, and strategic decisions, are provided from Hollander's U.S. head office by Hollander Sleep Products;
- c) Hollander Canada is almost wholly dependent on Hollander's U.S. office for administrative functions such as overhead services, accounting, and IT, which are provided by Hollander Sleep Products in the U.S.;
- d) Data for Hollander Canada's operations is housed within IT systems, located and operated out of the U.S.;
- e) Hollander Canada is reliant on the purchasing power and supplier relationships of the Hollander enterprise, and on its own could not replicate the supply arrangements necessary for its continued functioning;

² *Massachusetts Elephant & Castle Group Inc., (Re)*, 2011 ONSC 4201 (S.C.J. [Commercial List]).

- f) Hollander Canada's books and records are maintained at Hollander's head office in Boca Raton, Florida;
- g) All of Hollander Canada's directors reside in the United States;
- h) Canadian revenues make up only 10.7% of Hollander's revenues;
- i) Hollander Canada is entirely dependent on the U.S. Chapter 11 Debtors for the majority of licensing agreements, design partnerships, and company-owned brands;
- j) Substantially all of the trademarks and intellectual property relied on by Hollander Canada are owned by the U.S. Chapter 11 Debtors;
- k) The Chapter 11 Debtors, including Hollander Canada, operate an integrated, centralized cash management system; and
- l) Hollander Canada is dependent on the U.S. Chapter 11 Debtors for the establishment, maintenance, and administration of certain customer promotional programs involving Hollander Canada's key customers.

[36] Since all the Chapter 11 Debtors except Hollander Canada have registered offices in the United States, and since a review of Hollander Canada's business indicates that its COMI is in the United States, The COMI of all the Chapter 11 Debtors is in the United States and therefore the Chapter 11 Cases should be recognized as "foreign main proceedings".

SHOULD THE INITIAL RECOGNITION ORDER AND SUPPLEMENTAL ORDER BE GRANTED?

Is a Stay of Proceedings Required and Appropriate?

[37] Section 48(1) of the CCAA provides that once the Court has found that a foreign proceeding is a "foreign main proceeding", it is required to grant certain mandatory relief, including a stay of proceedings:

[38] In addition to the automatic relief provided for in s. 48, s.49 of the CCAA grants me the broad discretion to make any appropriate order if I am satisfied that it is necessary for the protection of the debtor company's property or the interests of creditors.

[39] Section 52(1) of the CCAA requires that if an order recognizing a foreign proceeding is made, the Court "shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding."

[40] Because of the circumstances facing Hollander, Hollander Canada and the other Chapter 11 Debtors, I am satisfied that a stay of proceedings is necessary in order to implement the proposed restructuring.

Should the First Day Orders be Recognized?

[41] The central principle governing Part IV of the CCAA is comity, which mandates that Canadian courts should recognize and enforce the judicial acts of other jurisdictions, provided that those other jurisdictions have assumed jurisdiction on a basis consistent with principles of order, predictability and fairness.

[42] Canadian courts have emphasized the importance of comity and cooperation in cross-border insolvency proceedings to avoid multiple proceedings, inconsistent judgments and general uncertainty. Coordination of international insolvency proceedings is particularly critical in ensuring the equal and fair treatment of creditors regardless of their location.

[43] I am satisfied that the First Day Orders should be recognized for the following reasons:

- a) The U.S. Court has appropriately taken jurisdiction over the Chapter 11 Cases, so comity will be furthered by this Court's recognition of and support for the Chapter 11 Cases already under way in the United States;
- b) Coordination of proceedings in the two jurisdictions will ensure equal and fair treatment of all stakeholders, whether they are in the United States or Canada;
- c) Given the close connection between Hollander and the United States, it is reasonable and sensible for the U.S. Court to have principal control over the insolvency process. This will produce the most efficient restructuring for the benefit of all stakeholders;
- d) The Chapter 11 Debtors must act quickly because of the expeditious timetable established under the Plan for their restructuring. It is imperative that there be a centralized and co-ordinated process for these insolvency proceedings to maximize the prospect of a successful restructuring and preserve value for stakeholders; and
- e) The Canadian and U.S. operations of Hollander are highly integrated.

Should the DIP ABL Charge be Granted?

[44] The Chapter 11 Debtors are facing a liquidity crisis and require DIP financing to fund their operations while they pursue a restructuring pursuant to the Plan or a sale in accordance with the marketing process to be conducted as part of the Chapter 11 proceeding. The ability of the Chapter 11 Debtors, including Hollander Canada, to maintain and finance their operations requires working capital from the DIP Facilities. If interim financing through the DIP Facilities is not obtained, neither the Chapter 11 Debtors as a whole, nor Hollander Canada on a standalone basis, have the funds to finance going-concern operations.

[45] The DIP ABL Facility includes an initial creeping roll-up provision pursuant to which the Chapter 11 Debtors will use receipts from their operations to pay down pre-filing obligations pending the issuance of the Final DIP Order. The amount borrowed under the DIP ABL Facility is proposed to be secured by, among other things, a court-ordered charge on Hollander Canada's property and the property of the other Chapter 11 Debtors in Canada (the "DIP ABL Charge").

[46] This court has concluded in previous proceedings that there is no impediment to granting approval of interim DIP financing including a full roll-up provision in foreign recognition proceedings under Part IV of the CCAA³.

[47] In *Hartford*, an application under Part IV of the CCAA, this court recognized a DIP facility authorized by the U.S. Court that included a full roll-up, and emphasized the importance of comity in foreign recognition proceeding as follows:

The Information Officer and Chapter 11 Debtors recognize that in CCAA proceedings, a partial "roll up" provision would not be permissible as a result of s.11.2 of the CCAA, which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

Section 49 of the CCAA provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.

It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding"....

A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

[48] For the same reasons I am satisfied that the DIP Order should be approved. The U.S. Court granted the DIP Order because it is necessary for the protection of Hollander's property and for the interests of creditors in Canada and the U.S.

[49] The DIP ABL Facility provides that Hollander Canada is jointly and severally liable for the borrowings of other Chapter 11 Debtors under the DIP ABL Facility.

[50] I have concluded that the following factors support recognizing Hollander Canada's joint and several liability under the DIP Order and the DIP ABL Charge:

- a) The DIP ABL Charge furthers the objectives of the CCAA and is commercially reasonable as it allows the Chapter 11 Debtors to continue operations and pursue a restructuring or going-concern sale as outlined in the proposed Plan;
- b) An estimated cash flow forecast extracted from the DIP budget reveals that Hollander Canada is projected to generate negative cash flow until at least July 1, 2019;

³ *Hartford Computer Hardware Inc., (Re)*, 2012 ONSC 964 at paras. 18-19.

- c) The Chapter 11 Debtors, including Hollander Canada, need immediate access to the DIP ABL Facility to ensure their continued operations during these proceedings;
- d) The DIP ABL Lenders are unwilling to provide funding to the Chapter 11 Debtors without Hollander Canada's joint and several liability under the DIP ABL Facility;
- e) The proposed DIP Facilities and Plan are supported by all secured creditors with an economic interest in Hollander Canada; and
- f) If the DIP ABL Charge is not granted, the restructuring contemplated by the Plan will not be implemented, likely resulting in liquidation. In a liquidation scenario, Hollander Canada's creditors will likely obtain only nominal recoveries, if any.

[51] To protect the interests of Hollander Canada and its creditors, the Chapter 11 Debtors negotiated certain protections to mitigate any prejudice to Hollander Canada's creditors. Specifically, the DIP Order includes a quasi-marshalling construct whereby the DIP ABL Agent is obligated to first look to proceeds of the Chapter 11 Debtors' U.S. collateral to satisfy any outstanding obligations of the U.S. Chapter 11 Debtors under the DIP ABL Facility, and to the proceeds of the Chapter 11 Debtors' Canadian collateral to satisfy any outstanding obligations of Hollander Canada under the DIP ABL Facility. Only once collateral in the U.S. has been exhausted can the DIP ABL Lenders look to the Canadian assets to satisfy any outstanding U.S. obligation.

[52] The absence of prejudice to creditors of Hollander Canada, and the DIP ABL Lenders' consent to the quasi-marshalling construct, are key factors distinguishing this case from *Payless Holdings Inc. LLC, (Re)*. In *Payless*, also a proceeding under Part IV of the CCAA, this court declined to approve a DIP order and lenders' charge that would have required the solvent Canadian applicants to guarantee borrowings from the DIP facility even though they would not receive advances from it. The DIP facility was opposed by the Canadian landlords who were uniquely prejudiced by its terms. The DIP facility in that case specifically precluded marshalling.

[53] I have concluded that the Court's decision in *Payless* is distinguishable from this case for the following reasons as set out in the applicant's factum:

- a) In *Payless*, the Canadian Applicants were not insolvent, were not prepetition borrowers, had never granted security and were not borrowers under the DIP facility. In this case, Hollander Canada is insolvent, its assets are encumbered, and it is incapable of maintaining going concern operations without urgent funding support from the DIP ABL Facility. For instance, \$7.2 million of Hollander Canada's accounts payable are currently past due; without support from the DIP ABL Facility, Hollander does not have sufficient liquidity to satisfy these obligations.
- b) In *Payless*, there was evidence of material prejudice to Canadian creditors and certain Canadian creditor groups opposed the DIP order because they were

disadvantaged. In this case, no such material prejudice or unequal treatment exists with respect to the creditors of Hollander Canada or the other Chapter 11 Debtors.

- c) In *Payless*, the Court intimated that if marshalling had been permitted, the inequitable treatment of Canadian creditors would have been resolved. In this case, the DIP ABL Lenders have specifically agreed to a quasi marshalling concept to ensure that Canadian assets are used first to satisfy Canadian DIP ABL indebtedness, and not applied to satisfy U.S. DIP ABL indebtedness until all U.S. assets are first exhausted.

[54] I have concluded that the DIP ABL Charge should be granted for these reasons.

SHOULD KSV BE APPOINTED INFORMATION OFFICER?

[55] I am satisfied that an information officer should be appointed to assist with the cooperation between the Canadian foreign recognition proceeding and the foreign representative and the U.S. Court. Further, KSV, a licensed insolvency trustee, is appropriate to act in this capacity.

SHOULD AN ADMINISTRATIVE CHARGE BE APPROVED?

[56] Finally, I am satisfied that an administration charge in the maximum amount of \$200,000 is reasonable and appropriate.

CONCLUSION

[57] For these reasons I have granted the Initial Recognition Order and the Supplemental Order.

[58] I am grateful to the applicant's counsel for their helpful submission.

HAINEY J.

Date: May 30, 2019

Tab 29

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**



THE HONOURABLE

MR. JUSTICE MCEWEN

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FRIDAY, THE 21ST

DAY OF DECEMBER, 2018

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP
HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS,
LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT
COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES
LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")**

**APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

ORDER

THIS MOTION, made by Relay Blocker LLC, formerly known as Rockport Blocker, LLC ("**Rockport Blocker**"), in its capacity as the foreign representative (the "**Foreign Representative**") of the Debtors, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form enclosed in the Motion Record was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Paul Kosturos sworn December 19, 2018 and the exhibits thereto (the "**Fifth Kosturos Affidavit**"), the fifth report of Richter Advisory Group Inc. ("**Richter**") in its capacity as the Court-appointed information officer (the "**Information Officer**") dated December 20, 2018 (the "**Fifth Report**"), and on hearing the submissions of counsel for the Debtors, counsel for the Information Officer, counsel for the Senior Secured Noteholders and DIP Note Lenders, counsel for The Cadillac Fairview Corporation Limited, counsel for Cushman & Wakefield Asset Services Inc., Ivanhoe Cambridge Inc., RioCan Real

Estate Investment Trust, and upon no one appearing for any other parties although duly served as appears from the Affidavit of Service of Mariela Adriana Gasparini sworn December 19, 2018, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. **THIS COURT ORDERS** that capitalized terms not defined herein shall have the meanings ascribed thereto in the Plan (as defined below).

RECOGNITION OF FOREIGN ORDERS

3. **THIS COURT ORDERS** that the following orders (the "**Foreign Orders**") of the United States Bankruptcy Court for the District of Delaware (the "**US Court**") made in the insolvency proceedings of the Debtors under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "**US Code**") are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA:

- a. an order, *inter alia*, authorizing the Debtors to amend the caption used in the US proceedings to reflect the change of the Debtors' corporate names (the "**Case Caption Change Order**");
- b. an order, *inter alia*, approving the rejection of contracts listed on Exhibit 1 thereto, including any amendments, modifications, addenda, schedules or exhibits thereto, not assumed and assigned to CB Marathon Opco, LLC ("**Marathon**") pursuant to the Sale Order (as defined in the Order of Mr. Justice McEwen dated July 20, 2018) (the "**Omnibus Contract Rejection Order**"); and
- c. an order, *inter alia*, (i) confirming the Debtors' plan of liquidation pursuant to Chapter 11 of the United States Bankruptcy Code as filed with the United States Bankruptcy Court for the District of Delaware (the "**US Court**") on September 21, 2018, as filed in revised form with the US Court on October 16, 2018, as filed in further revised form with the US

Court on December 17, 2018, and as filed in further revised form with the US Court on December 19, 2018 (including all amendments, modifications and supplements, the "**Plan**"), and (ii) approving the Debtors' disclosure statement in respect of the Plan (the "**Confirmation Order**");

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in these proceedings, the Orders of this Court shall govern with respect to the Property (as defined in the Supplemental Order (Foreign Main Proceeding) dated May 16, 2018 (the "**Supplemental Order**")) in Canada. Attached as Schedule "A" hereto is a copy of the Confirmation Order. Copies of the Case Caption Order and the Omnibus Contract Rejection Order are attached as Exhibits "A" and "B" to the Fifth Kosturos Affidavit.

IMPLEMENTATION OF PLAN

4. **THIS COURT ORDERS** that the Debtors and Richter, in its capacity as Information Order and Rockport Canada Plan Administrator, are authorized, directed and permitted to take all such steps and actions, and to do all things necessary or appropriate to implement the Plan and the transactions contemplated thereby in accordance with and subject to the terms of the Plan, and to enter into, execute, deliver, implement and consummate all the steps, transactions and agreements contemplated pursuant to the Plan.

5. **THIS COURT ORDERS AND DECLARES** that the Plan be and is recognized in Canada and that on the Information Officer filing a certificate in substantially the form attached as Schedule "B" (the "**Plan Implementation Certificate**"), the terms of the Plan shall be immediately effective and enforceable in Canada in accordance with the Confirmation Order and shall be deemed binding upon the Debtors and all claimants and all parties, subject to the jurisdiction of this Court, who have claims against any of the Debtors and who are subject to the settlements, compromises, releases, discharges and injunctions as defined in the Plan.

RICHTER AS ROCKPORT CANADA PLAN ADMINISTRATOR

6. **THIS COURT ORDERS THAT** the Rockport Canada Plan Administrator Agreement, a copy of which is attached as Exhibit "F" to the Fifth Kosturos Affidavit, be and is hereby approved.

7. **THIS COURT ORDERS THAT** Richter be and is hereby authorized to act as Rockport Canada Plan Administrator in accordance with the terms of the Plan and the Rockport Canada Plan Administrator Agreement. Richter may return to this Court for such advice and directions as Richter considers necessary to facilitate its role as Rockport Canada Plan Administrator.

8. **THIS COURT ORDERS THAT** the Administration Charge granted in the Supplemental Order shall remain in effect pending further Court order over the Rockport Canada Fund (as defined in the Fifth Kosturos Affidavit) in respect of the fees and disbursements incurred by Richter and Stikeman in carrying out the duties as Information Officer.

9. **THIS COURT ORDERS** in accordance with the Plan and the Rockport Canada Plan Administrator Agreement, the fees of the Rockport Canada Plan Administrator and its counsel shall be reimbursed from the Rockport Canada Fund.

10. **THIS COURT ORDERS THAT** Borden Ladner Gervais LLP ("BLG") is hereby entitled to a charge (the "BLG Charge") over the Rockport Canada Fund (as defined in the Fifth Kosturos Affidavit) in respect of the fees and disbursements incurred by BLG as counsel to the Debtors in the within proceedings.

DAMA DISTRIBUTION

11. **THIS COURT ORDERS** that upon the Information Officer filing the Plan Implementation Certificate, the Information Officer is authorized and directed to release the amount of CAD\$139,892.27 from the Lien Funds (as defined in the Fifth Kosturos Affidavit) to DAMA Construction, in full and final satisfaction of its lien claim.

PIPEDA

12. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, Richter in its capacity as Information Officer and Rockport Canada Plan Administrator may disclose personal information of identifiable individuals, as required to satisfy its obligations under the Plan or Rockport Canada Plan Administration Agreement. Each party to whom such personal information is disclosed as contemplated in the Plan, shall maintain and protect the privacy of such information and limit the

use of such information to its requirements under the Plan and thereafter shall return all such information to Richter, or in the alternative destroy all such information.

AID AND RECOGNITION

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative, the Debtors, the Information Officer, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order.

14. **THIS COURT ORDERS** that each of the Foreign Representative, the Debtors, and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

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DEC 21 2018

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PER / PAR:

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SCHEDULE "A" - CONFIRMATION ORDER

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
THE RELAY COMPANY, LLC, <i>et al.</i> ,	)	Case No. 18-11145 (LSS)
	)	
Debtors. ¹	)	Jointly Administered
	)	
	)	Re: Docket Nos. 554 & 649
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
(I) APPROVING REVISED COMBINED DISCLOSURE STATEMENT
AND CHAPTER 11 PLAN OF LIQUIDATION AS CONTAINING ADEQUATE
INFORMATION ON A FINAL BASIS AND (II) CONFIRMING REVISED COMBINED
DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION

WHEREAS, The Relay Company, LLC (formerly known as, The Rockport Company, LLC) and its affiliated debtors and debtors in possession (collectively, the “**Debtors**”) in the above captioned chapter 11 cases (the “**Chapter 11 Cases**”) have proposed and filed with the United States Bankruptcy Court for the District of Delaware (the “**Court**”) (i) the *Revised Combined Disclosure Statement and Chapter 11 Plan of Liquidation* [Docket No. 649] (as may be further modified, amended, and/or supplemented from time to time, the “**Combined Plan and Disclosure Statement**,” or individually, the “**Disclosure Statement**” and the “**Plan**,” as appropriate), a final version of which is attached hereto as Exhibit A,² (ii) the *Motion of Debtors*

¹ The debtors and debtors in possession in these cases and the last four digits of their respective Employer Identification Numbers are: Relay Blocker, LLC (f/k/a Rockport Blocker, LLC) (5097), The Relay Group Holdings, LLC (f/k/a The Rockport Group Holdings, LLC) (3025), Relay 1-P Holdings, LLC (f/k/a TRG 1-P Holdings, LLC) (4756), Relay Intermediate Holdings, LLC (f/k/a TRG Intermediate Holdings, LLC) (8931), Relay Class D, LLC (f/k/a TRG Class D, LLC) (4757), The Relay Group, LLC (f/k/a The Rockport Group, LLC) (5559), The Relay Company, LLC (f/k/a The Rockport Company, LLC) (5456), Drydock Footwear, LLC (7708), DD Management Services LLC (8274), and Relay Opco Canada ULC (f/k/a Rockport Canada ULC) (3548). The debtors’ mailing address is 1220 Washington Street, West Newton, Massachusetts 02465.

² All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Combined Plan and Disclosure Statement.

for Entry of an Order (I) Approving the Combined Plan and Disclosure Statement on an Interim Basis for Solicitation Purposes Only, (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Combined Disclosure Statement and Plan, (III) Approving the Form of Ballot and Solicitation Materials, (IV) Establishing Voting Record Date, (V) Fixing the Date, Time and Place for the Confirmation Hearing and the Deadline for Filing Objections Thereto and (VI) Approving Related Notice Procedures [Docket No. 506] (the “**Motion**”), and (iii) the Plan Supplement, dated November 9, 2019 [Docket No. 591];

WHEREAS, on October 16, 2018, the Debtors filed the solicitation version *Combined Disclosure Statement and Chapter 11 Plan of Liquidation* [Docket No. 554] (the “**Proposed Plan**”);

WHEREAS, on October 16, 2018, the Court entered the *Order (I) Approving the Combined Plan and Disclosure Statement on an Interim Basis for Solicitation Purposes Only, (II) Establishing Procedures for Solicitation Purposes Only, (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Combined Disclosure Statement and Plan, (III) Approving the Form of Ballot and Solicitation Materials, (IV) Establishing Voting Record Date, (V) Fixing the Date, Time and Place for the Confirmation Hearing and the Deadline for Filing Objections Thereto and (VI) Approving Related Notice Procedures* [Docket No. 557] (the “**Interim Approval and Procedures Order**”), approving, among other things, the Disclosure Statement on an interim basis for solicitation purposes only, the contents of the Solicitation Packages (defined herein), and procedures for soliciting and tabulating votes to accept or reject the Plan;

WHEREAS, due notice of the hearing to consider confirmation of the Plan (the “**Confirmation Hearing**”) has been given to Holders of Claims, Interests and other parties in

interest in compliance with the Bankruptcy Code, the Bankruptcy Rules and the Interim Approval and Procedures Order, as set forth in the *Affidavit of Service* [Docket No. 576] (the “**Confirmation Notice Affidavit**”);

WHEREAS, in compliance with the Bankruptcy Code, the Bankruptcy Rules and the Interim Approval and Procedures Order, solicitation packages containing the Interim Approval and Procedures Order, a Ballot and notice of the Confirmation Hearing (collectively, the “**Solicitation Packages**”) were transmitted to Holders of Claims in Class 2 (Prepetition Note Secured Claims against the U.S. Debtors), Class 4(a) (General Unsecured Claims against the U.S. Debtors) and Class 4(b) (General Unsecured Claims against Rockport Canada) (collectively, the “**Voting Classes**”);

WHEREAS, on December 17, 2018 Prime Clerk LLC filed the *Declaration of James Daloia of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on the Combined Disclosure Statement and Chapter 11 Plan of Liquidation* [Docket No. 651] (the “**Voting Declaration**”) containing a tabulation of all valid Ballots received and demonstrating acceptance of the Plan by the Voting Classes;

WHEREAS, on December 17, 2018, the Debtors filed the *Declaration of Paul Kosturos in Support of Confirmation of the Combined Disclosure Statement and Chapter 11 Plan of Liquidation* [Docket No. 652] (the “**Kosturos Declaration**”);

WHEREAS, on December 17, 2018, the Debtors filed the Plan;

WHEREAS, modifications to the Proposed Plan were primarily made to resolve certain objections and to implement the Prepetition Noteholders’ agreement to the use of their cash collateral to fund the Pre-Effective Date Professional Fee Reserve, the Pre-Effective Date SAP Claims Reserve and the Post-Effective Date Trust Reserve and thereby provide for the

payment of estimated U.S. Administrative Claims, U.S. Tax Priority Claims and Other Priority Claims against the U.S. Debtors in accordance with the terms of the Plan;

WHEREAS, on December 19, 2018, the Court conducted the Confirmation Hearing to consider, on a final basis, whether the Disclosure Statement contained adequate information within the meaning of Section 1125(a) of the Bankruptcy Code, and confirmation of the Plan; and

NOW, THEREFORE, based upon the Court's consideration of (i) the Combined Plan and Disclosure Statement, (ii) the Motion, (iii) the Confirmation Notice Affidavit, (iv) the Kosturos Declaration; (v) the Voting Declaration, (vi) any objections to the Combined Plan and Disclosure Statement and (vii) the Confirmation Hearing, and the Court having found the Disclosure Statement contains adequate information within the meaning of Section 1125(a) of the Bankruptcy Code and is confirmable in its current form and all objections thereto have either been settled, withdrawn or overruled at the Confirmation Hearing, and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND AND DETERMINED THAT:

A. Findings and Conclusions. The findings and conclusions set forth herein and in the record of the Confirmation Hearing constitute the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable herein by Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. Jurisdiction, Venue, Core Proceeding. The Court has jurisdiction over the Debtors' Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334. Approval of the Disclosure

Statement and confirmation of the Plan are core proceedings pursuant to 28 U.S.C. § 157(b), and this Court has jurisdiction to enter a final order with respect thereto. The Debtors are eligible debtors under Section 109 of the Bankruptcy Code. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The Debtors are the plan proponents in accordance with Section 1121(a) of the Bankruptcy Code. On May 14, 2018 (the "**Petition Date**"), the Debtors commenced with this Bankruptcy Court voluntary cases under Chapter 11 of the Bankruptcy Code.

C. Official Committee of Unsecured Creditors. On May 23, 2018, the Office of the United States Trustee for the District of Delaware appointed an official committee of unsecured creditors in the Chapter 11 Cases (the "**Creditors' Committee**").

D. Approval Under Section 1125. The Disclosure Statement contains adequate information within the meaning of Section 1125(a) of the Bankruptcy Code.

E. Interim Approval and Procedures Order Compliance. The Debtors have complied with the Interim Approval and Procedures Order, including the solicitation process, in all respects.

F. Burden of Proof. The Debtors have the burden of proving the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence. The Debtors have met this burden.

G. Voting. As evidenced by the Voting Declaration, votes to accept or reject the Combined Plan and Disclosure Statement have been solicited and tabulated fairly, in good faith, and in a manner consistent with the Bankruptcy Code and the Bankruptcy Rules, the solicitation process set forth in the Interim Approval and Procedures Order, and applicable non-bankruptcy law.

H. Solicitation. The Solicitation Packages were transmitted and served in compliance with the Bankruptcy Code, the Bankruptcy Rules, including Bankruptcy Rules 3017 and 3018, and the Interim Approval and Procedures Order. The form of the Ballots adequately addressed the particular needs of these Chapter 11 Cases and is appropriate to the Holders of the Claims in the Voting Classes, which are impaired under the Combined Plan and Disclosure Statement, and may receive a distribution under the Combined Plan and Disclosure Statement, and whose votes were, therefore, solicited.

1. The period during which the Debtors solicited acceptances of the Combined Plan and Disclosure Statement was reasonable in the circumstances of these Chapter 11 Cases and enabled Holders to make an informed decision to accept or reject the Plan. The Debtors were not required to solicit votes from the Holders of Claims in the following Classes as each such Class is unimpaired under the Plan and thus conclusively presumed to have accepted the Plan: Class 1 (Other Secured Claims) and Class 3 (Other Priority Claims).

2. The Debtors also were not required to solicit votes from the Holders of Claims or Interests in Class 5 (Intercompany Claims) and Class 6 (Equity Interests) (the "**Deemed Rejecting Classes**"), as each such Class received no recovery under the Plan and is deemed to reject the Plan.

3. As described in and as evidenced by the Voting Declaration and the Confirmation Notice Affidavit, the transmittal and service of the Solicitation Packages was timely, adequate, and sufficient under the circumstances. The solicitation of votes on the Plan complied with the Interim Approval and Procedures Order, was appropriate and satisfactory based upon the circumstances of these Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, and any other applicable rules, laws, and regulations. In connection therewith, the Debtors, and any and all affiliates, members, managers, shareholders, partners, employees, attorneys and advisors of the foregoing are entitled to the protection of Section 1125(e) of the Bankruptcy Code.

I. Good Faith. The Debtors have not engaged in any collusive or unfair conduct in connection with the Combined Plan and Disclosure Statement. The Combined Plan and Disclosure Statement was negotiated and conducted at arms-length and without collusion with any person or entity.

J. Notice. As is evidenced by the Voting Declaration and the Confirmation Notice Affidavit, the transmittal and service of the Solicitation Packages were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to confirmation of the Plan) have been given due, proper, timely, and adequate notice in accordance with the Interim Approval and Procedures Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required.

K. Modifications to the Proposed Plan. The modifications made to the Proposed Plan since solicitation (i) complied in all respects with Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, (ii) do not adversely affect the treatment of any holder of Allowed Claims, and (iii) do not require re-solicitation of votes with respect to the Plan. The votes cast to accept the Proposed Plan are deemed to have been cast with respect to the Plan.

L. Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1)). The Combined Plan and Disclosure Statement complies with the applicable provisions of the Bankruptcy Code and, as required by Bankruptcy Rule 3016, the Combined Plan and Disclosure Statement is dated and identifies the Debtors as plan proponents, thereby satisfying Section 1129(a)(1) of the Bankruptcy Code.

M. The Debtors' Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(2)). The Debtors have complied with all applicable provisions of the Bankruptcy Code, satisfying the requirements of Section 1129(a)(2) of the Bankruptcy Code.

N. Proposed in Good Faith (11 U.S.C. § 1129(a)(3)). The Combined Plan and Disclosure Statement has been proposed in good faith and not by any means forbidden by law, thereby satisfying Section 1129(a)(3) of the Bankruptcy Code.

O. Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)). Any payment made or to be made by the Debtors, or by a person issuing securities or acquiring property under the Combined Plan and Disclosure Statement, for services or for costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Combined Plan and Disclosure Statement and incident to the Chapter 11 Cases, has been approved by, or is subject to the approval of, the Court as reasonable, thereby satisfying Section 1129(a)(4) of the Bankruptcy Code.

P. Plan Administrator, Directors, Officers and Insiders (11 U.S.C. § 1129(a)(5)). The Debtors have complied with Section 1129(a)(5) of the Bankruptcy Code. The identity, affiliations and compensation of the Liquidating Trustee and the Rockport Canada Plan Administrator proposed to serve after the Effective Date have been fully disclosed in the Plan Supplement.

Q. No Rate Changes (11 U.S.C. § 1129(a)(6)). After confirmation of the Plan, the Debtors' businesses will not involve rates established or approved by, or otherwise subject to, any governmental regulatory commission. Thus, Section 1129(a)(6) of the Bankruptcy Code is not applicable.

R. Best Interest of Creditors (11 U.S.C. § 1129(a)(7)). The Plan satisfies Section 1129(a)(7) of the Bankruptcy Code. The liquidation analysis provided in the Combined Plan and Disclosure Statement, and the other evidence proffered or adduced at the Confirmation Hearing (i) is persuasive and credible, (ii) has not been controverted by other evidence, and (iii)

establishes that each Holder of an impaired Claim or Interest either has accepted the Plan or will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date, that is not less than the amount that such Holder would receive or retain if the Debtors were liquidated under Chapter 7 of the Bankruptcy Code on such date.

S. Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8)). All Classes of Claims or Interests either voted to accept the Plan (*i.e.*, Classes 2, 4(a) and 4(b)) or were deemed to accept the Plan (*i.e.*, Classes 1 and 3). The Deemed Rejecting Classes are impaired by the Plan and are not entitled to receive or retain any property under the Plan and, therefore, are deemed to have rejected the Plan pursuant to Section 1126(g) of the Bankruptcy Code. As found and determined below, pursuant to Section 1129(b)(1) of the Bankruptcy Code, the Plan may be confirmed notwithstanding the fact that the Deemed Rejecting Classes are impaired and are deemed to have rejected the Plan.

T. Administrative Expense Claims and Priority Tax Claims (11 U.S.C. § 1129(a)(9)). The treatment of Administrative Expense Claims under the Plan satisfies the requirements of Section 1129(a)(9) of the Bankruptcy Code. The treatment of Priority Tax Claims pursuant to the Plan satisfies the requirements of Section 1129(a)(9)(C) of the Bankruptcy Code.

U. Acceptance by Impaired Classes (11 U.S.C. § 1129(a)(10)). Holders of Claims in the Voting Classes voted to accept the Plan, determined without including any acceptance of the Plan by any insider, thereby satisfying the requirements of Section 1129(a)(10) of the Bankruptcy Code.

V. Feasibility (11 U.S.C. § 1129(a)(11)). The Combined Plan and Disclosure Statement itself calls for liquidation of the Debtors. Therefore, confirmation of the Plan is not

likely to be followed by the need for further financial reorganization of the Debtors. Further, the evidence proffered or adduced at or prior to the Confirmation Hearing, including the Kosturos Declaration establishes that the Plan is feasible and that there is a reasonable prospect of the Liquidating Trust and Rockport Canada being able to meet their financial obligations under the Plan, thereby satisfying Section 1129(a)(11) of the Bankruptcy Code.

W. Payment of Fees (11 U.S.C. § 1129(a)(12)). The Plan provides that on the Effective Date, and thereafter as may be required, the Debtors shall pay all fees payable pursuant to Section 1930 of Title 28 of the United States Code, thereby satisfying Section 1129(a)(12) of the Bankruptcy Code.

X. Continuation of Retiree Benefits (11 U.S.C. § 1129(a)(13)). The Debtors do not maintain retirement plans or other benefits obligations. Accordingly, Section 1129(a)(13) of the Bankruptcy Code is not applicable to the Combined Plan and Disclosure Statement.

Y. No Domestic Support Obligations (11 U.S.C. § 1129(a)(14)). The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, Section 1129(a)(14) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

Z. The Debtors are Not Individuals (11 U.S.C. § 1129(a)(15)). The Debtors are not individuals, and accordingly, Section 1129(a)(15) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

AA. No Applicable Non-bankruptcy Law Regarding Transfers (11 U.S.C. § 1129(a)(16)). The Debtors are moneyed, business, and/or commercial corporations, and accordingly, Section 1129(a)(16) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

BB. Fair and Equitable, No Unfair Discrimination (11 U.S.C. § 1129(b)). Holders of Claims or Interests in the Deemed Rejecting Classes are deemed to have not accepted the Plan. Based upon the evidence proffered, adduced, and presented by the Debtors at the Confirmation Hearing, including the Kosturos Declaration, the Plan does not discriminate unfairly and is fair and equitable with respect to the aforementioned Classes, as required by Sections 1129(b)(1) and (b)(2) of the Bankruptcy Code. Thus, the Plan may be confirmed notwithstanding the deemed rejection of the Plan by the Deemed Rejecting Classes.

CC. Only One Plan (11 U.S.C. § 1129(c)). The Plan is the only plan filed in the Chapter 11 Cases, and accordingly, Section 1129(c) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

DD. Principal Purpose of the Plan (11 U.S.C. § 1129(d)). The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of Section 5 of the Securities Act, and no governmental unit has objected to the confirmation of the Plan on any such grounds. Therefore, the Combined Plan and Disclosure Statement satisfies the requirements of Section 1129(d) of the Bankruptcy Code.

EE. Good Faith Solicitation (11 U.S.C. § 1125(e)). Based on the record before the Court, the Debtors and their agents, successors, predecessors, control persons, members, officers, directors, employees and agents and their respective attorneys, financial advisors, investment bankers, accountants, and other professionals retained by such persons, in each case, have acted in "good faith" within the meaning of Section 1125(e) of the Bankruptcy Code in compliance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and any applicable non-bankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with all their respective activities relating to the solicitation of acceptances to the

Plan and their participation in the activities described in Section 1125 of the Bankruptcy Code, and therefore are not, and on account of such offer, issuance and solicitation will not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan and are entitled to the protections afforded by Section 1125(c) of the Bankruptcy Code and, to the extent such parties are listed therein, the exculpation provisions set forth in Article XIII.E of the Combined Plan and Disclosure Statement.

FF. Implementation. All documents necessary to implement the Plan, and all other relevant and necessary documents have been developed and negotiated in good faith and at arms-length and shall, upon completion of documentation and execution, and subject to the occurrence of the Effective Date, be valid, binding, and enforceable agreements and not be in conflict with any federal or state law.

GG. Substantive Consolidation of the U.S. Debtors. The Court finds that it is critical and necessary to substantively consolidate the U.S. Debtors' Estates in order to implement the Plan. Based on the debt structure of Rockport Canada, the Debtors determined that it was appropriate to separate the estates of the U.S. Debtors and Rockport Canada for purposes of the Plan. Accordingly, the Plan includes separate classes for Claims and Interests against Rockport Canada and Rockport Canada is not substantively consolidated with the U.S. Debtors under the Plan.

HH. Settlement of the Rockport Canada Allocation Amount. The Court finds that the settlement of the Rockport Canada Allocation Amount set forth in the Plan is reasonable and appropriate under the circumstances and satisfies Sections 363 and 1123 of the Bankruptcy Code and Bankruptcy Rule 9019 as outlined by the U.S. Court of Appeals for the Third Circuit in *Myers v. Martin (In re Martin)*, 91 F.3d 389 (3d Cir. 1996).

II. Releases. The Court has jurisdiction under Sections 1334(a) and (b) of Title 28 of the United States Code to approve the releases set forth in Article XIII.F and the related injunction in Article XIII.A, and elsewhere in the Combined Plan and Disclosure Statement and this Confirmation Order. Section 105(a) of the Bankruptcy Code permits approval of the releases set forth in Article XIII.F, and the related injunction in Article XIII.A, and elsewhere in the Combined Plan and Disclosure Statement and this Confirmation Order, because, as has been established here based upon the evidence presented at the Confirmation Hearing, such provisions (i) were integral to achieving settlement among the various parties in interest and are essential to the formulation and implementation of the Combined Plan and Disclosure Statement, as provided in Section 1123 of the Bankruptcy Code, (ii) confer substantial benefits on the Debtors' Estates, and (iii) with respect to the Third Party Releases, such releases have been consented to by the Releasing Parties.

JJ. Pursuant to Section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a), the exculpation provision and the releases set forth in the Combined Plan and Disclosure Statement and implemented by this Confirmation Order are fair, equitable, reasonable, and in the best interests of the Debtors, and their Estates, creditors, and equity holders. The record of the Confirmation Hearing is sufficient to support the exculpation provision set forth in Article XIII.E and the releases provided for in Article XIII.F, and the related injunction in Article XIII.A, of the Combined Plan and Disclosure Statement. Accordingly, based upon the representations of the parties, and/or the evidence proffered, adduced, and/or presented at the Confirmation Hearing, this Court finds that the exculpation provision set forth in Article XIII.E and the releases set forth in Article XIII.F, and the related

injunction in Article XIII.A, of the Combined Plan and Disclosure Statement are consistent with the Bankruptcy Code and applicable law.

KK. Based on the foregoing, the Plan satisfies the requirements for confirmation set forth in Section 1129 of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Findings of Fact and Conclusions of Law. The above-referenced findings of fact and conclusions of law are hereby incorporated by reference as though fully set forth herein.

2. Notice of the Confirmation Hearing. Notice of the Confirmation Hearing complied with the terms of the Interim Approval and Procedures Order, was appropriate and satisfactory based upon the circumstances of the Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code and the Bankruptcy Rules.

3. Adequate Information. The Disclosure Statement is approved on a final basis as containing adequate information within the meaning of Section 1125 of the Bankruptcy Code, and any objections to the adequacy of the information contained in the Combined Plan and Disclosure Statement not otherwise consensually resolved are overruled.

4. Solicitation. The solicitation of votes on the Plan complied with the Interim Approval and Procedures Order, was appropriate and satisfactory based upon the circumstances of the Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, and applicable non-bankruptcy law.

5. Ballots. The form of Ballots annexed as Exhibits A-1 and A-2 to the Interim Approval and Procedures Order was in compliance with Bankruptcy Rule 3018(c), and

as modified, substantially conforms to Official Form Number 14, and is approved in all respects.

6. Confirmation of the Plan. The Plan, attached hereto as Exhibit A, is approved and confirmed under Section 1129 of the Bankruptcy Code. The terms of the Combined Plan and Disclosure Statement are an integral part of, this Confirmation Order.

7. Objections Resolved or Overruled. All objections, responses, statements and comments in opposition to the Combined Plan and Disclosure Statement, other than those withdrawn with prejudice, waived, or settled prior to, or on the record at, the Confirmation Hearing, shall be, and hereby are, overruled in their entirety.

8. General Authorizations. The Combined Plan and Disclosure Statement was approved by the officer of the Debtors whose approval was necessary. Pursuant to the appropriate provisions of the corporate or business organizations law of the applicable states or provinces of organization of the Debtors, and Section 1142(b) of the Bankruptcy Code, no additional action of the respective directors, members, managers or stockholders of the Debtors shall be required to authorize the Debtors to enter into, execute, deliver, file, adopt, amend, restate, consummate, or effectuate, as the case may be, the Combined Plan and Disclosure Statement and any contract, instrument, or other document to be executed, delivered, adopted or amended in connection with the implementation of the Combined Plan and Disclosure Statement.

9. Binding Effect. On the date of and following entry of this Confirmation Order and subject to the occurrence of the Effective Date, the provisions of the Combined Plan and Disclosure Statement shall bind the Debtors, all Holders of Claims and Interests (irrespective of whether such Claims or Interests are impaired under the Plan or whether the

Holders of such Claims or Interests have accepted the Plan), any and all non-Debtor parties to executory contracts and unexpired leases with the Debtors, any other party in interest in these Chapter 11 Cases, and the respective heirs, executors, administrators, successors, or assigns, if any, of any of the foregoing.

10. Vesting of Assets. As of the Effective Date, pursuant to the provisions of Section 1141(b) and (c) of the Bankruptcy Code, (i) all assets of the U.S. Debtors shall vest in the Liquidating Trust free and clear of all Claims, liens, encumbrances, charges, membership interests and other interests and (ii) all assets of Rockport Canada shall vest in Rockport Canada free and clear of all Claims, liens, encumbrances, charges, membership interests and other interests, in each case, except as otherwise expressly provided in the Combined Plan and Disclosure Statement or this Confirmation Order, and subject to the terms and conditions of the Combined Plan and Disclosure Statement and this Confirmation Order.

11. Implementation of the Combined Plan and Disclosure Statement. The Debtors are hereby authorized to execute, deliver, file, or record such documents, contracts, instruments, releases, and other agreements, and take such other actions as may be necessary to effectuate, implement, and further evidence the terms and conditions of the Combined Plan and Disclosure Statement, including all such actions delineated in Article X and Article XI of the Combined Plan and Disclosure Statement. On the Effective Date, the Liquidating Trustee and the Rockport Canada Plan Administrator shall be authorized to execute, deliver, file, or record such contracts, instruments, releases, consents, certificates, notices, resolutions, programs, and other agreements, instruments, and/or documents, and take such acts and actions as may be reasonably necessary or appropriate to effectuate, implement, substantially consummate, and/or

further evidence the terms and conditions of this Combined Plan and Disclosure Statement and any transactions described in or contemplated by this Combined Plan and Disclosure Statement.

12. Substantive Consolidation of the U.S. Debtors. As of the Effective Date, and solely for the purposes of these Chapter 11 Cases, the U.S. Debtors' Estates shall be substantively consolidated. For the avoidance of doubt, the estate of Rockport Canada shall not be substantively consolidated with the estates of the U.S. Debtors for purposes of the Plan.

13. Approval of Rockport Canada Allocation Amount Settlement. Pursuant to Sections 363 and 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, the compromise and settlement of the Rockport Canada Allocation Amount is approved in all respects.

14. Rejection of Executory Contracts. Except as is set forth in the Combined Plan and Disclosure Statement, pursuant to Article XII.A of the Combined Plan and Disclosure Statement, as of the Effective Date, each Executory Contract to which any of the Debtors is a party is hereby rejected as of the Effective Date unless previously assumed and/or assigned (including in connection with the Sale and pursuant to the Sale Order), subject to a pending motion to assume and/or assign, or rejected before the Effective Date.

15. Conditions to Effectiveness. The Combined Plan and Disclosure Statement shall not become effective unless and until the conditions set forth in Article XV.B of the Plan have been satisfied or waived pursuant to Article XV.E of the Plan.

16. Professional Compensation. Except as provided in the Combined Plan and Disclosure Statement, all Professionals (including any application of members of the Creditors' Committee for expense reimbursement) shall file with the Court and serve their respective final applications for allowance of Professional Fee Administrative Claims by the date that is thirty (30) calendar days after the Effective Date. Upon the Effective Date, any

requirement that Professionals comply with Sections 327 through 331 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and Professionals may be employed and paid in the ordinary course of business without any further notice to, or action, order, or approval of, the Court. Professional Fee Administrative Claims shall be paid in accordance with Article V.A of the Plan.

17. Binding Exculpation Provision. All exculpation provisions embodied herein and/or in the Combined Plan and Disclosure Statement, including but not limited to those contained in Article XIII.E of the Combined Plan and Disclosure Statement, are approved and shall be effective and binding on all persons and entities, to the extent provided therein.

18. Binding Release Provisions. All release provisions embodied herein and/or in the Combined Plan and Disclosure Statement, including but not limited to those contained in Article XIII.F of the Combined Plan and Disclosure Statement, are approved and shall be effective and binding on all persons and entities, to the extent provided therein; provided, however, that no provision of the Combined Plan and Disclosure Statement or this Confirmation Order shall be construed to grant a discharge pursuant to Section 1141(d) of the Bankruptcy Code.

19. Injunctions Relating to Releases. Except as otherwise specifically provided in the Combined Plan and Disclosure Statement or this Confirmation Order, from and after the Effective Date, all Persons and Entities who have held, hold, or may hold Claims or rights giving rise to any equitable relief against the Assets or any Interests in the Debtors arising prior to the Effective Date are permanently enjoined from taking any of the following actions against the Estates, the Released Parties, any member of the Creditors' Committee in its capacity as such, the Liquidating Trust, the Liquidating Trustee, the Rockport Canada Fund, the Rockport

Canada Plan Administrator or any of their respective property or Assets (collectively, the “**Estate Assets**”) on account of any such Claims or Interests: (a) commencing or continuing, in any manner or in any place, any action or proceeding seeking to collect or to recover in any manner against, or assert control or dominion over, the Estate Assets; (b) enforcing, attaching, collecting, or recovering in any manner against the Estate Assets, any judgment, award, decree or order; (c) creating, perfecting, or enforcing any Lien or encumbrance against the Estate Assets; (d) asserting recoupment unless such recoupment was formally asserted in a timely Filed proof of Claim or in a pleading Filed with the Court prior to entry of the Plan Confirmation Order (notwithstanding any indication in any proof of Claim or otherwise that such Holder asserts, has, or intends to preserve any right of recoupment) or right of subrogation of any kind against any debt, liability, or obligation due to the Debtors; and (e) commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with or with respect to any such Claims or Interests discharged, released, exculpated, or settled pursuant to the Plan or that is otherwise inconsistent with the provisions of the Plan; *provided, however*, that such Persons and Entities shall not be precluded from exercising their rights under and consistent with the terms of the Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement.

20. Preservation of Causes of Action. Pursuant to Article X.N of the Combined Plan and Disclosure Statement, the Causes of Action shall be and are hereby preserved, except as provided otherwise in the Combined Plan and Disclosure Statement or any Final Order of this Court.

21. Reservation of Rights. Except as expressly set forth herein, the Combined Plan and Disclosure Statement shall have no force or effect until the Effective Date. None of the

filing of the Combined Plan and Disclosure Statement, any statement or provision contained herein, or the taking of any action by the Debtors with respect to the Combined Plan and Disclosure Statement shall be or shall be deemed to be an admission or waiver of any rights of the Debtors, Holders of Claims or Interests before the Effective Date.

22. Payment of Statutory Fees. All fees payable pursuant to Section 1930(a) of Title 28 of the United States Code and/or Section 3717 of Title 31 of the United States Code, as determined by the Court, shall be paid for each quarter (including any fraction thereof) by each and every Debtor, as applicable, until the earlier of the time that a particular case is converted, dismissed or closed. For the avoidance of doubt, following the Effective Date, Statutory Fees relating to the U.S. Debtors shall be paid by the Liquidating Trust (including on account of any disbursements made by the Liquidating Trust) and Statutory Fees relating to Rockport Canada shall be paid by the Rockport Canada Plan Administrator (including on account of any disbursements made from the Rockport Canada Fund). For the avoidance of doubt, any Statutory Fees of the U.S. Debtors relating either to periods preceding the Effective Date (including any fraction thereof) or to the initial distribution under the Plan to the Holders of Allowed Prepetition Note Secured Claims shall be paid from the Pre-Effective Date SAP Claims Reserve.

23. Retention of Jurisdiction. On and after the Effective Date, the Court shall retain jurisdiction, to the fullest extent permissible under law, over all matters arising in, arising under, and related to the Chapter 11 Cases, the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement, and the Rockport Canada Plan Administrator Agreement for, among other things, the following purposes:

(a) To hear and determine any objections to Claims and to address any issues relating to Disputed Claims;

(b) To enter and implement such Orders as may be appropriate in the event the Plan Confirmation Order is for any reason stayed, revoked, modified, or vacated;

(c) To issue such Orders in aid of execution and Consummation of the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement;

(d) To consider any amendments to or modifications of the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement, to cure any defect or omission, or reconcile any inconsistency in any Order of the Court, including, without limitation, the Plan Confirmation Order;

(e) To hear and determine all requests for compensation and reimbursement of expenses under Section 330 or 503 of the Bankruptcy Code;

(f) To hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement, including the releases, exculpations, and injunctions provided hereunder;

(g) To hear and determine matters concerning state, local, and federal taxes in accordance with Sections 346, 505, and 1146 of the Bankruptcy Code;

(h) To hear any other matter not inconsistent with the Bankruptcy Code;

(i) To enter a final decree closing the Chapter 11 Cases;

(j) To ensure that Distributions to Holders of Allowed Claims are accomplished under the provisions of the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement;

(k) To decide or resolve any motions, adversary proceedings, contested or litigated matters arising out of, under, or related to, the Chapter 11 Cases, including those brought by the Liquidating Trustee on behalf of the Liquidating Trust or the Rockport Canada Plan Administrator on behalf of Rockport Canada;

(l) To issue injunctions, enter and implement other Orders, or take such other actions as may be necessary or appropriate to restrain interference by any Person or Entity with the occurrence of the Effective Date or enforcement of the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement;

(m) To approve, as may be necessary or appropriate, any Claims settlement entered into or offset exercised by the Liquidating Trust or the Rockport Canada Plan Administrator;

(n) To resolve any dispute or matter arising under or in connection with the Liquidating Trust or the Rockport Canada Plan Administrator Agreement, including any request for an extension of the term of the Liquidating Trust;

(o) To determine any other matters that may arise in connection with or related to the Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement, the Rockport Canada Plan Administrator Agreement, or any contract, instrument, release, indenture or other agreement or document created or implemented

in connection with the Combined Plan and Disclosure Statement, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement;

(p) To enforce, interpret, and determine any disputes arising in connection with any stipulations, orders, judgments, injunctions, exculpations, and rulings entered in connection with the Chapter 11 Cases (whether or not the Chapter 11 Cases have been closed);

(q) To resolve disputes concerning any reserves with respect to Disputed Claims or the administration thereof;

(r) To hear, decide and resolve any motions, adversary proceedings, contested or litigated matters involving or related to Causes of Action; and

(s) To resolve any other matter or for any purpose specified in the Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement, the Rockport Canada Plan Administrator Agreement or any other document entered into in connection with any of the foregoing.

24. Dissolution of the U.S. Debtors. Immediately following the Distribution of all of the Debtors' and their Estates' property under the terms of this Combined Plan and Disclosure Statement, on the Effective Date, the Debtors' members, directors, managers, and officers and any remaining employees shall be deemed to have resigned, and, as to all U.S. Debtors other than Rockport, the entity dissolved for all purposes and of no further legal existence under any applicable state or federal law, without the need to take any further action or file any plan of dissolution, notice, or application with the Secretary of State of the State of Delaware or any other state or government authority, and, as to Rockport, upon termination of the Liquidating Trustee or the wind down of the Liquidating Trust, Rockport shall be deemed

dissolved for all purposes and of no further legal existence under any applicable state or federal law, without the need to take any further action or file any plan of dissolution, notice, or application with the Secretary of State of the Delaware or any other authority.

25. Closure of the Certain Chapter 11 Cases. As soon as practicable after the Effective Date, the Liquidating Trustee is authorized to submit an order to the Court under certification of counsel that is in form and substance acceptable to the U.S. Trustee that closes and issues a final decree for each of the Chapter 11 Cases of the U.S. Debtors except for the Chapter 11 Case of Rockport. For the avoidance of doubt, the Chapter 11 Cases of Rockport and Rockport Canada shall remain open following the Effective Date until such time as the Liquidating Trustee or the Rockport Canada Plan Administrator, respectively, seek to close such cases pursuant to proper notice and a motion.

26. Exemption from Transfer Taxes and Recording Fees. Pursuant to Section 1146(a) of the Bankruptcy Code, any issuance, transfer or exchange of a security, or the making or deliver of an instrument of transfer in connection with the Combined Plan and Disclosure Statement shall not be taxed under any law imposing a stamp tax or similar tax. This Confirmation Order hereby directs the appropriate federal, state or local governmental officials or agents to forego the collection of any stamp or similar tax or governmental assessment and to accept for filing and recordation any of the foregoing instruments or other documents without the payment of any stamp or similar tax or governmental assessment.

27. Local Texas Tax Authorities. Notwithstanding anything to the contrary herein or in the Plan, Dallas County, Harris County and Montgomery County (collectively, the "Local Texas Tax Authorities") shall maintain a lien on that certain escrow of \$7,500 established pursuant to the Sale Order as adequate protection of the asserted secured claims of

the Local Texas Taxing Authorities until such time as (i) the Local Texas Tax Authorities' claims are paid in full; (ii) the Local Texas Tax Authorities and the Debtors and/or Liquidating Trustee reach an agreement with regards to such claims, which provides for a release of such liens; or (iii) the Court orders otherwise following notice to the Local Texas Tax Authorities and a hearing. Furthermore, the claims and liens of the Local Texas Tax Authorities shall remain subject to any objections any party would otherwise be entitled to raise as to the priority, validity or extent of such liens.

28. Attune Consulting USA Inc. Notwithstanding anything to the contrary herein or in the Plan, to the extent Attune Consulting USA Inc. ("**Attune**") is determined to be liable to Rockport, or any successors in interest, in connection with the Attune Litigation Claims, the rights of Attune to any setoff and/or recoupment are specifically preserved.

29. Modifications. The modifications to the Proposed Plan following solicitation of votes thereon satisfy the requirements of Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019 and do not adversely affect the treatment of any Claims, and, accordingly, neither require additional disclosure under Section 1125 of the Bankruptcy Code nor re-solicitation of votes on the Plan under Section 1126 of the Bankruptcy Code, nor do they require that Holders of Claims be afforded an opportunity to change previously cast acceptances or rejections of the Proposed Plan. The Combined Plan and Disclosure Statement may be amended, modified, or supplemented by the Debtors in the manner provided for by Section 1127 of the Bankruptcy Code or as otherwise permitted by law without additional disclosure pursuant to Section 1125 of the Bankruptcy Code, the Combined Plan and Disclosure Statement, and this Confirmation Order. In addition, after the Confirmation Date, the Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, may institute proceedings in

the Court to remedy any defect or omission or reconcile any inconsistencies in the Combined Plan and Disclosure Statement or this Confirmation Order, with respect to such matters as may be necessary to carry out the purposes and effects of the Combined Plan and Disclosure Statement. Further, prior to the Effective Date, the Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, may make appropriate technical adjustments and non-material changes to the Combined Plan and Disclosure Statement without further order or approval of the Court.

30. Provisions of Combined Disclosure Statement and Plan and Confirmation Order Non-severable and Mutually Dependent. The provisions of the Combined Plan and Disclosure Statement and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are non-severable and mutually dependent.

31. Governing Law. Except to the extent that the Bankruptcy Code or other federal law is applicable, the rights, duties, and obligations arising under the Combined Plan and Disclosure Statement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, without giving effect to the principles of conflict of laws thereof.

32. Applicable Non-bankruptcy Law. Pursuant to Sections 1123(a) and 1142(a) of the Bankruptcy Code, the provisions of this Confirmation Order, the Combined Plan and Disclosure Statement and related documents or any amendments or modifications thereto shall apply and be enforceable notwithstanding any otherwise applicable non-bankruptcy law.

33. Documents and Instruments. Each federal, state, commonwealth, local, foreign, or other governmental agency is hereby authorized to accept any and all documents and instruments necessary or appropriate to effectuate, implement or consummate the transactions contemplated by the Combined Plan and Disclosure Statement and this Confirmation Order.

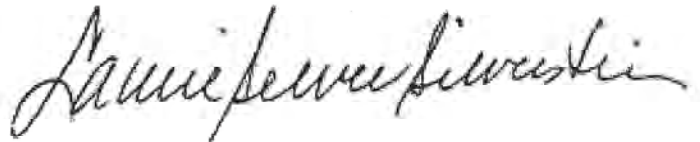
34. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state or other governmental authority with respect to the implementation or consummation of the Combined Plan and Disclosure Statement, any documents, instruments, or agreements, and any amendments or modifications thereto, and any other acts referred to in, or contemplated by, the Combined Plan and Disclosure Statement.

35. Notice of Entry of Confirmation Order and Effective Date. The form of notice of Effective Date and entry of this Confirmation Order, attached hereto as Exhibit B (the “**Effective Date Notice**”), provides adequate and reasonable notice and is hereby approved. On or within two (2) Business Days of the Effective Date, the Debtors shall file and serve the Effective Date Notice on the following parties: (i) all parties filing a notice of appearance and request for service pursuant to Bankruptcy Rule 2002 in these Chapter 11 Cases, (ii) state, provincial and local taxing authorities in which the Debtors did business, (iii) the Internal Revenue Service, (iv) the Securities and Exchange Commission, (v) the United States Attorney for the District of Delaware, (vi) Holders of Claims or Interests, (vii) all counterparties to executory contracts and unexpired leases with the Debtors, (viii) the United States Trustee and (ix) all persons or entities listed on the Debtors’ creditor mailing matrix.

36. Waiver of Stay. The stay of this Confirmation Order provided by any Bankruptcy Rule (including, without limitation, Bankruptcy Rules 3020(e), 6004(h), and 6006(d)), whether for fourteen (14) days or otherwise, is hereby waived, and this Confirmation Order shall be effective and enforceable immediately upon its entry by the Court.

37. Inconsistency. To the extent of any inconsistency between this Confirmation Order and the Combined Plan and Disclosure Statement, this Confirmation Order shall govern.

38. No Waiver. The failure to specifically include any particular provision of the Combined Plan and Disclosure Statement in this Confirmation Order shall not diminish the effectiveness of such provision nor constitute a waiver thereof, it being the intent of this Court that the Plan is confirmed in its entirety and incorporated herein by reference.



Dated: December 19th, 2018
Wilmington, Delaware

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

(The Plan)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 11
	)	
THE RELAY SHOE COMPANY, LLC, <i>et</i>	)	Case No. 18-11145 (LSS)
<i>al.</i> ,	)	
	)	(Jointly Administered)
Debtors. ¹	)	
	)	
	)	

**REVISED COMBINED DISCLOSURE STATEMENT
AND CHAPTER 11 PLAN OF LIQUIDATION**

Dated: December 19, 2018
Wilmington, Delaware

RICHARDS, LAYTON & FINGER, P.A.
Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
Amanda R. Steele (No. 5530)
Brendan J. Schlauch (No. 6115)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Email: collins@rlf.com
merchant@rlf.com
steele@rlf.com
schlauch@rlf.com

Counsel to the Debtors and Debtors in Possession

¹ The debtors and debtors in possession in these cases and the last four digits of their respective Employer Identification Numbers are: Relay Blocker, LLC (f/k/a Rockport Blocker, LLC) (5097), The Relay Group Holdings, LLC (f/k/a The Rockport Group Holdings, LLC) (3025), Relay 1-P Holdings, LLC (f/k/a TRG 1-P Holdings, LLC) (4756), Relay Intermediate Holdings, LLC (f/k/a TRG Intermediate Holdings, LLC) (8931), Relay Class D, LLC (f/k/a TRG Class D, LLC) (4757), The Relay Group, LLC (f/k/a The Rockport Group, LLC) (5559), The Relay Company, LLC (f/k/a The Rockport Company, LLC) (5456), Drydock Footwear, LLC (7708), DD Management Services LLC (8274), and Relay Opco Canada ULC (f/k/a Rockport Canada ULC) (3548). The debtors' mailing address is 1220 Washington Street, West Newton, Massachusetts 02465.

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Each Holder of a Claim against the Debtors entitled to vote to accept or reject the Plan should read this Combined Plan and Disclosure Statement in its entirety before voting. No solicitation of votes to accept or reject this Combined Plan and Disclosure Statement may be made except under the terms hereof and Section 1125 of the Bankruptcy Code. If you are entitled to vote to approve the Plan, you are receiving a Ballot with your notice of this Combined Plan and Disclosure Statement. The Debtors urge you to vote to accept the Plan.

This Combined Plan and Disclosure Statement has been prepared in accordance with Sections 1125 and 1129 of the Bankruptcy Code, Bankruptcy Rules 3016 and 3017, and Local Rule 3017-2, and not in accordance with federal or state securities law or other applicable non-bankruptcy law. Persons or Entities trading in or otherwise purchasing, selling, or transferring Claims against, or Interests in, the Debtors should evaluate this Combined Plan and Disclosure Statement in light of the purpose for which it was prepared. This Combined Plan and Disclosure Statement shall not be construed to be advice on the tax, securities, or other legal effects of this Combined Plan and Disclosure Statement as to Holders of Claims against or Interests in the Debtors.

There has been no independent audit of the financial information contained in this Combined Plan and Disclosure Statement except as expressly indicated herein. This Combined Plan and Disclosure Statement was compiled from information obtained from numerous sources believed to be accurate to the best of the Debtors' knowledge, information, and belief. This Combined Plan and Disclosure Statement was not filed with the Securities and Exchange Commission or any state authority and neither the Securities and Exchange Commission nor any state authority has passed upon the accuracy, adequacy, or merits of this Combined Plan and Disclosure Statement. Neither this Combined Plan and Disclosure Statement nor the solicitation of votes to accept or reject the Plan constitutes an offer to sell, or the solicitation of an offer to buy, securities in any state or jurisdiction in which such offer or solicitation is not authorized.

This Combined Plan and Disclosure Statement may contain "forward looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such statements consist of any statement other than a recitation of historical fact and can be identified by the use of forward looking terminology such as "may," "expect," "anticipate," "estimate," or "continue" or the negative thereof or other variations thereon or comparable terminology. The reader is cautioned that all forward looking statements are necessarily speculative and there are certain risks and uncertainties that could cause actual events or results to differ materially from those referred to in such forward looking statements.

Any projected recoveries to Creditors set forth in this Combined Plan and Disclosure Statement are based upon the analyses performed by the Debtors and their advisors. Although the Debtors and their advisors have made every effort to verify the accuracy of the information presented herein, the Debtors and their advisors cannot make any representations or warranties regarding the accuracy of the information.

Nothing herein shall be deemed or construed as an admission of any fact or liability by any party, or be admissible in any proceeding involving the Debtors or any other party. The statements contained herein are made as of the date hereof, unless another time is specified. The delivery of this Combined Plan and Disclosure Statement shall not be deemed or construed to create any implication that the information contained herein is correct at any time after the date hereof.

It is the opinion of the Debtors that the treatment of Creditors under the Plan contemplates a greater recovery than that which is likely to be achieved under other alternatives for the Debtors. Accordingly, the Debtors believe that confirmation of the Plan is in the best interests of Creditors, and the Debtors recommend that Creditors support and vote to accept the Plan.

I. INTRODUCTION

The Rockport Company, LLC (now known as The Relay Shoe Company, LLC) (“**Rockport**”)², together with its affiliated debtors and debtors in possession (collectively, the “**Debtors**”), propose this Combined Plan and Disclosure Statement under Sections 1125 and 1129 of the Bankruptcy Code and Local Rule 3017-2. While the Debtors are the proponents of this Combined Plan and Disclosure Statement within the meaning of Section 1129 of the Bankruptcy Code, this Combined Plan and Disclosure Statement, as may be amended from time to time, is the culmination of extensive negotiations between the Debtors, the Prepetition Noteholders, and other key constituents of the Debtors’ Estates, resulting in this liquidating chapter 11 plan for the Debtors and the remaining Assets of the Estates. While the Plan is consistent with the terms of the Final DIP Order Supplement (as defined herein and described in Section III.E.6 of the Plan) as agreed to by the Debtors, the Prepetition Noteholders, the DIP Note Purchasers, and the Creditors’ Committee, the Prepetition Noteholders have consented to the additional use of their cash collateral (above and beyond the amount agreed to in connection with the Final DIP Order Supplement) to fund the payment of U.S. Priority Tax Claims, Other Priority Claims against the U.S. Debtors and U.S. Administrative Expense Claims and to cover certain additional expenses of the Liquidating Trust in the manner set forth herein. Pursuant to the Final DIP Order Supplement, the Creditors’ Committee agreed to support a plan that is consistent with the terms of the Final DIP Supplement, which shall provide for broad releases in favor of the Prepetition Noteholders and related parties in any capacity. The Debtors support this Combined Plan and Disclosure Statement and encourage the Holders of impaired Claims entitled to vote hereunder to vote to accept this Combined Plan and Disclosure Statement.

This Combined Plan and Disclosure Statement contemplates the creation of a Liquidating Trust from which, under the terms of this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement, Distributions shall be made for the benefit of Holders of Allowed Claims against the U.S. Debtors.

The Combined Plan and Disclosure Statement also contemplates the establishment of the Rockport Canada Fund from which, under the terms of this Combined Plan and Disclosure Statement and the Rockport Canada Plan Administrator Agreement, Distributions shall be made for the benefit of Holders of Allowed Claims against Rockport Canada.

Subject to the restrictions on modifications set forth in Section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, and those restrictions on modifications set forth in Section XVII.A of this Combined Plan and Disclosure Statement, the Debtors expressly reserve the right, in accordance with Section XVII.A below, to alter, amend, or modify this Combined Plan and Disclosure Statement, including the Plan Supplements, one or more times before substantial Consummation thereof.

² Pursuant to Section 8.17 of the Asset Purchase Agreement, the Debtors were required to change the names of certain of the Debtors to remove any reference of “Rockport.” Accordingly, on August 8, 2018, the Debtors filed the necessary paperwork with the Secretary of State for the State of Delaware or other relevant governmental agency to effectuate the name change. The new name for each applicable Debtor is set forth in the caption to this Plan and further discussed in Section III.E.9 below. To avoid confusion for Holders of Claims and Equity Interests reviewing the Plan, all applicable Debtors will be referred to by their former names.

II. DEFINITIONS AND CONSTRUCTION OF TERMS

A. Definitions

As used herein, the following terms have the respective meanings specified below, unless the context otherwise requires:

1. **"ABL Administrative Agent"** means Citizens, as administrative agent and collateral agent for the ABL Lenders.

2. **"ABL Lenders"** means the lenders that were party from time to time to the Prepetition ABL Credit Agreement.

3. **"ABL Secured Parties"** means, collectively, the ABL Lenders and the ABL Administrative Agent.

4. **"Acquired Assets"** means all Assets transferred, conveyed, sold, and assigned to the Purchaser under and in connection with the consummation of the Sale under the Sale Documents, which are set forth in more detail in the Asset Purchase Agreement.

5. **"Acquired Companies"** means Rockport Japan K.K., The Rockport Company Korea, LTD, Rockport Hong Kong Limited, Dongguan Rockport Consulting Service Co, Ltd, Calzados Rockport S.L., The Rockport Company, Portugal, Unipessoal Lda, The Rockport Company B.V., Rockport (Europe) B.V., Relay Technical Services Private Limited, Rockport International Limited, and Rockport UK.

6. **"Additional Prepetition Notes"** means those certain Senior Secured Notes Due 2022 issued in the aggregate principal amount of \$40,573,966.05 pursuant to the Prepetition Note Purchase Agreement.

7. **"Adidas"** means adidas AG.

8. **"Adidas Parties"** means Adidas, Reebok, adidas (UK) Ltd., adidas Benelux BV, adidas Espana S.A.U., adidas Portugal, Artigos de Desporto, S.A., adidas Sverige AB, adidas Korea LLC, adidas Japan, K.K., and adidas International Trading, B.V.

9. **"Adidas Settlement Agreement"** means that certain Settlement Agreement and Releases, dated July 25, 2018, entered into by the Rockport Parties, the Adidas Parties and the Noteholder Parties.

10. **"Adidas Settlement Motion"** means the *Motion of Debtors for Entry of an Order Authorizing and Approving the Settlement Agreement By and Between the Rockport Parties, the Adidas Parties and the Noteholder Parties* [Docket No. 402].

11. **"Administrative Expense Claim"** means any Claim constituting an actual, necessary cost or expense of administering the Chapter 11 Cases under Sections 503(b), 507(a)(2) and 507(b) of the Bankruptcy Code including, without limitation, (a) any actual and necessary costs and expenses of preserving the Estates, (b) any fees or charges assessed against

the Estates under Section 1930 of chapter 123 of title 28 of the United States Code, and (c) all Claims arising under Section 503(b)(9) of the Bankruptcy Code.

12. **“Administrative Expense Claim Bar Date”** means the deadline, which is thirty (30) days from the Effective Date, for Holders of Administrative Expense Claims accruing for the period from the Petition Date through the Effective Date to file a request with the Bankruptcy Court for payment of such Administrative Expense Claim in the manner indicated in Section V herein.

13. **“Allowed”** means, with respect to Claims: (a) any Claim, proof of which was Filed (or for which Claim, under this Combined Plan and Disclosure Statement, the Bankruptcy Code, or a Final Order of the Bankruptcy Court, a proof of Claim is not or shall not be required to be Filed); (b) any Claim which has been or hereafter is listed by the Debtors in the Schedules as liquidated, and not otherwise amended, in amount and not disputed or contingent and for which no proof of Claim has been Filed; or (c) any Claim expressly allowed under this Combined Plan and Disclosure Statement or a Final Order of the Bankruptcy Court; provided that any Claim described in clauses (a) and (b) shall be considered Allowed only if and to the extent that with respect to such Claim, no objection to the allowance thereof has been interposed within the applicable period fixed by this Combined Plan and Disclosure Statement, the Bankruptcy Code, the Bankruptcy Rules, or the Bankruptcy Court, or such objection is interposed and the Claim or any portion thereof is subsequently Allowed by a Final Order; provided, further, that Claims Allowed solely for purposes of voting on this Combined Plan and Disclosure Statement under an Order of the Bankruptcy Court shall not be considered “Allowed” Claims hereunder. An Allowed Claim shall be net of any valid setoff exercised with respect to such Claim under the provisions of the Bankruptcy Code and applicable law. Moreover, any portion of a Claim that is released or waived during the Chapter 11 Cases is not an Allowed Claim. Unless otherwise specified in this Combined Plan and Disclosure Statement, in Section 506(b) of the Bankruptcy Code, or by Final Order of the Bankruptcy Court, “Allowed” Claims shall not, for purposes of Distributions under this Combined Plan and Disclosure Statement, include interest on such Claim accruing from and after the Petition Date.

14. **“Assets”** means all tangible and intangible assets of every kind and nature of the Debtors and the Estates within the meaning of Section 541 of the Bankruptcy Code.

15. **“Asset Purchase Agreement”** means that certain Asset Purchase Agreement, dated as of May 13, 2018, by and among CB Marathon Opco, LLC, as Purchaser, and the Debtors and Rockport Canada Holdings, as sellers, approved by the Bankruptcy Court on July 18, 2018, as amended, modified or supplemented from time to time.

16. **“Attune”** means attune Consulting USA, Inc.

17. **“Attune Litigation Claims”** means any and all Causes of Action against Attune, which shall be assigned, transferred and vest with the Liquidating Trust upon the Effective Date in accordance with the terms of the Plan.

18. **“Avoidance Actions”** means all rights to avoid transfers or distributions and recover any such avoided transfers or distributions for the benefit of the Estates under

Chapter 5 of the Bankruptcy Code or otherwise, including, but not limited to, Bankruptcy Code Sections 502(d), 510, 541, 542, 544, 545, 547, 548, 549, 550, 551, and 553, or otherwise under the Bankruptcy Code or under similar or related state or federal statutes and common law, including, without limitation, all preference, fraudulent conveyance, fraudulent transfer, and/or other similar avoidance claims, rights, and causes of action, whether or not demand has been made or litigation has been commenced as of the Effective Date.

19. **"Ballot"** means the ballot on which each Holder of a Claim entitled to vote on the acceptance or rejection of this Combined Plan and Disclosure Statement casts such vote.

20. **"Balloting Agent"** means Prime Clerk.

21. **"BAMS Reserves Amount"** means any amounts received by the U.S. Debtors after the Effective Date pursuant to the BAMS Reserves Stipulation. For the avoidance of doubt, it is anticipated that any such amounts received by the U.S. Debtors prior to the Effective Date will be used to fund the Pre-Effective Date Professional Fee Reserve, Pre-Effective Date SAP Claims and/or the Post-Effective Date Trust Reserve.

22. **"BAMS Reserves Stipulation"** means that Stipulation Regarding Application of Reserve to be filed, between the Debtors, on the one hand, and Bank of America N.A., Banc of America Merchant Services, LLC, Bank of America Merchant Services Canada Corp. and First Data Services, LLC, on the other hand (collectively, "BAMS"), relating to the return of the Reserve (as defined therein) established to provide credit protection with respect to chargebacks, adjustments, fees and other charges that may become due from Rockport to BAMS from time to time pursuant to the terms of certain merchant services agreements.

23. **"Bankruptcy Code"** means Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq.

24. **"Bankruptcy Court" or "Court"** means the United States Bankruptcy Court for the District of Delaware, having jurisdiction over the Chapter 11 Cases, or if such Court ceases to exercise jurisdiction over the Chapter 11 Cases, such court or adjunct thereof that exercises jurisdiction over the Chapter 11 Cases in lieu of the United States Bankruptcy Court for the District of Delaware.

25. **"Bankruptcy Rules"** means the Federal Rules of Bankruptcy Procedure as promulgated by the United States Supreme Court under Section 2075 of Title 28 of the United States Code, as amended from time to time.

26. **"Beneficiary"** means any Holder of an Allowed General Unsecured Claim against the U.S. Debtors in Class 4(a) that may, or that is entitled to, receive a Distribution from the Liquidating Trust under the terms of this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement.

27. **"Berkshire"** means Berkshire Partners LLC.

28. **"Bid Deadline"** means June 29, 2018 at 5:00 p.m. (prevailing Eastern time).

29. **"Bid Procedures Motion"** means the *Motion of Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Substantially All of the Debtors' Assets, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for, and Hearing to Approve, Sale of Substantially All of the Debtors' Assets, (D) Approving Form and Manner of Notice of Sale, Auction and Sale Hearing, (E) Approving Assumption and Assignment Procedures and (F) Granting Related Relief; and (II)(A) Approving Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interest and Encumbrances, (B) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases and (C) Granting Related Relief* [Docket No. 24].

30. **"Bid Procedures Order"** means the *Order (A) Approving Bidding Procedures for Sale of Substantially All of the Debtors' Assets, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for, and Hearing to Approve, Sale of Substantially All of the Debtors' Assets, (D) Approving Form and Manner of Notice of Sale, Auction and Sale Hearing, (E) Approving Assumption and Assignment Procedures and (F) Granting Related Relief* [Docket No. 146].

31. **"BLG"** means Borden Ladner Gervais LLP.

32. **"Blocker"** means Rockport Blocker, LLC (now known as Relay Blocker, LLC), a Delaware limited liability company.

33. **"Business Day"** means any day other than a Saturday, Sunday, or any other day on which commercial banks in New York, New York are required or authorized to close by law or executive order.

34. **"Canadian Court"** means the Ontario Superior Court of Justice (Commercial List).

35. **"Canadian Proceeding"** means the recognition proceeding commenced by Blocker as foreign representative of the Debtors, pursuant to Part IV of the CCAA, to, among other things, recognize the jointly administered Chapter 11 Cases as a "foreign main proceeding."

36. **"Cash"** means legal tender of the United States of America and equivalents thereof.

37. **"Cash Management Stipulation"** means that certain *Stipulation Modifying Final Cash Management Order to Permit Intercompany Transfers between Rockport Canada ULC and The Rockport Company, LLC* dated July 18, 2018 between the Debtors, the Information Officer and the DIP Note Purchasers.

38. **"Causes of Action"** means all claims, actions (including the Avoidance Actions), causes of action, choses in action, suits, refunds, turnovers, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies,

agreements, promises, variances, trespasses, damages, judgments, third-party claims, counterclaims, and crossclaims of any Debtor and/or any of the Estates against any Person, based in law or equity, including, but not limited to, under the Bankruptcy Code, whether direct, indirect, derivative, or otherwise and whether asserted or unasserted, known or unknown, liquidated or unliquidated, fixed or contingent, matured or unmatured, foreseen or unforeseen, and any and all commercial tort claims against any Person, arising from or relating to any act or omission or other event occurring at any time prior to (and including) the Effective Date; and subject, however, to any releases provided in this Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Sale Order, the Adidas Settlement Agreement, or any other Final Order of the Bankruptcy Court.

39. **“CCAA”** means the *Companies’ Creditors Arrangement Act* (Canada), R.S.C. 1985, c. C-36, as amended.

40. **“Chapter 11 Cases”** means the Chapter 11 cases commenced when the Debtors each filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on the Petition Date and with the following case numbers: 18-11145 (LSS), 18-11146 (LSS), 18-11147 (LSS), 18-11148 (LSS), 18-11149 (LSS), 18-11150 (LSS), 18-11151 (LSS), 18-11152 (LSS), 18-11153 (LSS) and 18-11154 (LSS), which Chapter 11 Cases are jointly administered under case number 18-11145 (LSS).

41. **“Chubb Companies”** means Federal Insurance Company, Great Northern Insurance Company, Pacific Indemnity Company, ACE American Insurance Company and each of their affiliates and successors. For the avoidance of doubt, each of the Chubb Companies is an Insurer.

42. **“Chubb Insurance Policies”** means all Insurance Policies for or to which a Chubb Company is an Insurer.

43. **“Citizens”** means Citizens Business Capital.

44. **“Claim”** has the meaning set forth in Section 101(5) of the Bankruptcy Code.

45. **“Claims Agent”** means Prime Clerk.

46. **“Claims Objection Deadline”** means the date that is one hundred and eighty (180) days after the Effective Date or such later date as may be approved by the Bankruptcy Court, as may be extended pursuant to the terms of this Combined Plan and Disclosure Statement.

47. **“Class”** means any group of substantially similar Claims or Interests classified by this Combined Plan and Disclosure Statement under Sections 1122 and 1123(a)(1) of the Bankruptcy Code.

48. **“Closing Date”** means August 2, 2018, the closing date of the Sale.

49. **"Collateral Agent"** means Cortland as collateral agent pursuant to the Prepetition Note Purchase Agreement.

50. **"Combined Plan and Disclosure Statement"** or **"Plan"** means this combined disclosure statement and Chapter 11 plan of liquidation including, without limitation, all exhibits, supplements, appendices, and schedules hereto, either in their present form or as the same may be altered, amended, or modified from time to time through and including the Effective Date; *provided that* any such modifications are reasonably acceptable to the Prepetition Noteholders.

51. **"Company"** means Rockport and its subsidiaries and affiliates.

52. **"Consummation"** or **"Consummate"** means the occurrence of or to achieve the Effective Date.

53. **"Cortland"** means Cortland Capital Market Services LLC.

54. **"CRA"** means the Canada Revenue Agency.

55. **"Creditor"** means any Person that is the Holder of a Claim against any of the Debtors.

56. **"Creditors' Committee"** means the Official Committee of Unsecured Creditors appointed by the U.S. Trustee in the Chapter 11 Cases on May 23, 2018 [Docket No. 96], as may be amended from time to time.

57. **"Cure Notices"** means all notices to counterparties to Executory Contracts, including the notices filed by the Debtors on June 8, 2018 [Docket No. 176], June 20, 2018 [Docket No. 278], July 3, 2018 [Docket No. 335] and August 7, 2018 [Docket No. 438] and including all amendments and supplements thereto and any additional such notices that may be Filed and served from time to time.

58. **"DD Management"** means DD Management Services, LLC, a Massachusetts limited liability company.

59. **"Debtor Releases"** means the releases by the Debtors set forth in Section XIII.E of this Plan.

60. **"Debtors"** means Blocker, Rockport Holdings, TRG 1-P, TRG Intermediate, TRG Class D, Rockport Group, Rockport, Drydock, DD Management, and Rockport Canada.

61. **"Debtors in Possession"** means the Debtors in their capacity as debtors in possession in the Chapter 11 Cases under Sections 1101, 1107(a), and 1108 of the Bankruptcy Code.

62. **"DIP ABL Agent"** means Citizens, as administrative agent and collateral agent, and including any of its affiliates, for the DIP ABL Lenders.

63. **"DIP ABL Credit Agreement"** means that certain Senior Secured Super-Priority Debtor-in-Possession Credit Agreement, dated as of May 17, 2018, as amended from time to time, by and among, the DIP ABL Loan Parties, the DIP ABL Agent and the DIP ABL Lenders.

64. **"DIP ABL Facility"** means the senior secured revolving postpetition financing and financial accommodations made available pursuant to the DIP ABL Credit Agreement and other related or ancillary documents.

65. **"DIP ABL Guarantors"** means, collectively, Rockport Canada Holdings, TRG Class D, Drydock and DD Management.

66. **"DIP ABL Lenders"** means Citizens and HSBC Bank USA, National Association with any other lenders party to the DIP ABL Credit Agreement.

67. **"DIP ABL Loan Parties"** means, collectively, Rockport, Rockport Group, Rockport Canada and the DIP ABL Guarantors.

68. **"DIP Facilities"** means, collectively, the DIP ABL Facility and the DIP Note Facility.

69. **"DIP Lenders"** means, collectively, the DIP Note Purchasers and the DIP ABL Lenders.

70. **"DIP Motion"** means, collectively, the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing on a Super-Priority, Senior Secured Basis and (B) Use Cash Collateral, (II) Granting (A) Liens and Super-Priority Claims and (B) Adequate Protection to Certain Prepetition Lenders, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 15].

71. **"DIP Note Agent"** means Cortland, as collateral agent for the DIP Note Purchasers.

72. **"DIP Note Borrowers"** means Rockport and Rockport Group.

73. **"DIP Note Facility"** means the senior secured postpetition financing and financial accommodations made available pursuant to the DIP Note Purchase Agreement and other related or ancillary documents.

74. **"DIP Note Guarantors"** means, collectively, Blocker, Rockport Group, TRG 1-P, TRG Intermediate, TRG Class D, Drydock and DD Management.

75. **"DIP Note Parties"** means, collectively, the DIP Note Borrowers and the DIP Note Guarantors.

76. **"DIP Note Purchase Agreement"** means that certain Debtor-in-Possession Note Purchase and Security Agreement, dated as of May 17, 2018, as amended from

time to time, by and among the DIP Note Parties, the DIP Note Agent and the DIP Note Purchasers.

77. **"DIP Note Purchasers"** means the purchasers party to the DIP Note Purchase Agreement from time to time.

78. **"DIP Order"** means any of, or collectively, (i) the Interim DIP Order; and (ii) the Final DIP Order, each as modified, amended and/or supplemented from time to time.

79. **"Directors and Officers"** means the current and former directors and officers of the Debtors.

80. **"Disputed"** means, with respect to any Claim or any portion thereof, (A) any Claim that (i) is, or hereafter may be listed on the Schedules as disputed, contingent, or unliquidated for which no proof of claim in a liquidated and non-contingent amount has been filed; (ii) is evidenced by a proof of Claim that, on its face, is contingent or unliquidated; or (iii) is objected to in whole or in part or subject to a request for estimation prior to the Claims Objection Deadline, which objection or request for estimation has not been withdrawn or resolved; and (B) any Claim that is not an Allowed Claim or a disallowed Claim in whole or in part by settlement or Final Order.

81. **"Distribution"** means Cash, property, interests in property or other value distributed to Holders of Allowed Claims, or their designated agents, or Beneficiaries, as applicable, under this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and/or the Rockport Canada Plan Administrator Agreement.

82. **"Distribution Date"** means the date or dates determined by the (i) Liquidating Trustee in accordance with the terms of this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement upon which the Liquidating Trustee shall make Distributions to holders of Allowed Claims against the U.S. Debtors entitled to receive Distributions under the Plan and (ii) the Rockport Canada Plan Administrator in accordance with the terms of this Combined Plan and Disclosure Statement and the Rockport Canada Plan Administrator Agreement upon which the Rockport Canada Plan Administrator shall make Distributions to holders of Allowed Claims against Rockport Canada entitled to receive Distributions under the Plan.

83. **"Distribution Record Date"** means the record date for purposes of making Distributions under the Plan, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement on account of Allowed Claims, which date or dates shall be set forth in the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement.

84. **"Drydock"** means Drydock Footwear, LLC, a Delaware limited liability company.

85. **"Effective Date"** means the date on which the conditions specified in Section XV.B of this Combined Plan and Disclosure Statement have been satisfied or waived and the transactions contemplated hereunder have been substantially consummated.

86. **"Employee Benefit Plans"** means The Rockport Company LLC 401(k) Savings and Retirement Plan.

87. **"Entity"** means an entity as defined in Section 101(15) of the Bankruptcy Code.

88. **"Equity Interest"** means any Equity Security in any Debtor, including, without limitation, all issued, unissued, authorized or outstanding shares of stock or limited company interests.

89. **"Equity Security"** means an "equity security" as defined in Section 101(16) of the Bankruptcy Code.

90. **"Estates"** means the estates of the Debtors created upon the commencement of the Chapter 11 Cases, including all of the Debtors' Assets.

91. **"Exculpated Parties"** means, as of the Petition Date through the date of Consummation of the Plan, the Debtors, the Information Officer, the Creditors' Committee and members of the Creditors' Committee (solely in their capacity as members of the Creditors' Committee), the Debtors' Professionals, and each of their respective Related Persons to the extent such Related Persons serve as fiduciaries of the Estates, as well as the Debtors' current directors and officers as of the Petition Date through the date of the Consummation of the Plan.

92. **"Executory Contract"** means any executory contract or unexpired lease as of the Petition Date between any Debtor and any other Person or Persons.

93. **"Expeditors"** means Expeditors International of Washington, Inc. and its subsidiaries and affiliates.

94. **"Expeditors Agreement"** means that certain Master Warehouse and Logistics Service Agreement, dated as of August 1, 2016, including all statement of works related thereto, as amended, supplemented, restated or otherwise modified from time to time.

95. **"Expeditors Litigation Claims"** means any and all Causes of Action against Expeditors, which shall be assigned, transferred and vest with the Liquidating Trust upon the Effective Date in accordance with the terms of the Plan.

96. **"File"**, **"Filed"**, or **"Filing"** means file, filed, or filing with the Bankruptcy Court in the Chapter 11 Cases or any other related proceedings.

97. **"Final Cash Management Order"** means the *Final Order (I) Authorizing Continued Use of Existing Cash Management System and Bank Accounts; (II) Waiving Certain United States Trustee Requirements; (III) Authorizing Continued Performance of Intercompany Transactions; and (IV) Granting Related Relief* [Docket No. 210].

98. **"Final DIP Order"** means the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing on a Super-Priority, Senior Secured Basis and (B) Use Cash Collateral, (II) Granting (A) Liens and Super-Priority Claims and (B) Adequate Protection to*

Certain Prepetition Lenders, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief [Docket No. 320].

99. **"Final DIP Order Supplement"** means that certain Final DIP Order Supplement attached as Exhibit A to the Final DIP Order [Docket No. 320].

100. **"Final Order"** means an Order of the Bankruptcy Court, or the Canadian Court, as applicable, or a Court of competent jurisdiction to hear appeals from the Bankruptcy Court, that has not been reversed, stayed, modified, or amended and as to which the time to appeal, to petition for certiorari, or to move for reargument or rehearing has expired and as to which no appeal, petition for certiorari, or other proceedings for reargument or rehearing shall then be pending; provided, however, that the possibility that a motion under Rule 59 or 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules or applicable state court rules of civil procedure, may be Filed with respect to such order shall not cause such order not to be a Final Order.

101. **"First Day Declaration"** means the *Declaration of Paul Kosturos in Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 14].

102. **"First Day Motions"** has the meaning set forth in Section III.E of this Combined Plan and Disclosure Statement.

103. **"General Administrative Expense Claim"** means any Administrative Expense Claim and any Professional Fee Administrative Claim.

104. **"General Bar Date"** means August 30, 2018, as established in the General Bar Date Order.

105. **"General Bar Date Order"** means that certain order of the Bankruptcy Court dated as of July 25, 2018 [Docket No. 405], establishing, among other things, (a) August 30, 2018 as the general bar date for filing proofs of Claim in the Chapter 11 Cases, and (b) November 12, 2018 as the deadline for all Governmental Units (as such term is defined in Section 101(27) of the Bankruptcy Code) for filing proofs of Claim in the Chapter 11 Cases, subject in each case to only those exceptions permitted thereby.

106. **"General Unsecured Claim"** means any Claim against the Debtors that arose or is deemed or determined by the Bankruptcy Code or Bankruptcy Court, as the case may be, to have arisen before the Petition Date and that is not: (i) a Secured Claim, (ii) an Administrative Expense Claim, (iii) a Professional Fee Administrative Claim, (iv) a Statutory Fee Claim, (v) a Priority Tax Claim, (vi) an Other Priority Claim or any other Claim entitled to priority under the Bankruptcy Code or any order of the Bankruptcy Court, or (vii) any Claim that constitutes an Interest. For the avoidance of doubt, General Unsecured Claims shall include (a) Rejection Damages Claims and (b) any deficiency claims, including any Prepetition Note Deficiency Claims, subject to the terms of the Plan, including, but not limited to, the Threshold Distribution Amount.

107. **"Governmental Unit"** has the meaning set forth in Section 101(27) of the Bankruptcy Code.

108. **"Governmental Unit Bar Date"** means November 12, 2018 at 5:00 p.m. (prevailing Eastern Time), the deadline for Governmental Units to file a proof of Claim against any of the Debtors for a Claim that arose prior to the Petition Date.

109. **"Holder"** means the legal or beneficial holder of any Claim or Interest.

110. **"Houlihan"** means Houlihan Lokey Capital, Inc.

111. **"Independent Directors"** means William Allen, Matthew Sheahan and Michael LeRoy.

112. **"Information Officer"** means Richter Advisory Group Inc., in its capacity as the Canadian Court-appointed information officer in the Canadian Proceeding.

113. **"Initial Prepetition Notes"** means those certain Senior Secured Notes Due 2022 issued in the original principal amount of \$130 million pursuant to the Prepetition Note Purchase Agreement.

114. **"Insurance Policies"** means all insurance policies that have been issued at any time or provide coverage, benefits or proceeds to any of the Debtors (or their predecessors) and all agreements, documents or instruments relating thereto.

115. **"Insurer"** means any company or other entity that issued an Insurance Policy, any third party administrator of or for any Insurance Policy, and any respective predecessors, successors and/or affiliates of any of the foregoing.

116. **"Intercompany Claims"** means (i) any account reflecting intercompany book entries by one Debtor with respect to another Debtor, or (ii) any Claim that is not reflected in such book entries and is held by a Debtor against another Debtor, in each case accruing before or after the Petition Date through the Effective Date, including, but not limited to, any Claim for reimbursement, payment as guarantor or surety, or any Claim for contribution or expenses that was allocable between the Debtors.

117. **"Intercompany Transactions"** means certain transactions between and among the Debtors as well as with certain of their former foreign affiliates.

118. **"Intercreditor Agreement"** means the Intercreditor Agreement, dated as of July 31, 2015, among the ABL Administrative Agent, the Collateral Agent and the Prepetition Noteholders party thereto, as amended, restated, amended and restated, supplemented, or otherwise modified prior to the Petition Date.

119. **"Interest"** means any equity or membership interest in any Debtor.

120. **"Interim DIP Order"** means *the Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing on a Super-Priority, Senior Secured Basis and (B) Use Cash Collateral, (II) Granting (A) Liens and Super-Priority Claims and (B) Adequate Protection to Certain Prepetition Lenders, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 60]

121. **"IRC"** means the Internal Revenue Code of 1986, as amended.

122. **"IRS"** means the Internal Revenue Service.

123. **"Key Employee Incentive Plan"** means the key employee incentive plan authorized by the *Order Approving Debtors' Key Employee Incentive Plan and Key Employee Retention Plan* [Docket No. 233].

124. **"Key Employee Retention Plan"** means the key employee retention plan authorized by the *Order Approving Debtors' Key Employee Incentive Plan and Key Employee Retention Plan* [Docket No. 233].

125. **"Lien"** means any mortgage, pledge, deed of trust, assessment, security interest, lease, lien, adverse claim, levy, charge, right of first refusal or surrender right, or other encumbrance of any kind, including any "lien" as defined in Section 101(37) of the Bankruptcy Code.

126. **"Liquidating Trust"** means the trust established on the Effective Date as described in Section VIII of this Combined Plan and Disclosure Statement and in accordance with the Liquidating Trust Agreement.

127. **"Liquidating Trust Advisors"** means any firm(s) or individual(s) retained by the Liquidating Trustee in accordance with the terms of the Liquidating Trust Agreement to serve as legal counsel for the Liquidating Trust or to provide other professional services for the Liquidating Trust in connection with the performance of the Liquidating Trustee's duties and responsibilities under this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement.

128. **"Liquidating Trust Agreement"** means the trust agreement, in form and substance reasonably acceptable to the Debtors, the Prepetition Noteholders, the Creditors' Committee and the Liquidating Trustee as of the Effective Date, establishing the Liquidating Trust described in Section VIII of this Combined Plan and Disclosure Statement, and which shall be filed in draft form as part of the Plan Supplement.

129. **"Liquidating Trust Assets"** means (i) any and all U.S. Litigation Claims and U.S. Litigation Proceeds; (ii) the Post-Effective Date Trust Reserve; (iii) the benefits, rights, interests and proceeds of any Insurance Policies with respect to the U.S. Debtors only to the extent payable to the U.S. Debtors in accordance with the terms of the Insurance Policies; and (iv) any and all other Assets belonging to the U.S. Debtors' Estates, including any Cash and other Assets that are not Acquired Assets remaining in the U.S. Debtors' Estates on the Effective Date. For the avoidance of doubt, the Pre-Effective Date Professional Fee Reserve, the Pre-Effective Date SAP Claims Reserve and Sale Escrow Amounts shall be transferred to the Liquidating Trust on the Effective Date to be administered by the Liquidating Trust in accordance with the terms of this Plan, the Sale Order or other applicable documents but shall not be considered Liquidating Trust Assets. Any unused portion of the Pre-Effective Date Professional Fee Reserve or the Pre-Effective Date SAP Claims Reserve following the payment of all Claims for which such funds are intended shall be available for distribution to the Holders

of Allowed Prepetition Note Secured Claims and shall not be available for distribution to the Holders of General Unsecured Claims.

130. **"Liquidating Trust Class 4 Distributable Assets"** means the remaining amount of the Post-Effective Date Trust Reserve and/or the U.S. Litigation Proceeds following the payment of all Liquidating Trust Operating Expenses available for distribution to the Holders of Allowed Class 4 General Unsecured Claims against the U.S. Debtors.

131. **"Liquidating Trustee"** means the Person or Persons selected by, the Creditors' Committee, in consultation with the Debtors and the Prepetition Noteholders, and appointed to administer the Liquidating Trust, which shall be disclosed in the Plan Supplement, with such rights, duties, and obligations as set forth in this Combined Plan and Disclosure Statement and in the Liquidating Trust Agreement.

132. **"Liquidating Trust Operating Expenses"** means the overhead and other operational expenses of the Liquidating Trust including, but not limited to, (i) reasonable compensation for the Liquidating Trustee and members of the Trust Oversight Committee (which expenses shall not include professional fees of such members) in accordance with the Liquidating Trust Agreement, (ii) costs and expenses incurred by the Liquidating Trustee in administering the Liquidating Trust, (iii) Statutory Fees incurred after the Effective Date to the U.S. Trustee, and (iv) any fees and expenses payable to the Liquidating Trust Advisors.

133. **"Local Rules"** means the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, as amended from time to time.

134. **"Management Agreement"** means that certain Management Agreement, dated as of July 31, 2015, entered into by Rockport and Adidas.

135. **"New Balance"** means New Balance Holdings, Inc.

136. **"New Money Notes"** means notes issued pursuant to the DIP Note Purchase Agreement.

137. **"North American Retail Assets"** means the Debtors' retail assets comprised of a total of 27 stores in the United States and 33 stores in Canada, including related inventory.

138. **"Note Priority Collateral"** shall have the meaning set forth in the Prepetition Note Purchase Agreement.

139. **"Noteholder Parties"** means Crescent Mezzanine Partners VI, L.P., Crescent Mezzanine Partners VIC, L.P., Crescent Mezzanine Partners VIB (Cayman), L.P., CM6B Rockport Equity, Inc., CM6C Rockport Equity, Inc., Corporate Capital Trust, Inc., Oregon Public Employees Retirement Fund, NYLCAP Mezzanine Partners III, LP, NYLCAP Mezzanine Partners III Parallel Fund, LP, NYLCAP mezzanine Partners III 2012 Co-Invest, LP, and NYLCAP Mezzanine Partners II 2012 Co-Invest ECI Blocker F, LP.

140. **"Order"** means an order, opinion, or judgment of the Bankruptcy Court as entered on the docket.

141. **"Other General Unsecured Claim"** means a General Unsecured Claim against the U.S. Debtors that is not a Prepetition Note Deficiency Claim.

142. **"Other Priority Claim"** means any Claim accorded priority in right of payment under Section 507(a) of the Bankruptcy Code, that is not otherwise a Priority Tax Claim, a Statutory Fee Claim, an Administrative Expense Claim, or a Professional Fee Administrative Claim.

143. **"Other U.S. Litigation Proceeds"** means all U.S. Litigation Proceeds other than U.S. Avoidance Action Litigation Proceeds; (except for U.S. Litigation Proceeds on account of Avoidance Actions under Section 549 of the Bankruptcy Code which shall constitute Other U.S. Litigation Proceeds).

144. **"Owned Real Property"** means all real property and all of the Debtors' right, title and interest in real property owned, in whole or in part, directly or indirectly by the Debtors, together with all buildings, fixtures and improvements located thereon, and all easements, rights of way, servitudes, tenements, appurtenances, privileges and other rights with respect thereto.

145. **"Other Secured Claim"** means any Secured Claim that is not otherwise a Prepetition Note Claim.

146. **"Permitted Rockport Canada Intercompany Transactions"** means following the Petition Date, Rockport Canada's transfer of funds to Rockport on account of (i) merchandise purchased postpetition from Rockport as necessary for Rockport Canada's ongoing operations and (ii) postpetition back-office services provided by Rockport.

147. **"Person"** means an individual, a corporation, a partnership, an association, a joint stock company, a joint venture, an estate, a trust, an unincorporated association or organization, a governmental unit or any agency or subdivision thereof or any other entity.

148. **"Petition Date"** means May 14, 2018, the date on which the Debtors commenced these Chapter 11 Cases.

149. **"Plan Confirmation Date"** means the date on which the Bankruptcy Court enters the Plan Confirmation Order.

150. **"Plan Confirmation Hearing"** means the hearing to be held by the Bankruptcy Court to consider approval and confirmation of this Combined Plan and Disclosure Statement, as such hearing may be adjourned or continued from time to time.

151. **"Plan Confirmation Order"** means an Order entered by the Bankruptcy Court approving and confirming this Combined Plan and Disclosure Statement on a final basis under Sections 1125 and 1129 of the Bankruptcy Code and Local Rule 3017-2.

152. **"Plan Documents"** means this Combined Plan and Disclosure Statement, the Plan Supplements, and all of the exhibits and schedules attached to any of the foregoing.

153. **"Plan Proponents"** means the Debtors as the proponents of the Combined Plan and Disclosure Statement.

154. **"Plan Supplement"** means the appendix of schedules and exhibits to be Filed at least ten (10) days before the Plan Confirmation Hearing containing, among other things, the Liquidating Trust Agreement as may be amended, modified, and/or supplemented; each of which shall be in form and substance reasonably acceptable to the Prepetition Noteholders and the Creditors' Committee.

155. **"Post-Closing Adjustments"** means certain closing adjustments and reconciliations owed by Rockport to Adidas pursuant to the Management Agreement.

156. **"Post-Effective Date Trust Reserve"** means a reserve to be established by the Debtors on or prior to the Effective Date in the amount of \$485,000, which may be used by the Liquidating Trustee, subject to the terms of the Liquidating Trust Agreement, to pay any Liquidating Trust Operating Expenses and/or to make a distribution to the Holders of Class 4 General Unsecured Claims against the U.S. Debtors in accordance with the Plan.

157. **"Pre-Effective Date Professional Fee Reserve"** means a reserve to be established by the Debtors on or prior to the Effective Date in an amount not to exceed \$5,750,000 (not including the use of any remaining pre-petition retainers that may be used to supplement the Pre-Effective Date Professional Fee Reserve) to cover estimated unpaid U.S. Professional Fee Administrative Claims, which, absent the consent of the Prepetition Noteholders, shall be used solely to pay any unpaid and Allowed U.S. Professional Fee Administrative Claims (including any amounts relating to the preparation and filing of tax returns for the U.S. Debtors for the tax periods preceding the Effective Date) in accordance with the Plan. The Pre-Effective Date Professional Fee Reserve shall not be a Liquidating Trust Asset. Any unused portion of the Pre-Effective Date Professional Fee Reserve following the payment of all unpaid and Allowed U.S. Professional Fee Administrative Claims incurred through the Effective Date shall be available for distribution to the Holders of Allowed Prepetition Note Secured Claims and shall not be available for distribution to the Holders of Class 4 General Unsecured Claims against the U.S. Debtors. On or about the Effective Date, the U.S. Debtors shall file a schedule identifying the actual amount of the Pre-Effective Date Professional Fee Reserve and identifying the amount allocated to each Professional (the **"Allocated Line Item Amount"**) based on estimated unpaid amounts incurred through the Effective Date. Notwithstanding anything in this Plan or the Plan Confirmation Order to the contrary, the payments to each Professional on account of their unpaid U.S. Professional Fee Administrative Claim shall be limited to their Allocated Line Item Amount.

158. **"Pre-Effective Date SAP Claims Reserve"** means a reserve to be established by the Debtors on or prior to the Effective Date in the amount of \$1,775,000, which, absent the consent of the Prepetition Noteholders, shall be used solely to pay any unpaid and Allowed (i) Other Secured Claims against the U.S. Debtors, (ii) U.S. General Administrative Claims (other than U.S. Professional Fee Administrative Claims) incurred through the Effective

Date, (iii) U.S. Priority Tax Claims, (iv) Other Priority Claims against the U.S. Debtors in accordance with the Plan, and (v) any unpaid Statutory Fees relating to the period from the Petition Date through the Effective Date and any Statutory Fees associated with the initial distribution by the Debtors or the Liquidating Trustee, as the case may be, to the Holders of Allowed Prepetition Note Secured Claims against the U.S. Debtors in accordance with the Plan. The Pre-Effective Date SAP Claims Reserve shall not be a Liquidating Trust Asset. Any unused portion of the Pre-Effective Date SAP Claims Reserve following the payment of all unpaid and Allowed Other Secured Claims against the U.S. Debtors, the U.S. General Administrative Claims (other than U.S. Professional Fee Administrative Claims) incurred through the Effective Date, U.S. Priority Tax Claims, Other Priority Claims or the Statutory Fees against the U.S. Debtors shall be available for distribution to the Holders of Allowed Prepetition Note Secured Claims referenced above and shall not be available for distribution to the Holders of Class 4 General Unsecured Claims against the U.S. Debtors.

159. **"Prepetition ABL Credit Agreement"** means, collectively, that certain Revolving Credit Agreement, dated as of July 31, 2015 among Rockport, Rockport Group, Rockport Canada, TRG Class D, the Subsidiaries (as defined therein) of Rockport Group from time to time, the ABL Lenders, and Citizens, as ABL Administrative Agent, as amended, supplemented, restated or otherwise modified from time to time.

160. **"Prepetition Credit Facilities"** means the Prepetition Notes Facility and the Prepetition ABL Facility.

161. **"Prepetition Note Claims"** means the Claims held by the Prepetition Noteholders.

162. **"Prepetition Note Deficiency Claims"** means Unsecured Deficiency Claims held by the Prepetition Noteholders. For the avoidance of doubt, Prepetition Note Deficiency Claims are General Unsecured Claims against the U.S. Debtors.

163. **"Prepetition Note Purchase Agreement"** means that certain Note Purchase Agreement, dated as of July 31, 2015, among Rockport, Rockport Group, TRG Class D, the Subsidiaries (as defined therein) of the Rockport Group from time to time, Cortland, the Collateral Agent and the Prepetition Noteholders.

164. **"Prepetition Note Secured Claims"** means, collectively, all Prepetition Note Claims that are Secured Claims.

165. **"Prepetition Notes"** means the Initial Prepetition Notes and the Additional Prepetition Notes.

166. **"Prepetition Noteholders"** means the purchasers of the Prepetition Notes pursuant to the Prepetition Note Purchase Agreement.

167. **"Prepetition Secured Parties"** means, collectively, the Prepetition Noteholders, the Collateral Agent, the ABL Secured Parties and the ABL Administrative Agent.

168. **"Prime Clerk"** means Prime Clerk LLC.

169. **"Priority Tax Claim"** means a Claim that is entitled to priority under Section 507(a)(8) of the Bankruptcy Code.

170. **"Privilege"** means the attorney client privilege, work product protections or other immunities (including without limitation those related to common interests or joint defenses with other parties), or protections from disclosure of any kind held by the Debtors or their Estates.

171. **"Professional"** means any professional Person employed by the Debtors or the Creditors' Committee in the Chapter 11 Cases under Section 327, 363, or 1103 of the Bankruptcy Code or otherwise under an Order of the Bankruptcy Court.

172. **"Professional Fee Administrative Claim"** means a Claim for compensation for services rendered or reimbursement of expenses incurred through and including the Effective Date under Sections 330, 331, 503(b)(2), 503(b)(3), 503(b)(4), or 503(b)(5) of the Bankruptcy Code, including Claims of any Professional seeking an award by the Bankruptcy Court of compensation for services rendered or reimbursement of expenses incurred through and including the Effective Date.

173. **"Pro Rata"** means the proportion that an Allowed Claim or Allowed Interest in a particular Class bears to the aggregate amount of Allowed Claims or Allowed Interests in that Class.

174. **"Purchaser"** means CB Marathon Opco, LLC in its capacity as purchaser under the Asset Purchase Agreement.

175. **"Qualified Bid"** means an offer, solicitation or proposal submitted in connection with the Sale satisfying the conditions set forth in the Bid Procedures Order.

176. **"Reebok"** means Reebok International Ltd.

177. **"Rejection Damages Claim"** means a Claim for damages arising out of the rejection of an Executory Contract.

178. **"Related Persons"** means, with respect to any Person, such Person's predecessors, successors, assigns and present and former (i) shareholders, (ii) equity holders, (iii) affiliates (whether by operation of law or otherwise), (iv) subsidiaries, (v) principals, (vi) employees, (vii) agents, (viii) officers, (ix) directors, (x) managers, (xi) trustees, (xii) partners, (xiii) members, (xiv) professionals, (xv) representatives, (xvi) advisors, (xvii) attorneys, (xviii) financial advisors, (xix) accountants, (xx) investment bankers, and (xxi) consultants, and (xxii) any Person claiming by or through any of the foregoing.

179. **"Released Parties"** means the Debtors, Prepetition Secured Parties, the Creditors' Committee, the Information Officer, and the DIP Lenders, in each case in their capacities as such, and each of their respective Related Persons for claims by or through the person they are related to.

180. **"Releasing Parties"** means (i) the Released Parties excluding the Debtors (excluding any Holder of a Prepetition Note Claim in Class 2 who votes to reject the Plan and opts out of the Third-Party Release and any investor in the Oregon Pension Fund), (ii) each Holder of a Claim who is conclusively deemed to have accepted the Plan and does not timely object to the releases provided in the Plan upon payment of such Holder's claim in full, (iii) each Holder of a Claim who votes to accept the Plan, (iv) each Holder of a Claim who votes to reject the Plan and does not mark its ballot to indicate its refusal to grant the Third-Party Release, (v) each Holder of a Claim who abstains from voting on the Plan and does not mark its ballot to indicate its refusal to grant the Third-Party Release, and (vi) with respect to the foregoing clauses (i) through (v), each of such Person's Related Persons (excluding any investor in the Oregon Pension Fund), in each case in their capacity as such, for claims by or through the person they are related to. Notwithstanding anything to the contrary herein, Releasing Parties shall not include any Holder of a Claim who is entitled to vote on the Plan, but such ballot was returned to the Balloting Agent as undeliverable.

181. **"Revolving Priority Collateral"** shall have the meaning set forth in the Prepetition ABL Credit Agreement.

182. **"Rockport"** means The Rockport Company, LLC (now known as The Relay Shoe Company, LLC), a Delaware limited liability company.

183. **"Rockport Canada"** means Rockport Canada ULC (now known as Relay Opco Canada ULC), a British Columbia unlimited liability company.

184. **"Rockport Canada Administrative Expense Claim"** means an Administrative Expense Claim against Rockport Canada.

185. **"Rockport Canada Cash"** means \$6,007,000.

186. **"Rockport Canada Fund"** means the fund established under this Plan to make Distributions on account of Allowed Claims against Rockport Canada and funded with (i) the Rockport Canada Cash, (ii) Rockport Canada Litigation Proceeds and (iii) the proceeds of any Insurance Policies with respect to Rockport Canada.

187. **"Rockport Canada General Administrative Claims"** means any Rockport Canada Administrative Claim and any Rockport Canada Professional Fee Administrative Claim.

188. **"Rockport Canada Holdings"** means Rockport Canada Ltd., an England and Wales limited company.

189. **"Rockport Canada Litigation Claims"** means any and all Causes of Action (except Causes of Action that constitute Acquired Assets and any claims or Causes of Action against Released Parties), related to Rockport Canada or a creditor of Rockport Canada which shall be assigned, transferred, and vest in Rockport Canada upon the Effective Date in accordance with the terms of the Plan.

190. **"Rockport Canada Litigation Proceeds"** means the net proceeds of the Rockport Canada Litigation Claims.

191. **"Rockport Canada Plan Administrator"** means the Person or Persons selected by Rockport Canada and appointed to administer the Rockport Canada Fund, which shall be disclosed in the Plan Supplement, with such rights, duties and obligations as set forth in this Combined Plan and Disclosure Statement and in the Rockport Canada Plan Administrator Agreement.

192. **"Rockport Canada Plan Administrator Agreement"** means the plan administrator agreement, in the form and substance reasonably acceptable to the Debtors and the Rockport Canada Plan Administrator as of the Effective Date, specifying the rights, duties and responsibilities of, and to be performed by, the Rockport Canada Plan Administrator under the Combined Plan and Disclosure Statement.

193. **"Rockport Canada Plan Administrator Professionals"** means agents, financial advisors, attorneys, consultants, independent contractors, representatives and other professionals of the Rockport Canada Plan Administrator and Rockport Canada (in each case, solely in their capacities as such).

194. **"Rockport Canada Priority Tax Claim"** means a Priority Tax Claim against Rockport Canada.

195. **"Rockport Canada Professional Fee Administrative Claims"** means Professional Fee Administrative Claims against Rockport Canada, including but not limited to, the Professional Fee Administrative Claims of BLG.

196. **"Rockport Group"** means The Rockport Group, LLC (now known as The Relay Group, LLC), a Delaware limited liability company.

197. **"Rockport Holdings"** means The Rockport Group Holdings, LLC (now known as The Relay Group Holdings, LLC), a Delaware limited liability company.

198. **"Rockport Parties"** means The Rockport Group, LLC, The Rockport Group Holdings, LLC, TRG 1-P Holdings, LLC, TRG Intermediate Holdings, LLC, TRG Class D, LLC, The Rockport Company, LLC, Drydock Footwear, LLC, DD Management Services LLC, Rockport Canada ULC, Rockport Canada Holdings, Ltd., Rockport Japan K.K., The Rockport Company Korea, Ltd, Rockport Hong Kong Limited, Dongguan Rockport Consulting Service Co., Ltd., Calzados Rockport S.L., The Rockport Company, Portugal, Unipessoal LDA, The Rockport Company B.V., Rockport (Europe) B.V., Relay Technical Services Private Limited, Rockport International Limited, Rockport UK Holdings Ltd., Rockport Canada Holdings, Ltd., and The Rockport Company Japan K.K.

199. **"Rockport Plaintiffs"** means The Rockport Group, LLC, The Rockport Group Holdings, LLC, TRG 1-P Holdings, LLC, TRG Intermediate Holdings, LLC, TRG Class D, LLC, The Rockport Company, LLC, Drydock Footwear, LLC, DD Management Services LLC, Rockport Canada ULC, Rockport Japan K.K., The Rockport Company Korea, Ltd, Rockport Hong Kong Limited, Dongguan Rockport Consulting Service Co., Ltd., Calzados

Rockport S.L., The Rockport Company, Portugal, Unipessoal LDA, The Rockport Company B.V., Rockport (Europe) B.V., Relay Technical Services Private Limited, Rockport International Limited, Rockport UK Holdings Ltd.

200. **"Rockport UK"** means Rockport UK Holdings, Ltd. (now known as Relay UK Holdings, Ltd.), a United Kingdom limited company.

201. **"Sale"** means the sale of substantially all of the Debtors' Assets as set forth in, and in accordance with, the Sale Documents, which was consummated on the Closing Date.

202. **"Sale Documents"** means the Asset Purchase Agreement, the Sale Order, and all documents, instruments, and agreements executed and delivered in connection with the consummation of the transactions contemplated by the Asset Purchase Agreement.

203. **"Sale Escrow Amounts"** means the escrowed funds in the aggregate amount of \$558,212.03 that were set aside in connection with the closing of the Sale, consisting of (i) \$572,607.75 relating to a cure dispute with Expeditors; (ii) \$7,500.00 relating to secured ad valorem property taxes asserted by the Local Texas Taxing Authorities (as defined in the Sale Order); and (iii) \$8,104.28 relating to a cure dispute with Oracle America, Inc.

204. **"Sale Motion"** means the *Motion of Debtors for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Substantially All of the Debtors' Assets, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for, and Hearing to Approve, Sale of Substantially All of the Debtors' Assets, (D) Approving Form and Manner of Notice of Sale, Auction and Sale Hearing, (E) Approving Assumption and Assignment Procedures and (F) Granting Related Relief; and (II)(A) Approving Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (B) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases and (C) Granting Related Relief* [Docket No. 24].

205. **"Sale Order"** means the *Order (A) Approving and Authorizing the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests, (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto, and (C) Granting Related Relief* [Docket No. 387].

206. **"Schedules"** mean the schedules of assets and liabilities, schedules of executory contracts, schedules of co-debtors and statements of financial affairs filed by the Debtors pursuant to Section 521 of the Bankruptcy Code, as may be amended, modified or supplemented from time to time.

207. **"Secured Claim"** means a Claim that is secured (a) by a Lien that is valid, perfected, and enforceable under the Bankruptcy Code or applicable non-bankruptcy law or by reason of an Order, or (b) as a result of rights of setoff under Section 553 of the Bankruptcy Code, but in any event only to the extent of the value determined in accordance with Section 506(a) of the Bankruptcy Code, of the Holder's interest in the Estate's interest in such property (unless an election has been made under Section 1111(b) of the Bankruptcy Code on or

prior to the Plan Confirmation Date) or to the extent of an amount subject to such setoff, as applicable.

208. **"Securities Act"** means the Securities Act of 1933, as amended.

209. **"Statutory Fees"** means any and all fees payable to the U.S. Trustee under Section 1930 of Title 28 of the United States Code and any interest thereupon.

210. **"Stores"** means the Debtors' North American retail locations.

211. **"Store Closing Sales Motion"** means the *Motion of Debtors for Entry of an Order (I) Authorizing the Debtors to (A) Conduct Store Closing Sales at Their North American Retail Locations and (B) Pay Store Closing Bonuses to Employees at the Closing Stores and (II) Granting Related Relief* [Docket No. 47].

212. **"Store Closing Sales Order"** means the *Order (I) Authorizing the Debtors to (A) Conduct Store Closing Sales at Their North American Retail Locations and (B) Pay Store Closing Bonuses to Employees at the Closing Stores and (II) Granting Related Relief* [Docket No. 234].

213. **"Successful Bidder"** shall have the meaning set forth in the Bid Procedures Order.

214. **"Third-Party Release"** means the releases set forth in Section XIII.F of this Plan.

215. **"Threshold Distribution Amount"** means \$2,000,000 as set forth in the Final DIP Order Supplement.

216. **"TRG 1-P"** means TRG 1-P Holdings, LLC (now known as Relay 1-P Holdings, LLC), a Delaware limited liability company.

217. **"TRG Class D"** means TRG Class D, LLC (now known as Relay TRG Class D, LLC), a Delaware limited liability company.

218. **"TRG Intermediate"** means TRG Intermediate Holdings, LLC (now known as Relay TRG Intermediate Holdings, LLC), a Delaware limited liability company.

219. **"Trust Oversight Committee"** means the committee formed on the Effective Date to be selected by the Creditors' Committee, the composition of such must be reasonably acceptable to the Debtors and the Prepetition Noteholders and identified in the Plan Supplement for the purposes set forth in the Liquidating Trust Agreement.

220. **"Unclaimed Distribution"** means a Distribution that is not claimed by a Holder of an Allowed Claim on or prior to the Unclaimed Distribution Deadline.

221. **"Unclaimed Distribution Deadline"** means, in each instance, the date that is one hundred and twenty (120) days from the date the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, makes a Distribution.

222. **"Unsecured Deficiency Claim"** means, with respect to a Claim that is secured by a Lien on property in which any Debtor's Estate has an interest or that is subject to setoff under Section 553 of the Bankruptcy Code, the amount by which such Claim exceeds the value of the Claim holder's interest in such Estate's interest in such property or the amount subject to setoff, as applicable, as determined pursuant to Section 506(a) of the Bankruptcy Code or, in the case of setoff, pursuant to Section 553 of the Bankruptcy Code.

223. **"U.S. Administrative Expense Claim"** means an Administrative Expense Claim against the U.S. Debtors.

224. **"U.S. Avoidance Action Litigation Proceeds"** means all U.S. Litigation Proceeds received on account of Avoidance Actions and commercial tort U.S. Litigation Claims, excluding U.S. Litigation Proceeds on account of Avoidance Actions under Section 549 of the Bankruptcy Code.

225. **"U.S. Debtors"** means Blocker, Rockport Holdings, TRG 1-P, TRG Intermediate, TRG Class D, Rockport Group, Rockport, Drydock and DD Management.

226. **"U.S. General Administrative Claims"** means any U.S. Administrative Claim and any U.S. Professional Fee Administrative Claim.

227. **"U.S. Litigation Claims"** means any and all Causes of Action (except Causes of Action that constitute Acquired Assets and any claims or Causes of Action against Released Parties), related to any U.S. Debtor or a creditor of a U.S. Debtor which shall be assigned, transferred, and vest in Liquidating Trust upon the Effective Date in accordance with the terms of the Plan. For the avoidance of doubt, the Expeditors Litigation Claims and Attune Litigation Claims shall be deemed and constitute U.S. Litigation Claims and shall not constitute Rockport Canada Litigation Claims under the terms of this Plan.

228. **"U.S. Litigation Proceeds"** means the net proceeds of the U.S. Litigation Claims.

229. **"U.S. Priority Tax Claim"** means a Priority Tax Claim against the U.S. Debtors.

230. **"U.S. Professional Fee Administrative Claims"** means Professional Fee Administrative Claims of the U.S. Debtors.

231. **"U.S. Trustee"** means the Office of the United States Trustee for the District of Delaware.

232. **"Vote Tabulation Procedures"** shall have the meaning set forth in Section IV.A of this Combined Plan and Disclosure Statement.

233. **"Voting Deadline"** means November 19, 2018 at 5:00 p.m. as described in Section IV.A of this Combined Plan and Disclosure Statement.

234. **"Warrant Agreement"** means the Warrant to Purchase Common Units of CB Marathon Holdings, LLC (**"CB Marathon Holdings"**) executed by and between CB Marathon Holdings and Blocker, pursuant to which the Warrants were issued by CB Marathon Holdings to Blocker upon the Closing Date.

235. **"Warrants"** means the warrants issued by CB Marathon Holdings and delivered to Blocker upon the Closing Date to purchase Five Million Five Hundred Forty Two Thousand One Hundred Five (5,542,105) (the **"Warrant Units"**) duly authorized and validly issued Common Units (as defined in the Amended and Restated Limited Liability Company Agreement of CB Marathon Holdings, as amended from time to time (the **"CB Marathon Holdings LLC Agreement"**)), at an initial purchase price per Warrant Unit equal to \$2.50 (the **"Warrant Price"**).

236. **"Wind-Down Reserve Amount"** means \$2,500,000.

B. Interpretation; Application of Definitions and Rules of Construction

Wherever from the context it appears appropriate, each term stated in either the singular or the plural shall include both the singular and the plural and pronouns stated in the masculine, feminine, or neuter gender shall include the masculine, feminine, and neuter. Unless otherwise specified, all section, article, schedule, or exhibit references in this Combined Plan and Disclosure Statement are to the respective section in, article of, Schedule to, or Exhibit to this Combined Plan and Disclosure Statement. The words "herein," "hereof," "hereto," "hereunder," and other words of similar import refer to this Combined Plan and Disclosure Statement as a whole and not to any particular section, subsection or clause contained in this Combined Plan and Disclosure Statement. The rules of construction contained in Section 102 of the Bankruptcy Code shall apply to the construction of this Combined Plan and Disclosure Statement. A term used herein that is not defined herein, but that is used in the Bankruptcy Code, shall have the meaning ascribed to that term in the Bankruptcy Code. The headings in this Combined Plan and Disclosure Statement are for convenience of reference only and shall not limit or otherwise affect the provisions of this Combined Plan and Disclosure Statement. Any reference to the "Liquidating Trustee" shall be deemed to include a reference to the "Liquidating Trust" and any reference to the "Liquidating Trust" shall be deemed to include a reference to the "Liquidating Trustee" unless the context otherwise requires. Bankruptcy Rule 9006 shall apply to all computations of time periods prescribed or allowed by this Combined Plan and Disclosure Statement unless otherwise set forth herein or provided by the Bankruptcy Court.

III. BACKGROUND

On the Petition Date, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code initiating these Chapter 11 Cases. Following the Petition Date, the Debtors remained in possession of their Assets and managed their businesses as Debtors in Possession under Sections 1107 and 1108 of the Bankruptcy Code.

A. General Background

Below is a summary of the Debtors' business, organizational structure, and the events leading to the Debtors' Chapter 11 filings. In addition, below is a summary of certain of the key events in these Chapter 11 Cases.³

1. The Debtors' Business

Founded in 1971 and headquartered in West Newton, Massachusetts, the Debtors were a leading global designer, distributor, and retailer of comfort footwear in more than fifty markets worldwide. The Debtors offered a wide array of men's and women's casual and dress style shoes, boots, and sandals, under their namesake Rockport brand and their owned Aravon and Dunham brands. The Debtors' Rockport brand was recognized as a global leader in lightweight, technology-infused comfort footwear for all occasions. The Debtors also offered premium footwear for comfort-conscious customers through their women's-oriented Aravon and outdoor-inspired Dunham brands.

The Debtors' business in the United States was operated by Rockport, and the Debtors' Canadian business was operated by Debtor Rockport Canada. Rockport Canada is a wholly-owned subsidiary of Rockport. All material decisions regarding Rockport Canada and its operations were made by Rockport personnel in the United States and substantially all of its books and records are located in the United States. As a result of these and other factors, the Debtors believe that the center of main interest for Rockport Canada is in the United States. Accordingly, on May 16, 2018, the Debtors commenced an ancillary proceeding under Part IV of the Companies' Creditors Arrangement Act (Canada) in Toronto, Ontario, Canada before the Canadian Court.

Prior to the Sale, the Debtors operated a global, multi-channel business, organized by brand, geography and customer type, consisting of the following segments:

- i. **Wholesale Business.** The Debtors were a leading supplier of men's and women's footwear to well-known retailers across a variety of wholesale formats, including department stores, family retail outlets, internet retailers, and independently-owned retailers. The Debtors' wholesale business accounted for approximately 57% of all global sales. In North America, the Debtors' Rockport-branded products were sold through two primary wholesale channels: (a) key accounts (department stores, family retail outlets, and internet retailers); and (b) specialty accounts (independently-owned retailers). International sales of the Debtors' Rockport-branded products were led by dedicated personnel in each location. The Debtors' Aravon- and Dunham-

³ Further information regarding such matters can be found in the First Day Declaration, which is incorporated by reference herein. Copies of the First Day Declaration and all other filings in the Chapter 11 Cases can be obtained and viewed free of charge at the following web address: <https://cases.primeclerk.com/rockport>.

branded products were sold only through department stores, internet retailers, and independently-owned retailers.⁴

- ii. **Direct North American Retail Store Business.** The Debtors operated eight (8) full-price and nineteen (19) outlet stores in the United States and fourteen (14) full-price and nineteen (19) outlet stores in Canada.
- iii. **Direct eCommerce Business.** The Debtors sold their footwear products directly through their websites (<http://www.rockport.com> and <http://www.rockport.ca>).
- iv. **International Business.** The Debtors used a distributor model to leverage their global brand in foreign markets without having to establish local operations. Prior to the Sale, the Debtors were partnered with twenty-two (22) distributors worldwide to sell their products in thirty-five countries, including China, Indonesia, Egypt, South Africa, Mexico, and Peru. In addition to this distributor model, certain of the Debtors' former non-debtor foreign affiliates operated approximately 121 retail stores around the world.

2. The Debtors' Organizational Structure and Pre-Closing Reorganization

The Debtors in these Chapter 11 Cases are Blocker, Rockport Holdings, TRG 1-P, TRG Intermediate, TRG Class D, Rockport Group, Rockport, Drydock, DD Management and Rockport Canada. Blocker, is the ultimate parent of each of the other Debtors. As set forth above, Rockport operated the Debtors' U.S. business and Rockport Canada operated the Debtors' Canadian business. All of the Debtors are Delaware limited liability companies except DD Management and Rockport Canada. DD Management is a Massachusetts limited liability company and Rockport Canada is a British Columbia unlimited liability company. A detailed organizational chart depicting the ownership structure of the Debtors and their former non-Debtor foreign affiliates prior to the Sale is attached hereto as **Exhibit A**.

In connection with the Sale and as provided for in the Asset Purchase Agreement, prior to the Closing Date, non-Debtor Rockport UK sold its interests in non-Debtor Rockport Canada Holdings to Rockport. As a result, on the date hereof, Rockport Canada Holdings is a wholly owned subsidiary of Rockport. In addition, pursuant to the Sale, the stock of the Acquired Companies was indirectly acquired by the Purchaser. A detailed organizational chart depicting the ownership structure of the Debtors as of the date hereof is attached hereto as **Exhibit B**.

3. The 2015 and 2017 Transactions

⁴ The Debtors' Dunham brand was sold in the United States and Canada. The Debtors' Aravon brand was sold only in the United States.

In 2015, Reebok, a subsidiary of Adidas, engaged in a sale transaction (the “**2015 Transaction**”) with Berkshire and New Balance. Pursuant to the 2015 Transaction, Reebok sold its Rockport division to the Rockport Group, an entity formed by Berkshire and New Balance, and New Balance contributed its owned brands, Cobb Hill, Aravon, and Dunham, to the Rockport Group.

In late 2017, Berkshire and New Balance sold 100% of their interests in the Debtors to the Prepetition Noteholders (the “**2017 Transaction**”). In connection with the closing of the 2017 Transaction, in December 2017, the Prepetition Noteholders appointed the Independent Directors of Blocker.

B. The Debtors’ Prepetition Capital Structure

In connection with the 2015 Transaction, certain of the Debtors entered into the Prepetition ABL Credit Agreement, the Prepetition Notes Agreement, and the Prepetition Subordinated Notes. As of the Petition Date, the Debtors had total outstanding liabilities and other obligations of approximately \$287 million, comprised of approximately:

- \$57 million outstanding under the Prepetition ABL Facility;
- \$188.3 million outstanding under the Prepetition Notes Facility;
- \$11.9 million outstanding under the Prepetition Subordinated Notes; and
- \$29.6 million outstanding in trade debt.

A detailed discussion of the Debtors’ capital structure as of the Petition Date, including their various debt obligations is set forth below.

1. Prepetition ABL Facility

As of the Petition Date, the Debtors had outstanding secured debt to various lenders pursuant to the Prepetition ABL Credit Agreement. The Prepetition ABL Credit Agreement provided for, among other things, up to \$60,000,000.00 in aggregate principal amount of revolving loan commitments, including letter of credit and swingline loan commitments, with a sublimit for letters of credit of \$10,000,000.00 (collectively, the “**Prepetition ABL Facility**”).

As of the Petition Date, the aggregate outstanding amount owed by the Debtors under the Prepetition ABL Facility was not less than \$53,425,436.95, plus \$3,550,000.00 of issued and outstanding letters of credit (collectively, together with any costs and other charges or amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition ABL Facility, and further including all “Obligations” as described in the Prepetition ABL Facility, including all obligations with respect to cash management services and bank products, and all interest, fees, costs and other charges allowable under Section 506(b) of the Bankruptcy Code, the “**Prepetition ABL Obligations**”). The Debtors, including Rockport Canada, are jointly and severally liable for the Prepetition ABL Obligations, and such obligations are secured by a first priority lien on the Revolving Priority Collateral and a second priority lien on the Note Priority Collateral, subject to the terms of the Intercreditor Agreement. The Revolving Priority

Collateral includes substantially all of the assets of Rockport Canada, including without limitation, all accounts, goods, inventory, and all proceeds of Rockport Canada's assets.

Prior to the Petition Date, the Prepetition ABL Facility was used to fund the Debtors' daily operations. As such, the Debtors made daily requests to the ABL Administrative Agent to transfer available funds under the Prepetition ABL Facility into the Debtors' primary operating account held by Rockport. Rockport would then use such funds to fund the Debtors' global enterprise, including the Debtors' operations in Canada. Although Rockport Canada did not borrow any monies directly under the Prepetition ABL Facility, its assets were included in the facility's borrowing base and funds received under that facility were used to, among other things, purchase merchandise sold by Rockport Canada, pay wages, salaries and benefits of the Debtors' corporate employees and other general expenses of the Debtors' enterprise. Rockport Canada's indirect access to the funding provided to the other Debtors under the Prepetition ABL Facility was critical to its ability to operate as a going concern prior to the Petition Date.

On August 3, 2018, the amounts outstanding under the Prepetition ABL Facility were paid in full from the proceeds of the Sale of the Debtors' Assets to the Purchaser.

2. Prepetition Notes Facility

Prior to the Petition Date, certain of the Debtors issued the Initial Prepetition Notes to the Prepetition Noteholders pursuant to the Prepetition Note Purchase Agreement. In addition, due to certain liquidity constraints following the issuance of the Initial Prepetition Notes, prior to the Petition Date, certain of the Debtors issued the Additional Prepetition Notes to the Prepetition Noteholders (together with the Initial Prepetition Notes, collectively, the "**Prepetition Notes Facility**") pursuant to the Prepetition Note Purchase Agreement. The Additional Prepetition Notes are senior in right of payment to the Initial Prepetition Notes.

As of the Petition Date, the aggregate outstanding amount owed by the Debtors in respect of the Prepetition Notes was not less than \$188,253,357.91 (collectively, together with any costs and other charges or amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Notes Facility, and further including all "Obligations" as described in the Prepetition Notes Facility, including all interest, fees, costs and other charges allowable under Section 506(b) of the Bankruptcy Code, the "**Prepetition Note Obligations**"). The Prepetition Note Obligations are secured by a first priority lien on the Note Priority Collateral, and a second priority lien on the Revolving Priority Collateral, subject to the terms of the Intercreditor Agreement.

Proceeds from the Initial Prepetition Notes were used to finance a portion of the 2015 Transaction, and proceeds from the Additional Prepetition Notes were used to provide the Debtors with additional liquidity and to fund day-to-day operations. Prior to the Petition Date, from time to time the Debtors would request that the Prepetition Noteholders purchase Additional Prepetition Notes. In response to such requests, the Prepetition Noteholders would then transfer available funds under the Prepetition Notes Facility into bank accounts operated by the Debtors.

3. Prepetition Subordinated Notes

As of the Petition Date, the Rockport Group had approximately \$11.9 million in contingent obligations under certain promissory notes (the “**Prepetition Subordinated Notes**”) issued to Reebok:

- that certain Unsecured Subordinated Promissory Note, dated as of July 31, 2015;
- that certain Unsecured Subordinated Contingent Promissory Note – Tranche A, dated as of July 31, 2015; and
- that certain Unsecured Subordinated Contingent Promissory Note – Tranche B, dated as of July 31, 2015.

The Prepetition Subordinated Notes are unsecured and subordinated to the Prepetition Credit Facilities pursuant to that certain Subordination Agreement, dated as of July 31, 2015, among the Rockport Group, Rockport, each of the other Loan Parties (as defined therein) from time to time, the ABL Administrative Agent, the Prepetition Noteholders, and Reebok.

4. Trade Debt

In the ordinary course of business, the Debtors sourced their inventory, merchandise, and other materials related to their on-going operations from third-party manufacturers located outside of the United States—primarily (but not exclusively) in mainland China, but also in Vietnam, India, and Brazil. As of the Petition Date, Debtors estimate that they owed approximately \$29.6 million in trade debt. Approximately, \$29.6 million of prepetition trade debt has been paid during these Chapter 11 Cases either pursuant to the relief requested by the First Day Motions approved by the Bankruptcy Court or through payment of cure claims upon consummation of the Sale.

C. Events Precipitating the Chapter 11 Filing

Over the last three years, the Debtors faced economic headwinds and operational challenges that significantly and adversely impacted the operating performance of the Debtors’ footwear business, including:

- *A costly and time consuming separation from the Adidas Networks.* Separation of the Debtors’ operations from the Adidas global logistics and information technology networks (the “**Adidas Networks**”) was not completed until November 2017, and proved to be more complex, took meaningfully longer, and was significantly more expensive than planned. In addition, the Debtors encountered operational challenges during the initial development of their own logistics network that negatively impacted revenue. Ultimately, significant operational challenges and one-time costs associated with the Debtors’ separation from the Adidas Networks contributed to the Debtors’ tightening liquidity during the two-year transition period.

- *Disruptive and costly supply chain interruption.* In October 2016, the Debtors experienced factory delivery delays due to the closure of three factories by certain of their foreign vendors. As a result, production of the Debtors' women's footwear program was relocated to other factories utilized by the Debtors for production of their remaining footwear programs. The reallocation of factory resources disrupted the Debtors' supply chain and resulted in significant shipment delays across multiple product lines shortly before the Fall 2017 season. In response to this disruption, the Debtors were forced to rely on more expensive expedited shipping methods in order to meet seasonal demands and minimize the delayed arrival of products to their customers.
- *Contract dispute with Expeditors and notice of default.* As explained above, the Debtors rely on warehouse and logistic providers to fulfill their distribution and warehousing needs in various locations throughout the world. To service the Debtors' operations in the United States and Canada, Expeditors operates distribution warehouse facilities in Rancho Cucamonga, California and Brampton, Canada. The parties' relationship is governed by the Expeditors Agreement, between Rockport and Expeditors. Since execution of the Expeditors Agreement, the parties' relationship has deteriorated, due largely to disputes over rates charged by Expeditors. On March 23, 2018, Expeditors sent a notice (the "**Default Notice**") alleging that Rockport was in material breach of the Expeditors Agreement for failure to pay certain charges disputed by Rockport. Pursuant to the Default Notice, Expeditors indicated that it would terminate the Expeditors Agreement unless Rockport cured its alleged breach by paying the disputed amounts on or before May 7, 2018. In order to ensure product delivery to the Debtors' customers and avoid irreparable harm to the Debtors as a result of the potential termination of the Expeditors Agreement, on May 4, 2018, the Debtors paid the disputed amounts under duress and protest (subject to the right of clawback in the future) and thereby cured this disputed default avoiding imminent disruption to their supply chain.⁵
- *A number of stores acquired in the 2015 Transaction performed below expectations in a competitive retail market.* Over the last several years the Debtors faced a highly promotional and competitive retail environment, underscored by a shift in customer preference for online shopping. In this unfavorable retail environment, many of the stores acquired by the Debtors in the 2015 Transaction (the "**Acquired Stores**") performed below expectations.

⁵ Expeditors disputes the Debtors' narrative set forth herein. The Debtors and Expeditors agree that no statements of fact or legal contentions in this Combined Plan and Disclosure Statement shall have any effect on the merits of the respective claims, causes of action, choses in action, suits, refunds, turnovers, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, third-party claims, counterclaims, crossclaims, objections or defenses, based in law or equity, including under the Bankruptcy Code, of the Debtors, the Liquidation Trust, or Expeditors against one or more of each other.

Moreover, the Acquired Stores were significantly impacted by the supply-chain disruption experienced by the Debtors in October 2016. The unfavorable performance of the Acquired Stores made it difficult for the Debtors to maintain sufficient liquidity and to operate their business outside of Chapter 11.

Given the Debtors' tight liquidity position in the lead up to these Chapter 11 Cases, the Debtors approached the ABL Administrative Agent and the Prepetition Noteholders on several occasions seeking amendments to the Prepetition ABL Credit Agreement and Prepetition Note Purchase Agreement to, among other things, obtain additional financing.

D. Prepetition Marketing Efforts

In December 2017, the Debtors retained Houlihan—an investment banker with expertise in mergers and acquisitions, recapitalization, and financial restructuring—to explore a potential sale of the Debtors' Assets. As part of this effort, Houlihan began facilitating a robust marketing process for the potential purchase of all, or certain of, the Assets and contacted one hundred and ten (110) potential strategic and financial acquirers (collectively, the **"Interested Parties"**) to garner interest in pursuing such transaction. Approximately sixty (60) Interested Parties executed a non-disclosure agreement and thereafter received a confidential information memorandum and access to an initial set of diligence materials in the dataroom. Ten (10) interested parties submitted an initial, non-binding indication of interest, seven (7) of which were granted access to a dataroom and six (6) of which met with senior management of Rockport.

As a result of this marketing process, the Debtors received four (4) bids (collectively, the **"Bids"**) from Interested Parties to acquire all or substantially all of the Debtors' Assets. After reviewing and carefully considering the Bids received from the four (4) Interested Parties, the Debtors determined, in consultation with their advisors, that Purchaser had submitted the highest or otherwise best offer, pursuant to which the Purchaser agreed to acquire substantially all of the Assets (other than the Debtors' North American Retail Assets)⁶ for a purchase price of (i) \$150 million in cash subject to certain working capital adjustments plus certain additional amounts if the Purchaser acquired any of the North American Retail Assets; (ii) a warrant to purchase up to 5% of common equity of the indirect parent of the Purchaser once the indirect parent of the Purchaser receives a return equal to 2.5 times its initial equity investment as of the Closing Date; and (iii) the assumption of certain liabilities (collectively, the **"Stalking Horse Bid"**).

Thereafter, the Debtors, in consultation with their advisors, determined to pursue the Stalking Horse Bid for the Assets, subject to definitive documentation. To this end, after good faith, arm's-length negotiations between the parties and in consultation with their advisors and key stakeholders, the Debtors and the Purchaser entered into the Asset Purchase Agreement,

⁶ As further described below, pursuant to the Asset Purchase Agreement, the Debtors agreed to allow the Purchaser twenty-five (25) days following the Petition Date to determine whether to acquire any of the Debtors' North American Retail Assets (the **"No Liquidation Period"**). Following the No Liquidation Period, the Purchaser elected not to acquire any of the North American Retail Assets.

pursuant to which the Purchaser agreed to acquire the Purchased Assets (as defined in the Asset Purchase Agreement), subject to higher or otherwise better offers.

E. The Chapter 11 Cases

The following is a brief description of certain material events that have occurred during these Chapter 11 Cases.

1. First Day Orders

On the Petition Date, in addition to the voluntary petitions for relief Filed by the Debtors, the Debtors Filed a number of motions and applications (collectively, the “**First Day Motions**”) seeking certain “first day” relief. A summary of the relief sought and obtained under the First Day Motions is set forth below:

- **Joint Administration Motion.** Following consideration of the *Motion of Debtors for Entry of an Order Directing Joint Administration of Chapter 11 Cases* [Docket No. 2], the Bankruptcy Court entered an Order [Docket No. 48] authorizing the joint administration of the Chapter 11 Cases for procedural purposes only.
- **Application to Retain Prime Clerk.** Following consideration of the *Application of Debtors For Entry of an Order Appointing Prime Clerk LLC as Claims and Noticing Agent Nunc Pro Tunc to the Petition Date* [Docket No. 3], the Bankruptcy Court entered an Order [Docket No. 49] authorizing the Debtors to retain Prime Clerk as Claims Agent in the Chapter 11 Cases.
- **Foreign Representative Motion.** Following consideration of the *Motion to Authorize Rockport Blocker, LLC to Act as Foreign Representative to the Debtors* [Docket No. 4], the Bankruptcy Court entered an Order [Docket No. 50] authorizing the Blocker to act as the foreign representative of the Debtors in any foreign country, including Canada.
- **Automatic Stay Motion.** Following consideration of the *Motion of Debtors for an Order Enforcing the Protections of Sections 362, 365, 525, and 541(C) of the Bankruptcy Code Pursuant to Section 105 of the Bankruptcy Code* [Docket No. 5], the Bankruptcy Court entered an Order [Docket No. 51] enforcing the protections provided to the Debtors by the automatic stay to aid in the administration of the Chapter 11 Cases and to alleviate any confusion regarding the effects on the Chapter 11 Cases on the Debtors’ business operations.
- **Utilities Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders (I) Prohibiting Utility Companies from Altering or Discontinuing Service on Account of Prepetition Invoices, (II) Deeming Utility Companies Adequately Assured of Future Performance*

and (III) *Establishing Procedures for Resolving Requests for Additional Adequate Assurance* [Docket No. 6], the Bankruptcy Court entered interim and final Orders [Docket Nos. 52 and 215] authorizing and approving the provision of adequate assurance of payment to the Debtors' utility service providers under Section 366 of the Bankruptcy Code, while allowing the Debtors to avoid the threat of imminent termination of their utility services from those utility companies.

- **Tax Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders Authorizing (I) Debtors to Pay Certain Taxes, Governmental Assessments and Fees and (II) Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 7], the Bankruptcy Court entered interim and final Orders [Docket Nos. 53 and 214] authorizing the Debtors to, among other things, pay prepetition taxes in the ordinary course of their business.
- **Shippers and Warehousemen Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders Authorizing (I) the Debtors to Pay (A) Certain Prepetition Claims of Shippers and Warehousemen and (B) Import Charges and (II) Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 8] and its supplement [Docket No. 153], the Bankruptcy Court entered interim and final Orders [Docket Nos. 54 and 236] authorizing the Debtors to, among other things, (a) pay prepetition claims of shippers and warehousemen in the ordinary course of their business and (b) satisfy prepetition custom duties imposed on shipments of goods from foreign suppliers.
- **Customer Programs Motion.** Following consideration of the *Motion of Debtors for Entry of an Order Authorizing (I) Debtors to (A) Maintain Customer Programs and (B) Pay and Honor Related Prepetition Obligations, and (II) Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 9], the Bankruptcy Court entered an Order [Docket No. 55] authorizing the Debtors to continue to honor prepetition obligations owed to customers arising under customer-related programs, practices and maintain, renew, replace, implement, modify or terminate any such customer programs, as the Debtors deem appropriate in their business judgment and in the ordinary course of business.
- **Critical and Foreign Vendors Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders Authorizing (I) Debtors to Pay Claims of Critical and Foreign Vendors in the Ordinary Course of Business and (II) Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 10], the Bankruptcy Court entered interim and final Orders [Docket Nos. 56 and 213] authorizing the Debtors to, among other things, pay prepetition claims of certain critical domestic and foreign vendors in the ordinary course of their business.

- **Employee Wages/Benefits Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders Authorizing (I) the Debtors to (A) Pay Certain Employee Compensation and Benefits, (B) Maintain and Continue Such Benefits and Other Employee-Related Programs, and (C) Pay Prepetition Claims of Independent Contractors and Temporary Workers and (II) Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 11], the Bankruptcy Court entered interim and final Orders [Docket Nos. 57 and 212] authorizing the Debtors to, among other things, pay and honor certain prepetition employee obligations, including prepetition payroll obligations, reimbursable expenses, and benefit plan obligations.
- **Insurance Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to Continue and Renew Their (A) Insurance Programs and Premium Financing and (B) Surety Bond Program and to Pay All Obligations with Respect Thereto, (II) Modifying the Automatic Stay with Respect to the Workers' Compensation Program and (III) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers* [Docket No. 12], the Bankruptcy Court entered interim and final Orders [Docket Nos. 58 and 211] authorizing the Debtors to, among other things, pay any outstanding obligations under the Debtors' existing Insurance Policies and renew, revise, extend, supplement, change, or enter into new Insurance Policies.
- **Cash Management Motion.** Following consideration of the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Continued Use of the Debtors' Existing Cash Management System and Bank Accounts; (II) Waiving Certain United States Trustee Requirements; (III) Authorizing Continued Performance of Intercompany Transactions; and (IV) Granting Related Relief* [Docket No. 13], the Bankruptcy Court entered interim and final Orders [Docket Nos. 59 and 210] that, among other things, (i) authorized the Debtors to continue to use their current cash management system, existing bank accounts, and business forms, including authorizing the Debtors to open and close certain bank accounts; (ii) continue intercompany transfers and, to the extent applicable, grant administrative expense priority status to postpetition Intercompany Claims held by a Debtor against one or more of the other Debtors.

2. Canadian Proceeding

On May 16, 2018, Blocker, as foreign representative of itself and the other Debtors, obtained an order from the Canadian Court, recognizing the Chapter 11 Cases as a "foreign main proceeding" under the CCAA and granting certain related relief. The Canadian Court also granted a second order (the "**Supplemental Recognition Order**"), granting additional relief, including recognition of certain of the orders entered by the Bankruptcy Court with respect to the First Day Motions. Subsequently, the Canadian Court recognized a number of

further orders made by the Bankruptcy Court in the Chapter 11 Cases, including the Final DIP Order, the Bid Procedures Order, the Sale Order and the General Bar Date Order.

3. Appointment of Creditors' Committee

On May 23, 2018, the U.S. Trustee formed the Creditors' Committee [Docket No. 96], consisting of (i) Earth, Inc.; (ii) Hemisphere Design & Manufacturing LLC; and (iii) Simon Property Group, LP. On June 29, 2018 the Bankruptcy Court authorized the retention of the following advisors to the Creditors' Committee: Cooley LLP [Docket No. 313] and Whiteford, Taylor & Preston LLC [Docket No. 314] as co-counsel and Province, Inc. as financial advisor [Docket No. 315].

4. Employment of Professionals and Advisors

On June 12, 2018, the Bankruptcy Court authorized the Debtors to retain (a) Richards, Layton & Finger, P.A. as their bankruptcy counsel in connection with these Chapter 11 Cases [Docket No. 220], (b) Prime Clerk as administrative advisor for the Debtors *nunc pro tunc* to the Petition Date [Docket No. 222], (c) BLG as special counsel for the Debtors *nunc pro tunc* to the Petition Date [Docket No. 221], and (d) HYPERAMS, LLC as liquidation consultant for the Debtors *nunc pro tunc* to May 25, 2018 [Docket No. 226].

On June 13, 2018, the Bankruptcy Court authorized the Debtors to retain Alvarez & Marsal North America, LLC to provide the Debtors with an Interim Chief Financial Officer and Interim Chief Operating Officer (and certain additional personnel) *nunc pro tunc* to the Petition Date [Docket No. 235].

On July 5, 2018, pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code, the Bankruptcy Court authorized the Debtors to retain Houlihan, as financial advisor and investment banker *nunc pro tunc* to the Petition Date [Docket No. 338].

On July 13, 2018, pursuant to Sections 327(a) and 328(a) of the Bankruptcy Code, the Bankruptcy Court authorized the Debtors to retain Deloitte Tax LLP ("**Deloitte**") as tax services provider *nunc pro tunc* to May 21, 2018 [Docket No. 373].

5. Schedules, Section 341(a) Meeting of Creditors, and Bar Dates

On June 18, 2018, the Debtors Filed their Schedules. On June 21, 2018, the U.S. Trustee conducted the meeting of creditors in these Chapter 11 Cases under Section 341(a) of the Bankruptcy Code. On June 29, 2018, the Debtors filed certain amendments to their Schedules.

On July 25, 2018, the Bankruptcy Court entered the General Bar Date Order [Docket No. 405] establishing (a) August 30, 2018 at 5:00 p.m. (prevailing Eastern Time) as the General Bar Date, and (b) November 12, 2018 at 5:00 p.m. (prevailing Eastern Time) as the Governmental Unit Bar Date.

6. Postpetition Financing

a. Interim DIP Order

In order to have sufficient Cash to operate their businesses while in bankruptcy, the Debtors sought approval to obtain postpetition financing through the DIP Motion. The DIP Motion sought authorization for the Debtors to, among other things, access the DIP ABL Facility (as set forth in the DIP ABL Credit Agreement) and the DIP Note Facility (as set forth in the DIP Note Purchase Agreement).

As set forth above, the Debtors, including Rockport Canada, are jointly and severally liable for the Prepetition ABL Obligations. Prior to the Petition Date, in order to properly apportion the joint and several liability with regards to the Prepetition ABL Obligations among Rockport Canada, on the one hand, and the remaining Debtors, on the other hand, the Debtors, the ABL Lender, the Prepetition Noteholders and the Information Officer, initiated discussions over the fair and equitable allocation of the Debtors' liability under the Prepetition ABL Facility as between Rockport Canada, on the one hand, and the remaining Debtors, on the other hand.

On May 15, 2018, the Bankruptcy Court entered the Interim DIP Order authorizing entry into the DIP Facilities on an interim basis. With regards to the outstanding allocation issue noted above, the Interim DIP Order provided that, prior to a final hearing on the relief requested in the DIP Motion, the Debtors, the ABL Lenders and the Prepetition Noteholders shall determine and agree upon an appropriate allocation of the DIP ABL Obligations (as defined in the Interim DIP Order) (the "**Proposed ABL Liability Allocation**") as between Rockport Canada and the U.S. Debtors. Further, the Interim DIP Order provided that the Proposed ABL Liability Allocation was to be heard by the Bankruptcy Court as part of the final hearing on the relief requested by the DIP Motion. The current status of the Proposed ABL Liability Allocation issue is discussed below.

b. Creditors' Committee Objection and Final DIP Order Supplement

The Debtors received two objections to the final relief requested in the DIP Motion. First, the Debtors received an objection [Docket No. 166] from the Creditors' Committee objecting to, among other things, the fees and expenses associated with the DIP Note Facility and the roll-up of \$40 million of the Prepetition Notes. Prior to the final hearing on the DIP Motion, the Debtors, the Creditors' Committee and DIP Note Purchasers resolved the Creditors' Committee objection and memorialized such resolution in the Final DIP Order Supplement that was approved in connection with the Final DIP Order. The Final DIP Order Supplement provided, among other things, that (1) following consummation of the Sale, a wind-down reserve (the "**Wind-Down Reserve**") would be established in the amount of \$2.5 million to fund certain expenses associated with the winding down of the Chapter 11 Cases and consummation of this Plan; (2) any plan of liquidation would establish a Liquidating Trust for the benefit of General Unsecured Creditors vested with the Liquidating Trust Assets; (3) the budget for the Creditors' Committee Professionals prior to the Closing Date would be increased to \$750,000; (4) the Prepetition Noteholders would waive a distribution under the Liquidating Trust on account of any deficiency claim provided that the aggregate distributions by the Liquidating Trust to General Unsecured Creditors is less than the Threshold Distribution Amount (\$2,000,000); (5) the Creditors' Committee would agree to support the allocation of 18.4% of the Prepetition ABL Obligations to Rockport Canada; and (5) the Creditors' Committee would

agree to support a plan that included broad releases in favor of the Prepetition Noteholders and related parties.

While the Prepetition Noteholders did honor their commitments under the Final DIP Order Supplement, the amount of the Wind-Down Reserve, which was based on the parties' best estimates at the time, proved insufficient to cover the actual amount of U.S. Professional Fee Claims, U.S. General Administrative Claims, U.S. Priority Tax Claims and Other Priority Claims against the U.S. Debtors asserted in the Chapter 11 Cases. Accordingly, following a series of good faith negotiations, the Prepetition Noteholders have consented to the additional use of their cash collateral in the manner reflected in this Plan. Absent the Prepetition Noteholders' consent to this additional funding, the Debtors would be unable to confirm the Plan, there would be no prospect of a recovery to the Holders of Allowed Class 4 General Unsecured Creditors against the U.S. Debtors and the U.S. Debtors would likely have had no choice but to convert their Chapter 11 Cases to cases under Chapter 7 of the Bankruptcy Code.

c. Proposed ABL Liability Allocation Dispute and Final DIP Order

The Debtors also received an objection [Docket No. 165] to the final relief requested in the DIP Motion from the Information Officer. The Information Officer objected to, among other things, the Proposed ABL Liability Allocation of 18.4% of the Prepetition ABL Obligations to Rockport Canada (as had been agreed to the Debtors, the Creditors' Committee and the DIP Note Purchasers in connection with the Final DIP Order Supplement). On June 13, 2018, the Bankruptcy Court held a hearing to consider the Final DIP Order, including the Proposed ABL Liability Allocation. Following testimony from the Debtors in support of the Proposed ABL Liability Allocation, the Bankruptcy Court took the matter under advisement. On June 18, 2018, the Bankruptcy Court held a continued hearing regarding the Final DIP Order. At the continued hearing, the Bankruptcy Court declined to resolve the Proposed ABL Liability Allocation at that time. Accordingly, after further discussions between the parties and in light of the Bankruptcy Court's ruling, the Debtors, the DIP ABL Lenders, the DIP Note Purchasers and the Information Officer agreed to a form of Final DIP Order that provided, among other things, that (i) the Bankruptcy Court's determination of the Proposed ABL Liability Allocation was a condition precedent to the issuance of any additional New Money Notes (unless otherwise agreed to by the DIP Note Purchasers) and (ii) expressly reserved the Information Officer's rights with respect to the Proposed ABL Liability Allocation, the allocation of the proceeds of any sale of the Debtors' assets among the Debtors, the allocation of the costs of the Debtors' Chapter 11 Cases among the Debtors, and the treatment of claims against Rockport Canada.

On June 29, 2018, the Bankruptcy Court entered the Final DIP Order, authorizing and approving on a final basis, *inter alia*, the Debtors' entry into and performance under the DIP Facilities and the granting of certain liens and adequate protection in connection therewith, all as more fully set forth in such Final DIP Order. Under the Final DIP Order, the Debtors were authorized to obtain postpetition secured DIP financing in an aggregate amount of up to \$80 million consisting of (i) up to a \$60 million DIP ABL Facility and (ii) up to a \$20 million new money DIP Note Facility.

d. Cash Management Stipulation

As set forth above, on June 12, 2018, the Bankruptcy Court entered the Final Cash Management Order granting the relief requested in the Cash Management Motion on a final basis. Pursuant to the Final Cash Management Order, postpetition Intercompany Transactions as between Rockport and Rockport Canada are limited solely to the Permitted Rockport Canada Intercompany Transactions. In addition, as set forth above, pursuant to the Final DIP Order, a condition precedent to the issuance of any additional New Money Notes (unless otherwise agreed in writing by the DIP Note Purchasers in their sole discretion) was the resolution of the Proposed ABL Liability Allocation in a final order by the Court.

As of July 13, 2018, the bank accounts operated by Rockport Canada held cash balances of more than \$8.2 million (CAD); however, Rockport Canada was not permitted to transfer such funds to Rockport in accordance with the restrictions on Intercompany Transactions set forth in the Final Cash Management Order. As a result, the Debtors had limited unrestricted cash with which to operate as a going concern.

Accordingly, following discussions between the Debtors, the DIP Note Purchasers and the Information Officer, the parties agreed to modify the Final Cash Management Order to permit the Debtors to access certain funds held by Rockport Canada in order to alleviate the Debtors' liquidity constraints. On July 18, 2018, the Debtors, the DIP Note Purchasers and the Information Officer entered into the Cash Management Stipulation that (i) directed Rockport Canada to immediately transfer \$4.5 million (USD) to Rockport for the purpose of repaying the certain obligations under the DIP ABL Facility (the **"Initial Rockport Canada Intercompany Transfer"**), thereby freeing up availability thereunder; (ii) accorded the Initial Rockport Canada Intercompany Transfer and any subsequent transfers agreed to by the parties (collectively, the **"Rockport Canada Intercompany Transfers"**) superpriority administrative expense priority under Section 507(b) of the Bankruptcy Code; (iii) directed Rockport to refund such Rockport Canada Intercompany Transfers as required by Rockport Canada to satisfy its operational and Chapter 11 expenses to the extent Rockport Canada experienced a shortfall in funding; and (iv) included a waiver of the DIP Note Purchasers of the condition precedent, as described in paragraph 39 of the Final DIP Order, that the Proposed ABL Liability Allocation be determined by a Final Order prior to the issuance of any additional New Money Notes. On July 18, 2018, the Court entered an order [Docket No. 386] approving the Cash Management Stipulation.

On August 3, 2018, the amounts outstanding under the DIP Facilities were paid in full from the proceeds of the Sale of the Debtors' Assets to the Purchaser.

7. Key Employee Incentive Plan and Key Employee Retention Plan

On June 13, 2018, the Bankruptcy Court approved the Debtors' Key Employee Incentive Plan and Key Employee Retention Plan [Docket No. 261], authorizing the Debtors (i) to make incentive payments to nine (9) executive employees of the Debtors subject to the consummation of the Sale, with the amount of such payments fluctuating based upon the "Aggregate Gross Consideration" of such Sale, and (ii) to make retention payments in the aggregate amount of \$748,313 to twenty (20) non-executive employees of the Debtors that remained employed by the Debtors on the date that is later of (a) the closing date of the Sale, and (ii) the completion of the Store Closing Sales (unless an employee is terminated before such date by the Debtors without cause). In consideration of the bonus payments under the Key Employee

Incentive Plan and the Key Employee Retention Plan, participants were required to waive and release other claims that they may have against the Debtors for any severance payments and/or retentive- or incentive-based bonus amounts.

8. Rejection of Executory Contracts and Unexpired Leases

In connection with the 2015 Transaction, Rockport, as sub-lessee, entered into sub-leases for, among others, eight (8) stores with Reebok, as sub-lessor (the “**Vacated Stores**”). On April 16, 2018, Reebok sent notices of termination of the Vacated Stores to the Debtors. Subsequently, Reebok locked Rockport out of the Vacated Stores. Out of an abundance of caution, on May 14, 2018, the Debtors filed a motion [Docket No. 38] (the “**Reebok Rejection Motion**”) seeking to reject the sub-leases associated with the Vacated Stores *nunc pro tunc* to the Petition Date. Following the filing of the Reebok Rejection Motion, the Debtors and Reebok entered into a stipulation (the “**Reebok Stipulation**”) agreeing, among other things, that Reebok had validly terminated each of the sub-leases with Rockport under applicable law effective as of April 28, 2018, and accordingly, the Debtors’ request for authorization to reject such sub-leases was moot. On June 12, 2018, the Court entered an order [Docket No. 227] approving the Reebok Stipulation.

In connection with the Store Closing Sales (as discussed further below), on July 5, 2018, the Debtors filed a motion [Docket No. 343] (the “**North American Retail Lease Rejection Motion**”) seeking authorization to reject the underlying leases and any subleases for each of the Store locations effective as of July 31, 2018 (or such later date as the Debtors unequivocally surrendered possession of the premises to the respective landlord). On July 25, 2018, the Court entered an order [Docket No. 404] (the “**North American Retail Lease Rejection Order**”) granting the relief requested in the North American Retail Lease Rejection Motion. The Debtors concluded the Store Closing Sales and vacated and surrendered all Stores prior to July 31, 2018. Accordingly, pursuant to the North American Retail Lease Rejection Order, all Store leases and subleases were rejected effective July 31, 2018.

In addition, on August 24, 2018, the Debtors filed a motion [Docket No. 471] (the “**Contract Rejection Motion**”) seeking authorization to reject certain executory contracts that were not assumed and assigned to the Purchaser in connection with the Sale. On October 1, 2018, the Court entered an order [Docket No. 527] granting the relief requested in the Contract Rejection Motion.

9. Sale of Substantially All of the Debtors’ Assets

a. Marketing Process and Bid Procedures Order

On May 14, 2018 the Debtors filed the Bid Procedures Motion, which set forth both a proposed schedule and process, including bidding procedures, for the marketing and sale of all or substantially all of the Debtors’ Assets to the highest bidder at auction. Under the Bid Procedures Motion, the Purchaser was named as the “Stalking Horse Bidder” of the Debtors’ Assets. On June 5, 2018, the Court granted the procedural relief requested in the Bid Procedures Motion by entry of the Bid Procedures Order.

As set forth above, the Debtors and Houlihan conducted an extensive marketing process for the sale of substantially all of the Debtors' Assets prior to filing these Chapter 11 Cases. This marketing process continued following the Petition Date in accordance with the deadlines and procedures approved in the Bid Procedures Order. No Qualified Bid, other than the "Stalking Horse Bid", was submitted to the Debtors prior to the Bid Deadline. Accordingly, on July 6, 2018, the Debtors canceled the Auction and filed a notice that the Purchaser was the Successful Bidder.

b. The Store Closing Sales

At the time that the Debtors entered into the Asset Purchase Agreement with the Purchaser, the Purchaser was still considering whether to purchase any portion of the North American Retail Assets. Accordingly, pursuant to the Asset Purchase Agreement, the Debtors agreed to allow the Purchaser twenty-five (25) days following the Petition Date to determine whether to acquire any of the Debtors' North American Retail Assets.

As a result of the Debtors' prepetition marketing efforts, the feedback and expressions of interest received from prospective purchasers and the terms of the Asset Purchase Agreement, the Debtors did not expect there to be any significant interest in the North American Retail Assets. Accordingly, on May 15, 2018, the Debtors filed the Store Closing Sales Motion, seeking authorization from the Bankruptcy Court to (a) conduct store closing sales (the "**Store Closing Sales**") at the Debtors' retail locations in the United States and Canada (the "**Closing Stores**") in the accordance with certain guidelines set forth therein and (b) pay retention and shrink bonuses to non-insider retail employees at the Closing Stores who remained employed at the Closing Stores for the duration of the Store Closing Sales. On June 13, 2018, the Bankruptcy Court entered the Store Closing Sales Order.

Following the Petition Date, the Purchaser informed the Debtors that it did not intend to acquire any of the Debtors' North American Retail Assets. Accordingly, following entry of the Store Closing Sales Order, the Debtors commenced the wind down of their North American Retail Assets pursuant to the Store Closing Sales. The Store Closings Sales concluded on or before July 31, 2018, thereby stemming the incurrence of any August administrative rent.

c. The Adidas Sale Objection, Adversary Proceeding and Adidas Settlement Agreement

As stated above, Adidas and Reebok are the former owners of the Debtors' business and sold the business to Berkshire and New Balance in connection with the 2015 Transaction. On June 28, 2018, Adidas and Reebok filed an objection to the Sale [Docket No. 310] (the "**Adidas Sale Objection**"), asserting various objections relating to the potential assumption and assignment of the Management Agreement and other related agreements. As part of the Adidas Sale Objection, Adidas and Reebok also asserted their view that, pursuant to the Management Agreement, all of the Rockport Parties (including the Acquired Companies) were jointly and severally liable for the Post-Closing Adjustments (in an amount not less than \$54 million). Under the terms of the Asset Purchase Agreement, the Purchaser was directly or indirectly acquiring the stock of each of the Acquired Companies—meaning that the Acquired Companies would remain subject to any such liabilities (if valid) post-closing.

On June 29, 2018, the Purchaser issued a notice of breach (the “**Notice of Breach**”) of the Asset Purchase Agreement based on the allegation of Adidas and Reebok concerning the purported liability of the Acquired Companies for the Post-Closing Adjustments. Specifically, the Purchaser asserted in the Notice of Breach that such assertion would constitute a breach of the representations made in the Asset Purchase Agreement, including, without limitation, the representations set forth in Section 5.5(c) of the Asset Purchase Agreement (which if not cured would constitute an unsatisfied closing condition under Section 10.1(a)(ii) of the Asset Purchase Agreement).

The Debtors disputed that the Acquired Companies had any liability for the Post-Closing Adjustments. Nevertheless, the assertions contained in the Adidas Sale Objection put the Debtors in the unenviable task of having to prove a negative (the absence of liability) in order to close the Sale. Accordingly, on July 10, 2018, the Rockport Plaintiffs initiated an adversary proceeding against Adidas and Reebok (the “**Adidas Adversary Proceeding**”) seeking declaratory relief that the Management Agreement imposed liability only on Rockport, and not on its subsidiaries or affiliates. *See Emergency Complaint for Declaratory Judgment Against Adidas AG and Reebok International Ltd.*, Adv. Pro. No. 18-50636 (LSS), [Docket No. 1] (the “**Adidas Complaint**”). Contemporaneously with the filing of the Adidas Complaint, the Rockport Plaintiffs sought expedited adjudication of the Adidas Adversary Proceeding in an effort to address the issue prior to August 13, 2018 (the contemplated outside closing date under the Asset Purchase Agreement).

On July 16, 2018, the Adidas Parties answered the Complaint and filed counterclaims against Rockport Canada Holdings, Ltd, The Rockport Company Japan KK, the Rockport Company Korea Ltd., Calzados Rockport S.L. (ES), The Rockport Company, Portugal Unipessoal, Lda., The Rockport Company, B.V., and Rockport International Limited (UK) (collectively, the “**Rockport Foreign Subsidiaries**”) (i) seeking a declaratory judgment that the Rockport Foreign Subsidiaries are jointly and severally liable with Rockport for the Post-Closing Adjustments, (ii) alleging that the Rockport Foreign Subsidiaries breached their obligations under the Management Agreement and certain related transfer agreements, and (iii) alleging that the Rockport Foreign Subsidiaries were unjustly enriched by failing to perform under the terms of the operative agreements. *See Defendants’ Answer and Counterclaims* [Adv. Pro. Docket No. 18].

On July 17, 2018, the Debtors, Adidas and the Prepetition Noteholders agreed to participate in a judicial mediation (the “**Mediation**”) before the Honorable Kevin Gross, United States Bankruptcy Judge on July 19, 2018. The parties reached a compromise and settlement in connection with the Mediation and entered into the Adidas Settlement Agreement. Pursuant to the Adidas Settlement Agreement the Parties agreed to, among other things, the following: (i) at closing of the Sale, a \$8,000,000 payment to Adidas from Sale proceeds, in full and final satisfaction of all claims of Adidas and Reebok and certain related parties against any one or more of the Rockport Parties arising out of or related to the Master Purchase Agreement, the Management Agreement and related agreements, including relating to the Adidas Post-Closing Adjustments; (ii) certain mutual releases between the parties; and (iii) that the Adidas Parties would agree to support a plan proposed by the Debtors and supported by the DIP Note Purchasers.

On July 24, 2018, the Debtors filed the Adidas Settlement Motion and sought expedited consideration of the relief requested in the Adidas Settlement Motion so that the Debtors could close the Sale as soon as possible. On July 30, 2018, the Bankruptcy Court entered an order [Docket No. 425] approving the relief requested in the Adidas Settlement Motion, including the Debtors' entry in the Adidas Settlement Agreement.

On August 2, 2018, pursuant to the terms of the Adidas Settlement Agreement, Adidas was paid \$8,000,000 from the proceeds of the Sale.

d. Sale Order and Sale of Assets to the Purchaser

On July 16, 2018, the Bankruptcy Court held a hearing on the approval of the Asset Purchase Agreement and authorization to close the Sale and, on July 18, 2018, entered the related Sale Order.

The Debtors and the Purchaser consummated the Sale on August 2, 2018. Having sold substantially all of their Assets, the Debtors seek to wind-down their remaining operations and liquidate their remaining Assets as set forth in this Plan.

e. The Debtors' Name Change

Section 8.17 of the Asset Purchase Agreement required the Debtors to cease using the name "Rockport" and any derivations thereof within 10 days of the Closing Date. In addition, the Asset Purchase Agreement required the Debtors to file a motion with the Court seeking to change the case caption to remove any references to "Rockport" within ten days of the Closing Date. *See* § 8.17 of the Asset Purchase Agreement.

Accordingly, following the Closing Date, the Debtors filed the necessary documentation in the applicable jurisdictions changing the corporate names of certain of the Debtors to the following:

Old Company Name	New Company Name
The Rockport Company, LLC	The Relay Shoe Company, LLC
Rockport Blocker, LLC	Relay Blocker, LLC
The Rockport Group Holdings, LLC	The Relay Group Holdings, LLC
TRG 1-P Holdings, LLC	Relay 1-P Holdings, LLC
TRG Intermediate Holdings, LLC	Relay Intermediate Holdings, LLC
TRG Class D, LLC	Relay Class D, LLC
The Rockport Group, LLC	The Relay Group, LLC
Rockport Canada ULC	Relay Opco Canada ULC

On August 24, 2018, the Court entered an order [Docket No. 466] authorizing the Debtors to change the case caption to reflect the corporate name changes.

10. Allocation of Sale Proceeds

The Debtors, the Information Officer and the Prepetition Noteholders have reached an agreement regarding an appropriate allocation of the remaining Sale Proceeds (**the "Sale Proceeds"**) as between the U.S. Debtors and Rockport Canada. This agreement is the product of numerous settlement discussions between the parties and their respective advisors. During these discussions, the parties exchanged detailed information regarding the value of Rockport Canada's assets, potential claims against Rockport Canada and projected recoveries for the Holders of Allowed Rockport Canada General Unsecured Claims (and the U.S. Debtors on account of their intercompany claims against Rockport Canada). The Debtors, the Information Officer and the Prepetition Noteholders ultimately arrived at an agreed allocation of the Sale Proceeds as between the U.S. Debtors and Rockport Canada that the Debtors believe is fair, reasonable and in the best interests of the Debtors' estates. The Information Officer has agreed that, as a result of this settlement, it (i) has no objection to, and fully supports, confirmation of the Plan and (ii) will recommend to the Canadian Court that the Confirmation Order (approving this Plan and the settlement) be recognized in the Canadian Proceeding.

The Plan shall constitute a motion by the Debtors, pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, to approve the agreement amongst the Debtors, the Information Officer and the Prepetition Noteholders as to an appropriate allocation of the Sale Proceeds as between the U.S. Debtors and Rockport Canada. The proposed allocation of Sale Proceeds will result in a settlement amount of \$6,007,000 (the **"Rockport Canada Allocation Amount"**) in Sale Proceeds being allocated to Rockport Canada, which shall constitute the Rockport Canada Cash under the terms of the Plan and be used to fund the Rockport Canada Fund. The methodology for arriving at the agreed Rockport Canada Allocation Amount was detailed and complex and took into consideration (i) the net proceeds available from the Sale after factoring in certain adjustments consistent with the Asset Purchase Agreement or as deemed reasonable given the overall costs and benefits of consummating the global transaction; (ii) the gross distributable assets at Rockport Canada, which includes the gross proceeds of the Sale attributable to Rockport Canada, the reimbursement of the Initial Rockport Canada Intercompany Transfer and cash on hand at Rockport Canada; (iii) the net distributable proceeds at Rockport Canada after considering Rockport Canada's fair share of the overall process costs incurred in connection with the Chapter 11 Cases (including amounts paid under the Key Employee Incentive Plan and Key Employee Retention Plan, fees paid to the Debtors' professionals, interest and fees under the DIP Facilities and amounts paid in connection with the Adidas Settlement Agreement, Rockport Canada's share of the fees incurred by HyperAMS (allocated based on retail liquidation proceeds) and PTO and salary amounts paid to Rockport Canada retail employees upon conclusion of the Store Closing Sales); (iv) a determination of Rockport Canada's allocable share of the debt under the DIP ABL Facility; (v) an estimation of all administrative and priority claims against Rockport Canada; and (iv) the projected recoveries for the Holders of Allowed Rockport Canada General Unsecured Creditors (including to the U.S. Debtors on account of their allowed intercompany claims against Rockport Canada in the absence of an agreement on the allocation of the Sale Proceeds).

The proposed settlement represents a final settlement as to the allocation of the Sale Proceeds, and the Debtors, the Information Officer and the Prepetition Noteholders have agreed that there will be no reconsideration of or adjustments to the Rockport Canada Allocation

Amount. The Rockport Canada Allocation Amount will be used to fund the Rockport Canada Fund and to pay all administrative and priority claims against Rockport Canada, and thereafter to provide a distribution to the Holders of Allowed Rockport Canada General Unsecured Claims. The balance of the Sale Proceeds will be retained by the U.S. Debtors and distributed to creditors of the U.S. Debtors in accordance with the Plan. As part of the overall settlement, Rockport will waive its right to any distributions on account of its Allowed Intercompany Claim against Rockport Canada. Accordingly, the only circumstance under which any portion of the Rockport Canada Allocation Amount would be returned to the U.S. Debtors would be in the event that the Holders of Rockport Canada General Unsecured Claims are paid in full and there is a distribution to Rockport on account of its Equity Interest in Rockport Canada.

The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, as of the Effective Date, of the proposed settlement relating to the allocation of the Sale Proceeds between the U.S. Debtors and Rockport Canada pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 9019(a). Section 105 of the Bankruptcy Code provides in pertinent part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a). Bankruptcy Rule 9019(a) provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Before approving a settlement under Bankruptcy Rule 9019, a court must determine that the proposed settlement is in the best interests of the debtor's estate. See *Myers v. Martin (In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996); *In re Marvel Entertainment Group, Inc.*, 222 B.R. 243, 249 (D. Del. 1998) ("[T]he ultimate inquiry is whether 'the compromise is fair, reasonable, and in the interest of the estate.'"). In evaluating the reasonableness of a proposed settlement, a court must consider the following four factors: (i) the probability of success in litigation; (ii) the likely difficulties in collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (iv) the paramount interest of the creditors. See *Martin*, 91 F.3d at 393; *Depositor v. Mary M. Holloway Found.*, 36 F.3d 582, 587 (7th Cir. 1994). Settlements should only be rejected if they fall "below the lowest point in the range of reasonableness." *Cossoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir. 1983) (citing *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

The Debtors believe that payment of the Rockport Canada Allocation Amount to Rockport Canada represents a fair and reasonable settlement of all issues relating to the allocation of the Sale Proceeds between the U.S. Debtors and Rockport Canada. As discussed above, the Rockport Canada Allocation Amount was determined based on a detailed and thoughtful analysis as to the appropriate allocation of value and costs between the Debtors' respective estates. While the majority of the costs associated with these Chapter 11 Cases were incurred in the U.S. by the Debtors and their respective professionals, such costs were incurred in furtherance of a going concern sale for the benefit of the Debtors' global enterprise, in formulating and pursuing confirmation of the Plan for the benefit of all of the Debtors' stakeholders or otherwise in connection with the wind-down of the Debtors' estates. Thus, an equitable result requires that Rockport Canada not only share in the benefit of such efforts, but also bear its proportionate share of the costs necessary in completing such tasks. The Debtors submit that the settlement embodied in the Plan provides for a fair apportionment of the costs as between the U.S. Debtors and Rockport Canada, while also accommodating the differences in

the debt structure between their respective estates (thereby resulting in a significantly greater recovery for the Holders of Allowed General Unsecured Creditors of Rockport Canada).

The absence of a settlement would likely result in extensive and costly litigation, both before the Bankruptcy Court and the Canadian Court between the U.S. Debtors and Rockport Canada as to the appropriate allocation of the Sale Proceeds. Moreover, the outcome of such litigation would be extremely uncertain and it is unclear that any more favorable result for either of the estates would outweigh the costs of litigating this issue before the Bankruptcy Court and any subsequent appeals or recognition hearings. Accordingly, the Debtors believe that the proposed allocation of the Sale Proceeds embodied in this Plan should be approved as being fair, reasonable and in the best interests of the Debtors' estates.

IV. CONFIRMATION AND VOTING

A. Confirmation Procedures

1. Plan Confirmation Hearing

The Bankruptcy Code, Bankruptcy Rules, and Local Rules require the Bankruptcy Court, after appropriate notice, to hold a hearing on confirmation of this Combined Plan and Disclosure Statement. On October 16, 2018, the Bankruptcy Court entered an order scheduling the Plan Confirmation Hearing for November 28, 2018 at 10:00 a.m. (prevailing Eastern Time),⁷ to consider, among other things, final approval of this Combined Plan and Disclosure Statement under Section 1125 of the Bankruptcy Code and confirmation of this Combined Plan and Disclosure Statement under Section 1129 of the Bankruptcy Code. Notice of the Plan Confirmation Hearing will be provided to all known Creditors, Holders of Equity Interests, and other parties in interest.

Any objection to confirmation of this Combined Plan and Disclosure Statement must be in writing, must conform to the Bankruptcy Rules, must set forth the name of the objector, the nature and amount of Claims or Interests held or asserted by the objector against the Debtors, the basis for the objection and the specific grounds of the objection, and must be Filed with the Bankruptcy Court, and served upon the following parties so as to be received no later than November 19, 2018 at 4:00 p.m. (prevailing Eastern Time): (i) counsel to the Debtors, Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19801 Attn: Mark D. Collins, collins@rlf.com and Michael J. Merchant, merchant@rlf.com, (ii) counsel to the Committee, (a) Cooley LLP, 1114 Avenue of the Americas, New York, New York 10036 Attn: Jay Indyke, jindyke@cooley.com and Robert Winning, rwinning@cooley.com, and (b) Whiteford, Taylor & Preston LLC, 405 North King Street, Suite 500, Wilmington, Delaware 19801, Attn: Christopher M. Samis, csamis@wtplaw.com and L. Katherine Good, kgood@wtplaw.com; (iii) counsel to the Prepetition Noteholders and DIP Note Purchasers, (a) Debevoise & Plimpton LLP, 919 Third Avenue, New York, New York 10022, Attn: My Chi To, mcto@debevoise.com, and Daniel E.

⁷ The Confirmation Hearing was twice adjourned to December 19, 2018 at 10:30 a.m. (prevailing Eastern Time).

Stroik, destroik@debevoise.com, and (b) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, Wilmington, Delaware 19801, Attn: Bradford J. Sandler, bsandler@pszjlaw.com and James E. O'Neill, joneill@pszjlaw.com; (iv) counsel to the Collateral Agent and DIP Notes Agent, (a) Holland & Knight LLP, 131 South Dearborn Street, 30th Floor, Chicago, Illinois 60603, Attn: Joshua Spencer, joshua.spencer@khlaw.com, and (b) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, Wilmington, Delaware 19801, Attn: Bradford J. Sandler, bsandler@pszjlaw.com and James E. O'Neill, joneill@pszjlaw.com; and (v) the U.S. Trustee, 844 King Street, Suite 2207, Wilmington, Delaware 19801, Attn: Brya M. Keilson, brya.keilson@usdoj.gov.

Bankruptcy Rule 9014 governs objections to Confirmation of this Combined Plan and Disclosure Statement. **UNLESS AN OBJECTION TO CONFIRMATION OF THIS COMBINED PLAN AND DISCLOSURE STATEMENT IS TIMELY SERVED UPON THE PARTIES LISTED ABOVE AND FILED WITH THE BANKRUPTCY COURT, IT MAY NOT BE CONSIDERED BY THE BANKRUPTCY COURT IN DETERMINING WHETHER TO CONFIRM THIS COMBINED PLAN AND DISCLOSURE STATEMENT.**

2. Requirements for Confirmation

The Bankruptcy Court will confirm this Plan only if the Plan meets all the applicable requirements of Section 1129 of the Bankruptcy Code. Among the requirements for confirmation in these Chapter 11 Cases is that this Plan (i) is accepted by each impaired Class of Claims and Interests or, if rejected by an impaired Class, that this Plan "does not discriminate unfairly" against and is "fair and equitable" with respect to such Class; and (ii) is feasible. The Bankruptcy Court must also find, among other things, that:

- a. this Plan has classified Claims and Interests in a permissible manner;
- b. this Plan complies with the technical requirements of Chapter 11 of the Bankruptcy Code; and
- c. this Plan has been proposed in good faith.

3. Cram Down

If any impaired Class of Claims entitled to vote does not accept the Plan by the requisite statutory majority provided in Sections 1126(c) and (d) of the Bankruptcy Code, the Debtors reserve the right to amend the Plan in accordance with Section 1127 of the Bankruptcy Code or to seek Bankruptcy Court confirmation of the Plan under Section 1129(b) of the Bankruptcy Code (a procedure known as "cram down"), or both. The determination as to whether to seek confirmation of the Plan under such circumstances will be announced before or at the Confirmation Hearing.

The Bankruptcy Code contains provisions for confirmation of a plan even if the plan is not accepted by all impaired classes, as long as at least one impaired class of claims has

accepted the plan. The “cram down” provisions of the Bankruptcy Code are set forth in Section 1129(b) of the Bankruptcy Code.

Under the “cram down” provisions, on the request of a plan proponent the bankruptcy court will confirm a plan despite the lack of acceptance by an impaired class or classes if the bankruptcy court finds that:

- the plan does not discriminate unfairly with respect to each non-accepting impaired class;
- the plan is fair and equitable with respect to each non-accepting impaired class; and
- at least one impaired class has accepted the plan.

These standards ensure that holders of junior interests cannot retain any interest in the debtor under a plan of reorganization that has been rejected by a senior impaired class of claims or interests unless the claims or interests in that senior impaired class are paid in full.

As used by the Bankruptcy Code, the phrases “discriminate unfairly” and “fair and equitable” have narrow and specific meanings unique to bankruptcy law. A plan does not discriminate unfairly if claims or interests in different classes but with similar priorities and characteristics receive or retain property of similar value under a plan. By establishing separate Classes for the Holders of each type of Claim or Equity Interest and by treating each Holder of a Claim or Equity Interest in each Class similarly, the Plan has been structured in order to satisfy the “unfair discrimination” test of Section 1129(b) of the Bankruptcy Code.

The Bankruptcy Code sets forth different standards for establishing that a plan is “fair and equitable” with respect to a dissenting class, depending on whether the class is comprised of secured claims or unsecured claims. In general, Section 1129(b) of the Bankruptcy Code permits confirmation of a plan despite non-acceptance by an impaired class if that class and all junior classes are treated in accordance with the “absolute priority” rule. This rule requires that the dissenting class be paid in full before a junior class may receive anything under the plan. The Bankruptcy Code establishes “cram down” tests for secured creditors, unsecured creditors and equity holders as follows:

- Secured Creditors. Either: (1) each impaired secured creditor retains its liens securing its secured claim and receives on account of its secured claim deferred cash payments having a present value equal to the amount of its allowed secured claim; (2) each impaired secured creditor realizes the “indubitable equivalent” of its allowed secured claim; or (3) the property securing the claim is sold free and clear of liens with such liens to attach to the proceeds of the sale and the treatment of such liens on proceeds to be as described in clauses (1) and (2) above.
- Unsecured Creditors. Either: (1) each impaired unsecured creditor receives or retains under the plan property of a value equal to the amount

of its allowed claim; or (2) the holders of claims and interests that are junior to the claims of the dissenting class will not receive any property under the plan.

- Equity Interests. Either: (1) each holder of an equity interest will receive or retain under the plan property of a value equal to the greater of the fixed liquidation preference to which such holder is entitled, or the fixed redemption price to which such holder is entitled or the value of the interest; or (2) the holder of an interest that is junior to the nonaccepting class will not receive or retain any property under the plan.

In addition, the Bankruptcy Code requires that a debtor demonstrate that no class senior to a non-accepting impaired class will receive more than payment in full on its claims. If all of the applicable requirements for confirmation of the Plan are satisfied as set forth in Sections 1129(a)(1) through (13) of the Bankruptcy Code, except that one or more Classes of impaired Claims have failed to accept the Plan under Section 1129(a)(8) of the Bankruptcy Code, the Debtors will request that the Bankruptcy Court confirm the Plan under the "cram down" procedures in accordance with Section 1129(b) of the Bankruptcy Code. The Debtors believe that this Combined Plan and Disclosure Statement satisfies the "cram down" requirements of the Bankruptcy Code, but there can be no assurance that the Bankruptcy Court will determine that this Combined Plan and Disclosure Statement meets the requirements of Section 1129(b) of the Bankruptcy Code or that at least one impaired class of Claims will vote to accept the Plan, as required for confirmation of a Plan under the "cram down" procedures.

4. Best Interests of Creditors Test

The Bankruptcy Code requires that, with respect to an impaired Class of Claims or Interests, each Holder of an impaired Claim or Interest in such Class either (i) accepted the plan or (ii) will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount (value) such Holder would receive or retain if the debtor was liquidated under Chapter 7 of the Bankruptcy Code on the effective date.

The costs of a Chapter 7 liquidation would necessarily include fees payable to a Chapter 7 trustee, as well as fees likely to be payable to attorneys, advisors, and other professionals that such a Chapter 7 trustee may engage to carry out its duties under the Bankruptcy Code. Other costs of liquidating the Debtors' Estates would include the expenses incurred during the bankruptcy cases and allowed by the Bankruptcy Court in the Chapter 7 cases. The foregoing types of claims, costs, expenses, and fees that may arise in a Chapter 7 liquidation case would be paid in full before payments would be made towards Chapter 11 administrative, priority, and unsecured claims. Without the benefit of settlements and resolutions reached in these Chapter 11 Cases, any recoveries for Holders of Allowed General Unsecured Claims in a Chapter 7 liquidation would be significantly diluted.

Accordingly, the Debtors believe that in a Chapter 7 liquidation, Holders of Claims and Interests would receive less than such Holders would receive under this Combined Plan and Disclosure Statement. There can be no assurance, however, as to values that would actually be realized in a Chapter 7 liquidation, nor can there be any assurance that a Bankruptcy

Court would accept the Debtors' conclusions or concur with such assumptions in making its determinations under Section 1129(a)(7) of the Bankruptcy Code.

5. Feasibility

Under Section 1129(a)(11) of the Bankruptcy Code, a debtor must demonstrate that a bankruptcy court's confirmation of a plan is not likely to be followed by the liquidation or need for further financial reorganization of the debtor under the plan, unless such liquidation or reorganization is proposed under the plan. Under this Combined Plan and Disclosure Statement, the U.S. Litigation Claims are being transferred to the Liquidating Trust for prosecution, liquidation and distribution in accordance with the Liquidating Trust Agreement and the Rockport Canada Litigation Claims vest with Rockport Canada for prosecution, liquidation and distribution in accordance with this Combined Plan and Disclosure Statement. Therefore, as this is a liquidating Plan, the Bankruptcy Court's confirmation of this Combined Plan and Disclosure Statement will not be followed by unanticipated liquidation or the need for any further reorganization.

6. Classification of Claims and Interests

Section 1122 of the Bankruptcy Code requires the proponent of this Combined Plan and Disclosure Statement to place a Claim or Interest in a particular Class only if such Claim or Interest is substantially similar to the other Claims or Interests in such Class. The Debtors believe that this Combined Plan and Disclosure Statement's classification scheme places substantially similar Claims or Interests in the same Class and, thus, meets the requirements of Section 1122 of the Bankruptcy Code.

7. Impaired Claims or Interests

Under Section 1126 of the Bankruptcy Code, only the Holders of Claims in Classes "impaired" by this Combined Plan and Disclosure Statement and receiving a Distribution under this Combined Plan and Disclosure Statement may vote to accept or reject this Combined Plan and Disclosure Statement. Under Section 1124 of the Bankruptcy Code, a Class of Claims may be "impaired" if this Combined Plan and Disclosure Statement alters the legal, equitable, or contractual rights of the Holders of such Claims or Interests treated in such Class. The Holders of Claims not impaired by this Combined Plan and Disclosure Statement are deemed to accept this Combined Plan and Disclosure Statement and do not have the right to vote on this Combined Plan and Disclosure Statement. The Holders of Claims or Interests in any Class that will not receive any Distribution or retain any property under this Combined Plan and Disclosure Statement are deemed to reject this Combined Plan and Disclosure Statement and do not have the right to vote.

8. Eligibility to Vote on this Combined Plan and Disclosure Statement

Unless otherwise ordered by the Bankruptcy Court, only Holders of Allowed Claims in Classes 2 and 4 may vote on this Combined Plan and Disclosure Statement. In order to vote on this Combined Plan and Disclosure Statement, you must hold an Allowed Claim in a voting class or be the Holder of a Claim that has been temporarily Allowed for voting purposes only under Bankruptcy Rule 3018(a).

9. Procedure/Voting Deadlines

In order for your Ballot to count, you must (1) properly complete, date, and execute the Ballot and (2) deliver the Ballot to the Balloting Agent at the following address: The Rockport Company, LLC Balloting, c/o Prime Clerk LLC, 830 3rd Avenue, 3rd Floor, New York, NY 10022.

The Balloting Agent must RECEIVE original ballots on or before **November 19, 2018 at 5:00 p.m.** (prevailing Eastern Time), the Voting Deadline.

Any Ballot that is timely received, that contains sufficient information to permit the identification of the claimant, and that is cast as an acceptance or rejection of this Combined Plan and Disclosure Statement will be counted and cast as an acceptance or rejection, as the case may be, of this Combined Plan and Disclosure Statement.

Absent the prior agreement of the Debtors, the following tabulation procedures (the "**Vote Tabulation Procedures**") apply for determining whether this Combined Plan and Disclosure Statement has been accepted or rejected by the class in which such Holder holds a Claim or Interest:

- a. Unless otherwise provided in these Vote Tabulation Procedures, a Claim will be deemed temporarily allowed for voting purposes only in an amount equal to (i) the amount of such Claim as set forth in the Debtors' Schedules if no proof of Claim has been timely filed in respect of such Claim (except as provided in subsection (c) below); or (ii) if a proof of Claim has been timely filed in respect of such Claim, the amount set forth in such proof of Claim (except as provided in subsection (d) below).
- b. Duplicative Claims (i.e., the same Claim against two or more of the Debtors classified in the same plan class) listed in the Debtors' Schedules or in timely-filed Proofs of Claim will be deemed temporarily allowed for voting purposes only in an amount equal to one such Claim and not in an amount equal to the aggregate of such Claims.
- c. If a Claim, for which no proof of Claim has been timely filed, is listed on the Schedules, but is listed as contingent, unliquidated or disputed, either in whole or in part, or if no Claim amount is specified, such Claim shall be disallowed for voting purposes; provided, however, that any undisputed portion, if any, of such Claim will be deemed temporarily allowed for voting purposes, subject to the other Vote Tabulation Procedures; provided, further, however, that such Claim shall be entitled to vote in the amount of \$1.00 if the applicable bar date for this Claim has not expired.
- d. If a Claim, for which a proof of Claim has been timely filed, has not been disallowed and is not subject to a pending objection or

adversary proceeding as of the Voting Record Date, is marked or otherwise referenced on its face as contingent, unliquidated or disputed, either in whole or in part, or if no Claim amount is specified on such proof of Claim, such Claim shall be temporarily allowed solely for voting purposes in the amount of \$1.00, irrespective of how such Claim may or may not be set forth on the Schedules; provided, however, that any liquidated or undisputed portion, if any, of such Claim will be deemed temporarily allowed for voting purposes, subject to the other Vote Tabulation Procedures.

- e. If the Debtors have served an objection or request for estimation as to a Claim on or before November 2, 2018, such Claim is temporarily disallowed for voting purposes only and not for purposes of allowance or distribution, except to the extent and manner as set forth in such objection.
- f. Except as otherwise ordered by the Court, any Ballots received after the Voting Deadline will not be counted absent the consent of the Debtors (in their sole discretion).
- g. Any Ballot that does not indicate an acceptance or rejection of this Combined Plan and Disclosure Statement, or that indicates both an acceptance and rejection of this Combined Plan and Disclosure Statement, will not be counted.
- h. Any Ballot that is returned indicating acceptance or rejection of this Combined Plan and Disclosure Statement but does not bear an original signature will not be counted.
- i. Any Ballot that is illegible or contains insufficient information to permit the identification of the Creditor will not be counted.
- j. Any Ballot received by the Balloting Agent by facsimile or other electronic communication will not be counted, provided that Ballots submitted through the online voting portal will be counted.
- k. Any Ballot cast by a Person or Entity that does not hold a Claim in a Class that is entitled to vote to accept or reject this Combined Plan and Disclosure Statement will not be counted.
- l. Whenever a Creditor casts more than one Ballot voting the same Claim prior to the Voting Deadline, only the latest-received valid Ballot timely received will be deemed to reflect the voter's intent and, thus, will supersede any prior received Ballots.
- m. If a Creditor casts simultaneous duplicative Ballots that are voted inconsistently, such Ballots will not be counted.

- n. Each Creditor will be deemed to have voted the full amount of its Claim as set forth on the Ballot.
- o. Creditors may not split their vote within a Class; thus, each Creditor will be required to vote all of its Claims within the Class either to accept or reject this Combined Plan and Disclosure Statement.
- p. Ballots partially rejecting and partially accepting this Combined Plan and Disclosure Statement will not be counted.
- q. The method of delivery of Ballots to the Balloting Agent is at the risk of each Creditor, and such delivery will be deemed made only when the original Ballot is actually received by the Balloting Agent.
- r. The Debtors expressly reserve the right to amend the terms of this Combined Plan and Disclosure Statement (subject to compliance with Section 1127 of the Bankruptcy Code). If the Debtors make material changes to the terms of this Combined Plan and Disclosure Statement, the Debtors will disseminate additional solicitation materials and extend the solicitation period, in each case to the extent required by law or further order of the Court.
- s. If a Ballot is executed by a trustee, executor, administrator, guardian, attorney-in-fact, officer of a corporation or other person acting in a fiduciary or representative capacity on behalf of a Creditor, such person will be required to indicate such capacity when signing and, at the Debtors' or Balloting Agent's discretion, must submit proper evidence satisfactory to the Debtors and/or Balloting Agent to so act on behalf of the Creditor.
- t. Any Creditor who has delivered a valid Ballot voting on the Combined Plan and Disclosure Statement may withdraw such vote solely in accordance with Bankruptcy Rule 3018(a).
- u. Subject to any contrary order of the Court, the Debtors further reserve the right to waive any defects or irregularities or conditions of delivery as to any particular Ballot.
- v. Unless waived by the Debtors or as ordered by the Court, any defects or irregularities in connection with deliveries of Ballots must be cured by the Voting Deadline or within such time as Debtors or the Court determines, and unless otherwise ordered by the Court, delivery of such Ballots will not be deemed to have been made until such irregularities have been cured or waived.

- w. Neither the Debtors, nor any other person or entity, will be under any duty to provide notification of defects or irregularities with respect to deliveries of Ballots nor will any of them incur any liabilities for failure to provide such notification.

10. Releases

All Holders of Claims are urged to carefully read the release provisions set forth in Section XII.F of the Plan. The Plan provides that each Holder of a Claim or an Interest that (i) is a Released Party, (ii) is conclusively deemed to have accepted the Plan and does not timely object to the releases provided in the Plan, (iii) votes to accept the Plan, (iv) votes to reject the Plan and does not mark its ballot to indicate its refusal to grant the Third-Party Release contained in Section XII.F of the Plan, (v) abstains from voting on the Plan and does not mark its ballot to indicate its refusal to grant the Third-Party Release contained in Section XII.F of the Plan, or (vi) is a Related Person with respect to each of the foregoing clauses (i) through (v), will be deemed to have expressly, unconditionally, generally, individually, and collectively released and discharged the Released Parties and their Related Persons from any and all Claims and Causes of Action against the Debtors and the Released Persons.

The releases provided are critical parts of this Combined Plan and Disclosure Statement and are appropriate under the Third Circuit standard. Such releases are: (i) in exchange for the good, valuable, and reasonably equivalent consideration provided by the Released Parties; (ii) in the best interests of the Debtors, the Estates, and Holders of Claims and Interests; (iii) fair, equitable, and reasonable; and (iv) a bar to all Persons barred as set forth in this Combined Plan and Disclosure Statement from asserting any Claims or Causes of Action released under the Plan in favor of the Released Parties.

As a result of the consideration and various concessions provided by the Prepetition Noteholders, the Combined Plan and Disclosure Statement provides for meaningful benefits to the Holders of Administrative Expense Claims, Priority Tax Claims, Other Priority Claims and General Unsecured Claims. The Prepetition Noteholders have agreed to, among other things, (i) allow the Debtors or the Liquidation Trust to satisfy first out of the Prepetition Noteholders collateral all budgeted and Allowed Administrative Expense Claims incurred prior to the Closing Date, (ii) fund the Liquidation Trust with the Wind-Down Reserve; (iii) forego distribution on account of the Prepetition Note Deficiency Claim from Liquidating Trust Assets (other than Other U.S. Litigation Proceeds) until the Distributions to Allowed Other General Unsecured Claims exceed the Threshold Distribution Amount; and (iv) the allocation of Sale Proceeds as between the U.S. Debtors and Rockport Canada, including the resolution of intercompany claims of the U.S. Debtors against Rockport Canada, and the funding of the Rockport Canada Fund. The Debtors submit that these concessions by the Prepetition Noteholders constitute substantial consideration without which confirmation and implementation of this Combined Plan and Disclosure Statement and the benefits contained herein would not be possible. In exchange for this consideration, Section XII.E of the Combined Plan and Disclosure Statement provides the Prepetition Noteholders and their Related Persons, in their capacities as such, with a release of all Causes of Action the Debtors or their Estates may hold against the

Prepetition Noteholders. In further consideration, the Combined Plan and Disclosure Statement also provides that Holders of Allowed Class 4 General Unsecured Claims entitled to vote on the acceptance or rejection of the Combined Plan and Disclosure Statement will release the Prepetition Noteholders, and their respective Related Persons, in their capacities as such, from any claims or causes of action such Holders may have against the Prepetition Noteholders, and their Related Persons, in their capacities as such, unless such Holders affirmatively "opt out" of providing such releases on their Ballots. Notwithstanding the proposed releases contained in the Combined Plan and Disclosure Statement, the Debtors are not aware of any Causes of Action against the Prepetition Noteholders or their Related Persons that would provide a net benefit to the Debtors' Estates.

11. Acceptance of this Combined Plan and Disclosure Statement

As a Creditor, your acceptance of this Combined Plan and Disclosure Statement is important. In order for this Combined Plan and Disclosure Statement to be accepted by an impaired Class of Claims, a majority in number (i.e., more than half) and two-thirds in dollar amount of the Claims voting (of each impaired Class of Claims) must vote to accept this Combined Plan and Disclosure Statement. At least one impaired Class of Creditors, excluding the votes of insiders, must actually vote to accept this Combined Plan and Disclosure Statement. The Debtors urge that you vote to accept this Combined Plan and Disclosure Statement. **YOU ARE URGED TO COMPLETE, DATE, SIGN, AND PROMPTLY RETURN THE BALLOT. PLEASE BE SURE TO COMPLETE THE BALLOT PROPERLY AND LEGIBLY IDENTIFY THE EXACT AMOUNT OF YOUR CLAIM AND THE NAME OF THE CREDITOR.**

V. TREATMENT OF UNCLASSIFIED CLAIMS

A. General Administrative Expense Claims

1. U.S. General Administrative Expense Claims

U.S. General Administrative Expense Claims comprise U.S. Administrative Expense Claims, including but not limited to, all Allowed Claims arising under Section 503(b)(9) of the Bankruptcy Code and U.S. Professional Fee Administrative Claims. Allowed U.S. Professional Fee Administrative Claims incurred through and including the Effective Date (including amounts relating to preparation and filing of tax returns for the U.S. Debtors for the tax periods preceding the Effective Date) shall be paid by the Liquidating Trustee from the Pre-Effective Date Professional Fee Reserve. All other Allowed U.S. General Administrative Expense Claims shall be paid from the Pre-Effective Date SAP Claims Reserve..

2. Rockport Canada General Administrative Expense Claims

Rockport Canada General Administrative Expense Claims comprise Rockport Canada Administrative Expense Claims, including, but not limited to, all Allowed Claims arising under Section 503(b)(9) of the Bankruptcy Code against Rockport Canada and Rockport Canada Professional Fee Administrative Claims. All Allowed Rockport Canada Professional Fee Administrative Claims incurred through and including the Closing Date shall be paid in full from

amounts currently held by such Professionals in trust on account of funds previously disbursed by Rockport Canada. All other Allowed Rockport Canada General Administrative Expense Claims shall be paid from the Rockport Canada Fund. Further, any and all unpaid postpetition claims of the Information Officer and its professionals shall be Rockport Canada Administrative Expense Claims and shall be paid from the Rockport Canada Fund, with such claims being deemed allowed on a final basis, without the Information Officer or its professionals being required to file any request or application with the Bankruptcy Court, upon entry of the Confirmation Order in accordance with the Supplemental Order entered by the Ontario Superior Court on May 16, 2018.

3. Treatment of Allowed Administrative Expense Claims and Deadline to File Administrative Expense Claims

With respect to Allowed Administrative Expense Claims, in full and complete satisfaction of such Claims, payment as soon as reasonably practicable following the date such Administrative Expense Claim becomes an Allowed Claim, with such Administrative Expense Claims being paid in the full amount Allowed in Cash (as determined by agreement, settlement, or Final Order of the Bankruptcy Court), or such other treatment as may be agreed upon by a Holder of any such Allowed Administrative Expense Claim, the Debtors, the Prepetition Noteholders (following the Effective Date with respect to U.S. Administrative Expense Claims incurred prior to the Closing Date), the Creditors' Committee (prior to the Effective Date), the Liquidating Trustee (after the Effective Date with respect to U.S. Administrative Expense Claims) and the Rockport Canada Plan Administrator (following the Effective Date with respect to Rockport Canada Administrative Expense Claims). Allowed U.S. General Administrative Expense Claims shall be paid from the Pre-Effective Date Professional Fee Reserve, or the Pre-Effective Date SAP Claims Reserve, as set forth herein. Allowed Rockport Canada General Administrative Expense Claims shall be paid from the amounts currently held by such Professionals in trust (on account of amounts previously disbursed by Rockport Canada) or the Rockport Canada Fund, as applicable. To be eligible to receive Distributions under this Combined Plan and Disclosure Statement on account of an Administrative Expense Claim that is not otherwise expressly Allowed by this Combined Plan and Disclosure Statement, a request for payment of an Administrative Expense Claim must have been or be Filed on or before the Administrative Expense Claim Bar Date; *provided, however*, that Claims arising under Section 503(b)(9) of the Bankruptcy Code shall be and remain subject to the General Bar Date. Any Administrative Expense Claim that is not timely asserted by the Administrative Expense Claim Bar Date or the General Bar Date, as applicable, in accordance herewith and the General Bar Date Order, as applicable, shall be deemed disallowed under this Combined Plan and Disclosure Statement and shall be forever barred against the Debtors, the Estates, the Liquidating Trust, the Rockport Canada Fund or any of their Assets or property, and the Holder thereof shall be enjoined from commencing or continuing any action, employment of process, or act to collect, offset, recoup, or recover such Claim.

4. Treatment of Allowed Professional Fee Administrative Expense Claims and Deadline to File Professional Fee Administrative Claims

With respect to Professional Fee Administrative Claims, in full and complete satisfaction of their Claims, payment on the later of (i) the Effective Date, and (ii) the date such

Professional Fee Administrative Claim becomes an Allowed Claim by a Final Order of the Bankruptcy Court, to be paid in the full Allowed amount in Cash (as determined by agreement, settlement, or order of the Bankruptcy Court), or such other treatment as may be agreed upon by a Holder of any such Allowed Professional Fee Administrative Claim and the Debtors. Allowed U.S. Professional Fee Administrative Claims shall be paid in full from the Pre-Effective Date Professional Fee Reserve. All Allowed Rockport Canada Professional Fee Administrative Claims incurred prior to the Closing Date shall be paid in full from amounts currently held by such Professionals in trust on account of funds previously disbursed by Rockport Canada. Allowed Rockport Canada Professional Fee Administrative Claims incurred following the Closing Date shall be paid from the Rockport Canada Fund.

The deadline for submission by all Professionals (including any applications of members of the Creditors' Committee for expense reimbursement) for Bankruptcy Court approval of Professional Fee Administrative Claims shall be thirty (30) days after the Effective Date. Any Professional or other Person or Entity that is required to File and serve a request for approval of a Professional Fee Administrative Claim that fails to File and serve a timely request will be forever barred, estopped, and enjoined from asserting any request for payment of a Professional Fee Administrative Claim or participating in Distributions under the Plan on account thereof.

The Pre-Effective Date Professional Fee Reserve shall be funded on or before the Effective Date and shall hold an amount based on estimates of each Professional's unpaid U.S. Professional Fee Administrative Claims incurred through the Effective Date. Upon approval of professional fees consistent with the procedures established by the Bankruptcy Court, the Liquidating Trustee, as applicable, shall release the appropriate amount to the Professionals from the Pre-Effective Date Professional Fee Reserve. Professionals shall apply any unused portion of their pre-petition retainers to such Professional's unpaid and Allowed U.S. Professional Fee Administrative Claims prior to payment from the Pre-Effective Date Professional Fee Reserve and any pre-petition retainer amounts remaining after payment of such Professional's unpaid and Allowed U.S. Professional Fee Administrative Claim may be used to supplement the Pre-Effective Date Professional Fee Reserve and pay other unpaid and Allowed U.S. Professional Fee Administrative Claims. Any amounts remaining in the Pre-Effective Date Professional Fee Reserve following the payment of all Allowed U.S. Professional Fee Administrative Claims incurred through the Effective Date shall be made available for distribution to the Holders of Allowed Prepetition Note Secured Claims and shall not be available for distributions to Holders of Class 4 General Unsecured Claims against the U.S. Debtors.

Unbudgeted and Allowed U.S. Professional Fee Administrative Claims incurred through the Closing Date that the Prepetition Noteholders have not authorized to be paid from the Professional Fee Escrow and Allowed U.S. Professional Fee Administrative Claims incurred after the Closing Date shall be paid by the Debtors or the Liquidating Trustee, as applicable, from the Wind-Down Reserve upon approval of professional fees consistent with the procedures established by the Bankruptcy Court. All Allowed Rockport Canada Professional Fee Administrative Claims incurred prior to the Closing Date shall be paid in full from amounts currently held by such Professionals in trust on account of funds previously disbursed by Rockport Canada. Rockport Canada Professional Fee Administrative Claims incurred following the Closing Date shall be paid by Rockport Canada or the Rockport Canada Plan Administrator,

as applicable, from the Rockport Canada Fund upon approval of professional fees consistent with the procedures established by the Bankruptcy Court, this Plan, and the Confirmation Order.

B. Priority Tax Claims

Each Holder of an Allowed Priority Tax Claim, shall receive in full satisfaction of such Allowed Priority Tax Claim, in accordance with Section 1129(a)(9)(C) of the Bankruptcy Code, payment in Cash equal to the Allowed amount of such Priority Tax Claim, on the later of (i) the Effective Date and (ii) the first Distribution Date following the date such Priority Tax Claim becomes an Allowed Claim by Final Order of the Bankruptcy Court, or such other treatment as may be agreed upon by any such Holder of a Priority Tax Claim, the Debtors, the Prepetition Noteholders, the Creditors' Committee (prior to the Effective Date), the Liquidating Trustee (after the Effective Date with respect to U.S. Priority Tax Claims) and the Rockport Canada Plan Administrator (after the Effective Date with respect to Rockport Canada Priority Tax Claims). U.S. Priority Tax Claims shall be paid from the Pre-Effective Date SAP Claims Reserve. Rockport Canada Priority Tax Claims shall be paid from the Rockport Canada Fund. For the avoidance of doubt, any Allowed Rockport Canada Priority Tax Claims, including but not limited to Claims of the CRA, shall be paid from the Rockport Canada Fund. The Liquidating Trustee (with consent of the Prepetition Noteholders) or the Rockport Canada Plan Administrator, as applicable, reserves the right to prepay such Allowed Priority Tax Claim at any time. On the Effective Date, any Liens securing any Allowed Priority Tax Claim shall be deemed released, terminated, and extinguished, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order, or rule or the vote, consent, authorization, or approval of any Person.

C. Statutory Fees

Statutory Fees from the Petition Date through the Effective Date shall be paid by the Debtors and/or the Liquidating Trustee on the Effective Date. Statutory Fees relating to any period of time after the Effective Date shall be paid by the Liquidating Trust (with respect to distributions from the Liquidating Trust) or the Rockport Canada Plan Administrator (with respect to distributions from the Rockport Canada Fund).

**VI. CLASSIFICATION OF CLAIMS AND INTERESTS;
ESTIMATED RECOVERIES**

For purposes of voting, confirmation and making Distributions under the Plan, the Plan provides for and is premised upon the substantive consolidation of the U.S. Debtors and their Estates. Rockport Canada shall not be substantively consolidated with the U.S. Debtors for the purposes of the Plan and any allowed Claims or Interests against Rockport Canada shall be separately classified in a separate subclass herein. Claims for each of the Debtors – other than Administrative Expense Claims, Professional Fee Administrative Claims, Priority Tax Claims, and Statutory Fees Claims – are classified for all purposes, including voting, confirmation, and Distribution under this Combined Plan and Disclosure Statement, as follows:



Class	Type	Status Under Plan	Voting Status	Anticipated Recovery
1(a)	Other Secured Claims against U.S. Debtors	Unimpaired	Deemed to Accept	100%
1(b)	Other Secured Claims against Rockport Canada	Unimpaired	Deemed to Accept	100%
2	Prepetition Note Secured Claims against U.S. Debtors	Impaired	Entitled to Vote	26% - 28%
3(a)	Other Priority Claims against U.S. Debtors	Unimpaired	Deemed to Accept	100%
3(b)	Other Priority Claims against Rockport Canada	Unimpaired	Deemed to Accept	100%
4(a)	General Unsecured Claims against U.S. Debtors	Impaired	Entitled to Vote	0%-2% ⁸
4(b)	General Unsecured Claims against Rockport Canada	Impaired	Entitled to Vote	68% -78%
5(a)	Intercompany Claims against U.S. Debtors	Impaired	Deemed to Reject	No Distribution
5(b)	Intercompany Claims against Rockport Canada	Impaired	Deemed to Reject	No Distribution

⁸ The initial projections contained in the Disclosure Statement were based on the estimated remaining balance of the Wind-Down Reserve Amount following the satisfaction of all senior Claims and any related expenses of the Liquidating Trustee. The Debtors estimated at the time that \$246,000 would be available for distribution to the Holders of Class 4 Allowed General Unsecured Claims against the U.S. Debtors following the payment of all senior Claims. This projected recovery, however, was dependent on the Debtors' estimates as to the aggregate amount of the senior Claims to be paid from the Wind-Down Reserve and was therefore subject to fluctuate upwards or downwards in the event such estimates proved to be incorrect.

The amount of the Wind-Down Reserve, however, proved insufficient to cover the actual amount of U.S. Professional Fee Claims, U.S. General Administrative Claims, U.S. Priority Tax Claims and Other Priority Claims against the U.S. Debtors asserted in the Chapter 11 Cases. Accordingly, following a series of good faith negotiations, the Prepetition Noteholders have consented to the additional use of their cash collateral in the manner reflected in the Plan. Pursuant to the terms of the Plan, as revised, the Prepetition Noteholders have agreed to fund a Post-Effective Date Trust Reserve in the amount of \$485,000, which, along with any U.S. Litigation Proceeds, can be used to fund a potential distribution to Class 4 Holders of General Unsecured Claims against the U.S. Debtors following the payment of all Liquidating Trust Operating Expenses.

6(a)	Equity Interests in U.S. Debtors	Impaired	Deemed to Reject	No Distribution
6(b)	Equity Interests in Rockport Canada	Impaired	Deemed to Reject	No Distribution

VII. TREATMENT OF CLAIMS AND INTERESTS

A. Treatment of Claims and Interests against U.S. Debtors

1. Other Secured Claims against U.S. Debtors (Class 1(a))

a. Classification

Class 1(a) consists of all Other Secured Claims, if any, against any U.S. Debtor, secured by such U.S. Debtor's assets.

b. Impairment and Voting

Class 1(a) is unimpaired. Holders of Allowed Class 1(a) Other Secured Claims against the U.S. Debtors are conclusively presumed to have accepted this Combined Plan and Disclosure Statement under Section 1126(f) of the Bankruptcy Code and, thus, are not entitled to vote to accept or reject this Combined Plan and Disclosure Statement.

c. Treatment

Except to the extent that a Holder of an Allowed Other Secured Claim against the U.S. Debtors agrees to less favorable treatment, in settlement, and release of each Allowed Other Secured Claim, each Holder of such Allowed Other Secured Claim against the U.S. Debtors shall receive, on account of its Allowed Other Secured Claim against the U.S. Debtors, one of the following treatments, as determined by the Debtors or the Liquidating Trustee, as soon as reasonably practicable after the Effective Date or such later date on which such Other Secured Claim becoming an Allowed Secured Other Claim: (i) payment in full in Cash from the Pre-Effective Date SAP Claims Reserve; (ii) delivery of the collateral securing any such Allowed Other Secured Claim; and/or (iii) other treatment such that the Allowed Other Secured Claim shall be rendered unimpaired.

2. Prepetition Note Secured Claims against U.S. Debtors (Class 2)

a. Classification

Class 2 consists of Prepetition Note Secured Claims against the U.S. Debtors.

b. Impairment and Voting

Class 2 is impaired. Holders of Allowed Class 2 Prepetition Note Secured Claims are entitled to vote to accept or reject this Combined Plan and Disclosure Statement.

c. Treatment

Except to the extent that a Holder of an Allowed Prepetition Note Secured Claim agrees to less favorable treatment, in settlement and release of each Allowed Prepetition Note Secured Claim, each Holder of an Allowed Prepetition Note Secured Claim shall receive on account of its Allowed Prepetition Note Secured Claim on or as soon as practicable after the Effective Date:

(i) its Pro Rata share of all remaining Cash of the U.S. Debtors (following the funding of the Pre-Effective Date Professional Fee Reserve, Pre-Effective Date SAP Claims Reserve, and the Post-Effective Date Reserve and the Rockport Canada Fund);

(ii) its Pro Rata share of any amounts remaining in the Pre-Effective Date Professional Fee Reserve, or Pre-Effective Date SAP Claims Reserve following the payment of all Claims for which such funds are intended;

(iii) its Pro Rata share of any portion of the BAMS Reserves Amount that reverts to the U.S. Debtors;

(iv) its Pro Rata share of any proceeds from the Expeditors Litigation Claims;

(v) its Pro Rata share of any Sale Escrow Amounts that revert to the U.S. Debtors; and

(vi) its Pro Rata share of the Warrants to such Holder of an Allowed Prepetition Secured Note Claim or its designee.

3. Other Priority Claims against U.S. Debtors (Class 3(a))

a. Classification

Class 3(a) consists of all Other Priority Claims, if any, against the U.S. Debtors.

b. Impairment and Voting

Class 3(a) is unimpaired. Holders of Allowed Class 3(a) Other Priority Claims against the U.S. Debtors are conclusively presumed to have accepted this Combined Plan and Disclosure Statement under Section 1126(f) of the Bankruptcy Code and, thus, are not entitled to vote to accept or reject this Combined Plan and Disclosure Statement.

c. Treatment

Except to the extent that a Holder of an Allowed Other Priority Claim against the U.S. Debtors agrees to less favorable treatment, in settlement and release of each Allowed Other Priority Claim against the U.S. Debtors, each Holder of an Allowed Other Priority Claim against

the U.S. Debtors shall receive, on account of its Allowed Other Priority Claim against the U.S. Debtors, payment in full in Cash from the Pre-Effective Date SAP Claims Reserve as soon as reasonably practicable after the later of the Effective Date and the date on which such Other Priority Claim becomes an Allowed Other Priority Claim.

4. General Unsecured Claims against U.S. Debtors (Class 4(a))

a. Classification

Class 4(a) consists of all General Unsecured Claims against the U.S. Debtors.

b. Impairment and Voting

Class 4(a) is impaired, and Holders of Allowed General Unsecured Claims against the U.S. Debtors are entitled to vote to accept or to reject this Combined Plan and Disclosure Statement.

c. Treatment

i. Allowed Other General Unsecured Claims against U.S. Debtors

Except to the extent that a Holder of an Allowed Other General Unsecured Claim against the U.S. Debtors agrees to a less favorable treatment, and after satisfaction in full of all senior Claims, in settlement and release of each Allowed Other General Unsecured Claim against a U.S. Debtor, each Holder of an Allowed Other General Unsecured Claim against a U.S. Debtor shall receive on account of such Allowed Other General Unsecured Claim against a U.S. Debtor on or as soon as practicable after the Effective Date, a beneficial interest in the Liquidating Trust, which beneficial interest shall entitle such Holder of an Allowed Other General Unsecured Claim to its pro rata share of the Liquidating Trust Class 4 Distributable Assets.

ii. Allowed Prepetition Note Deficiency Claims against the U.S. Debtors

Except to the extent that a Holder of an Allowed Prepetition Note Deficiency Claim against the U.S. Debtors agrees to a less favorable treatment, and after satisfaction in full of all senior Claims, in settlement and release of each Allowed Prepetition Note Deficiency Claim against a U.S. Debtor, each Holder of an Allowed Prepetition Note Deficiency Claim against a U.S. Debtor shall receive on account of such Allowed Prepetition Note Deficiency Claim against a U.S. Debtor on or as soon as practicable after the Effective Date, a beneficial interest in the Liquidating Trust, which beneficial interest shall entitle such Holder of an Allowed Prepetition Note Deficiency to receive:

(i) its Pro Rata share of Other U.S. Litigation Proceeds with all Allowed Other General Unsecured Claims against the U.S. Debtors; and

(ii) to the extent that the aggregate Distributions by the Liquidating Trust to Allowed Other General Unsecured Claims exceeds the Threshold Distribution Amount, its Pro

Rata share of all other Liquidating Trust Class 4 Distributable Assets with all Allowed Other General Unsecured Claims against the U.S. Debtors.

5. Intercompany Claims against U.S. Debtors (Class 5(a))

a. Classification

Class 5(a) consists of all Intercompany Claims against the U.S. Debtors.

b. Impairment and Voting

Class 5(a) is impaired, and Holders of Allowed Intercompany Claims against the U.S. Debtors are not entitled to vote to accept or to reject this Combined Plan and Disclosure Statement.

c. Treatment

Holders of Intercompany Claims against the U.S. Debtors in Class 5(a) will not receive a Distribution under the Combined Plan and Disclosure Statement, and their Intercompany Claim will be canceled as of the Effective Date.

6. Equity Interests in U.S. Debtors (Class 6(a))

a. Classification

Class 6(a) consists of all Equity Interests in the U.S. Debtors.

b. Impairment and Voting

Class 6(a) is impaired, and Holders of Allowed Equity Interests in the U.S. Debtors are not entitled to vote to accept or to reject this Combined Plan and Disclosure Statement.

c. Treatment

Holders of Equity Interests in the U.S. Debtors in Class 6(a) will not receive a Distribution under the Combined Plan and Disclosure Statement, and their Equity Interests will be canceled as of the Effective Date.

B. Treatment of Claims and Interests against Rockport Canada

1. Other Secured Claims against Rockport Canada (Class 1(b))

a. Classification

Class 1(b) consists of all Other Secured Claims, if any, against Rockport Canada, secured by Rockport Canada's assets.

b. Impairment and Voting

Class 1(b) is unimpaired. Holders of Allowed Class 1(b) Other Secured Claims against Rockport Canada are conclusively presumed to have accepted this Combined Plan and Disclosure Statement under Section 1126(f) of the Bankruptcy Code and, thus, are not entitled to vote to accept or reject this Combined Plan and Disclosure Statement.

c. Treatment

Except to the extent that a Holder of an Allowed Other Secured Claim against Rockport Canada agrees to less favorable treatment, in settlement, and release of each Allowed Other Secured Claim, each Holder of such Allowed Other Secured Claim shall receive, on account of its Allowed Other Secured Claim, one of the following treatments, as determined by the Debtors or the Rockport Canada Plan Administrator, as soon as reasonably practicable after the Effective Date or such later date on which such Other Secured Claim becomes an Allowed Secured Other Claim: (i) payment in full in Cash from the Rockport Canada Fund; (ii) delivery of the collateral securing any such Allowed Other Secured Claim; and/or (iii) other treatment such that the Allowed Other Secured Claim shall be rendered unimpaired.

2. Other Priority Claims against Rockport Canada (Class 3(b))

a. Classification

Class 3(b) consists of all Other Priority Claims, if any, against Rockport Canada.

b. Impairment and Voting

Class 3(b) is unimpaired. Holders of Allowed Class 3(b) Other Priority Claims against Rockport Canada are conclusively presumed to have accepted this Combined Plan and Disclosure Statement under Section 1126(f) of the Bankruptcy Code and, thus, are not entitled to vote to accept or reject this Combined Plan and Disclosure Statement.

c. Treatment

Except to the extent that a Holder of an Allowed Other Priority Claim against Rockport Canada agrees to less favorable treatment, in settlement and release of each Allowed Other Priority Claim against Rockport Canada, each Holder of an Allowed Other Priority Claim against Rockport Canada shall receive, on account of its Allowed Other Priority Claim against Rockport Canada, payment in full in Cash from the Rockport Canada Fund as soon as reasonably practicable after the later of the Effective Date and the date on which such Other Priority Claim becomes an Allowed Other Priority Claim.

3. General Unsecured Claims against Rockport Canada (Class 4(b))

a. Classification

Class 4(b) consists of all General Unsecured Claims against Rockport Canada.

b. Impairment and Voting

Class 4(b) is impaired, and Holders of Allowed General Unsecured Claims against Rockport Canada are entitled to vote to accept or to reject this Combined Plan and Disclosure Statement.

c. Treatment

Except to the extent that a Holder of an Allowed General Unsecured Claim against Rockport Canada agrees to a less favorable treatment, and after satisfaction in full of all senior Claims, in settlement and release of each Allowed General Unsecured Claim against Rockport Canada, each Holder of an Allowed General Unsecured Claim against Rockport Canada shall receive on account of such Allowed General Unsecured Claim against Rockport Canada its Pro Rata share of the Rockport Canada Fund up to the full amount of such Allowed General Unsecured Claim.

4. Intercompany Claims against Rockport Canada (Class 5(b))

a. Classification

Class 5(b) consists of all Intercompany Claims against Rockport Canada.

b. Impairment and Voting

Class 5(b) is impaired, and Holders of Allowed Intercompany Claims against Rockport Canada are not entitled to vote to accept or to reject this Combined Plan and Disclosure Statement.

c. Treatment

Provided that the Court approves the proposed allocation of the Sale Proceeds set forth herein, Holders of Intercompany Claims against Rockport Canada in Class 5(b) will not receive a Distribution under the Combined Plan and Disclosure Statement, and their Intercompany Claim will be canceled as of the Effective Date.

5. Equity Interests in Rockport Canada (Class 6(b))

a. Classification

Class 6(b) consists of all Equity Interests in Rockport Canada.

b. Impairment and Voting

Class 6(b) is impaired, and Holders of Allowed Equity Interests in Rockport Canada are not entitled to vote to accept or to reject this Combined Plan and Disclosure Statement, as it is not anticipated that there will be any funds available for distribution to the Holders of Allowed Equity Interests.

c. Treatment

To the extent that funds remain in the Rockport Canada Fund following payment in full of all senior Claims, including all General Unsecured Claims of Rockport Canada and all fees and expenses of the Rockport Canada Plan Administrator, such funds shall be transferred to the Liquidating Trust on account of Allowed Equity Interests in Rockport Canada. As it is not anticipated that there will be any residual funds transferred to the Liquidating Trust, Class 6(b) shall be deemed an impaired rejecting Class under the Plan, and all Equity Interests in Rockport Canada will be cancelled as of the Effective Date.

C. Modification of Treatment of Claims and Interests

The Plan Proponents, with the consent of the Prepetition Noteholders, reserve the right to modify the treatment of any Allowed Claim or Equity Interest in any manner adverse only to the Holder of such Claim or Equity Interest at any time after the Effective Date upon the consent of the Holder of the Claim or Equity Interest whose Allowed Claim or Equity Interest, as the case be, is being adversely affected.

VIII. PROVISIONS REGARDING THE LIQUIDATING TRUST

A. Appointment of the Liquidating Trustee

The Liquidating Trustee shall be selected by the Creditors' Committee, in consultation with the Debtors and the Prepetition Noteholders, and shall be identified by the Debtors in the Plan Supplement. At the Plan Confirmation Hearing, the Bankruptcy Court shall consider and, if appropriate, ratify the selection of the Liquidating Trustee. All compensation for the Liquidating Trustee shall be paid from the Post-Effective Date Trust Reserve in accordance with the terms of the Plan and Liquidating Trust Agreement. The approved Person shall serve as the Liquidating Trustee upon execution of the Liquidating Trust Agreement on the Effective Date. The Liquidating Trustee shall not be required to give any bond or surety or other security for the performance of their duties unless otherwise ordered by the Bankruptcy Court. The Liquidating Trust Agreement shall be provided in the Plan Supplement. On the Effective Date, all Beneficiaries of the Liquidating Trust shall be deemed to have ratified and become bound by the terms and conditions of the Liquidating Trust Agreement. In the event that the Liquidating Trustee resigns or is removed, terminated, or otherwise unable to serve as Liquidating Trustee, then successors shall be appointed as set forth in the Liquidating Trust Agreement. Any successor Liquidating Trustee appointed shall be bound by and comply with the terms of this Combined Plan and Disclosure Statement, the Plan Confirmation Order, and the Liquidating Trust Agreement.

Following the Effective Date, the Liquidating Trustee shall also be, and shall enjoy the powers of, the Debtors' authorized representative for all purposes, including, without limitation, Section 1123 of the Bankruptcy Code. No further proof of such power shall be necessary or required.

B. Creation of Liquidating Trust

On the Effective Date, the Liquidating Trustee shall sign the Liquidating Trust Agreement and, in its capacity as Liquidating Trustee, accept all Liquidating Trust Assets on behalf of the Beneficiaries thereof, and be authorized to obtain, collect, seek the turnover of,

liquidate, and collect all of the Liquidating Trust Assets not in its possession or control and to prosecute the U.S. Litigation Claims. The Liquidating Trust will then be created and effective without any further action by the Bankruptcy Court or any Person as of the Effective Date. The Liquidating Trust shall be established for the primary purpose of prosecuting the U.S. Litigation Claims, liquidating the Liquidating Trust Assets and making Distributions in accordance with this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement, with no objective to continue or engage in the conduct of a trade or business, except only in the event and to the extent necessary to, and consistent with, the liquidating purpose of the Liquidating Trust.

The Liquidating Trustee shall also receive and administer the Pre-Effective Date Professional Fee Reserve, the Pre-Effective Date SAP Claims Reserve and the Sale Escrow Amounts, but such amounts shall not be considered Liquidating Trust Assets and shall not be available for distribution to the beneficiaries of the Liquidating Trust.

C. Beneficiaries of Liquidating Trust

The Holders of Allowed General Unsecured Claims against the U.S. Debtors entitled to Distributions hereunder shall be the Beneficiaries of the Liquidating Trust. Such Beneficiaries shall be bound by the Liquidating Trust Agreement. The interests of the Beneficiaries in the Liquidating Trust shall be uncertificated and transferable in accordance with the terms set forth in this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement.

D. Vesting and Transfer of Assets to the Liquidating Trust

Under Section 1141(b) of the Bankruptcy Code, the Liquidating Trust Assets shall be assigned, transferred, and vest in the Liquidating Trust upon the Effective Date free and clear of all Claims and Liens; *provided, however*, that the Liquidating Trustee may abandon or otherwise not accept any Assets that the Liquidating Trustee believes, in good faith, to have no value to, or will be unduly burdensome to, the Liquidating Trust in accordance with the terms of the Liquidating Trust Agreement. Any Assets that the Liquidating Trustee so abandons or otherwise does not accept shall not be property of the Liquidating Trust. As of the Effective Date, all Liquidating Trust Assets vest in the Liquidating Trust and all Assets dealt with in this Combined Plan and Disclosure Statement shall be free and clear of all Liens, Claims, and Interests except as otherwise specifically provided in this Combined Plan and Disclosure Statement or in the Plan Confirmation Order.

E. Funding of the Liquidating Trust

The Liquidating Trust shall be funded with (i) the Pre-Effective Date Professional Fee Reserve; (ii) the Pre-Effective Date SAP Claims Reserve; (iii) the Post-Effective Date Trust Reserve; (iv) net recoveries resulting from the prosecution of any and all U.S. Litigation Claims; (v) the benefits, rights, interests and proceeds of any Insurance Policies with respect to the U.S. Debtors only to the extent payable to the U.S. Debtors in accordance with the terms of the Insurance Policies; and (vi) any and all other Assets belonging to the U.S. Debtors' Estates (subject to the distribution of such Assets in accordance with the terms of the Plan).

To the extent not paid in full in Cash on the Effective Date, reserves for payment of Disputed Claims and U.S. Professional Fee Administrative Claims shall be set aside and held by Liquidating Trustee until such Claims are approved, Allowed and authorized to be paid, by the Bankruptcy Court.

On or after the Effective Date, the Debtors shall cause to be transferred to the Liquidating Trust the Sale Escrow Amounts, which shall be held and administered by the Liquidating Trustee in accordance with the terms of the Sale Order or other applicable documents or agreements. For the avoidance of doubt, the Sale Escrow Amounts shall not be considered Liquidating Trust Assets and shall not be available for distribution to the Holders of Allowed Class 4 General Unsecured Claims. To the extent that any of the Sale Escrow Amounts revert to the U.S. Debtors, they shall be distributed to the Holders of Allowed Prepetition Note Secured Claims in accordance with the terms of the Plan.

On the Effective Date, the Debtors and the Debtors' Estates shall transfer and be deemed to have transferred the Liquidating Trust Assets to the Liquidating Trust and such Liquidating Trust Assets shall vest in the Liquidating Trust to be utilized, administered, and distributed by the Liquidating Trustee in accordance with the terms and conditions of this Combined Plan and Disclosure Statement, the Plan Confirmation Order, and the Liquidating Trust Agreement.

F. Distributions from the Liquidating Trust

Distributions from the Liquidating Trust shall be made in accordance with the Combined Plan and Disclosure Statement and the Liquidating Trust Agreement. For the avoidance of doubt, the U.S. Litigation Proceeds shall be used to pay any Liquidating Trust Operating Expenses prior to making any Distributions to Beneficiaries of the Liquidating Trust.

G. Certain Powers and Duties of the Liquidating Trust and Liquidating Trustee

1. General Powers of the Liquidating Trustee

The Liquidating Trustee shall have, and enjoy the powers of, the Debtors' authorized representative for all purposes and shall have the power and authority to perform the acts described in the Liquidating Trust Agreement (subject to approval by the Bankruptcy Court where applicable), in addition to any powers granted by law or conferred to it by any other provision of this Combined Plan and Disclosure Statement, including without limitation any set forth herein, *provided, however*, that enumeration of the following powers shall not be considered in any way to limit or control the power and authority of the Liquidating Trustee to act as specifically authorized by any other provision of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement, and/or any applicable law, and to act in such manner as the Liquidating Trustee may deem necessary or appropriate, including, without limitation, to discharge all obligations assumed by the Liquidating Trustee or provided herein, to conserve and protect the Liquidating Trust and the Liquidating Trust Assets, or to confer on the Beneficiaries the benefits intended to be conferred upon them by this Combined Plan and Disclosure Statement. The powers, rights, and responsibilities of the Liquidating Trustee shall be specified in the Liquidating Trust Agreement and shall include the authority, power, and

responsibility to: (a) receive, manage, invest, supervise, and protect Liquidating Trust Assets; (b) pay taxes or other obligations incurred by the Liquidating Trust and issue to employees or other Persons, and/or file with the appropriate Governmental Units, applicable tax and wage returns and forms; (c) retain and compensate, without further order of the Bankruptcy Court, the services of employees, professionals, and consultants to advise and assist in the administration, prosecution and Distribution of Liquidating Trust Assets; (d) calculate and implement Distributions of Liquidating Trust Assets; (e) investigate, prosecute, compromise, and settle, in accordance with the specific terms of the Liquidating Trust Agreement and without further order of the Bankruptcy Court, the U.S. Litigation Claims vested in the Liquidating Trust, as set forth in the Liquidating Trust Agreement; (f) resolve issues involving Claims and Equity Interests in accordance with this Combined Plan and Disclosure Statement, including the power to object to Claims against the U.S. Debtors, and to subordinate and recharacterize Claims by objection, motion, or adversary proceeding against the U.S. Debtors without any further notice to or action, order or approval by the Court; (g) undertake all administrative functions of the Chapter 11 Cases, including the payment of Statutory Fees incurred post-Effective Date with respect to distributions from the Liquidating Trust and the ultimate closing of the Chapter 11 Cases and dissolution of the U.S. Debtor entities; (h) dissolve the Debtors' Employee Benefit Plans not sold and transferred to the Purchaser in connection with the Sale; and (i) take such other action as may be vested in or assumed by the Liquidating Trustee consistent with this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement, and any applicable Orders of the Bankruptcy Court, or as may be necessary and proper to carry out the provisions of this Combined Plan and Disclosure Statement. Notwithstanding anything herein or in the Liquidation Trust Agreement to the contrary, the Liquidating Trustee shall (i) consult with, and obtain the prior written consent of, the Prepetition Noteholders with regards to any decision whether to pay, object to or settle any U.S. Administrative Expense Claim, U.S. Priority Claim or Other Priority Claim against the U.S. Debtors and (ii) provide the Prepetition Noteholders and their professionals with regular updates, and promptly respond to reasonable requests for information, with respect to the administration of the Pre-Effective Date Professional Fee Reserve, the Pre-Effective Date SAP Claims Reserve and the Sale Escrow Amounts.

Except as expressly set forth in this Combined Plan and Disclosure Statement and in the Liquidating Trust Agreement, the Liquidating Trustee, on behalf of the Liquidating Trust, shall have absolute discretion to pursue or not to pursue any U.S. Litigation Claims as he/she/it determines is in the best interests of the Liquidating Trust's Beneficiaries and consistent with the purposes of the Liquidating Trust, and shall be indemnified to the fullest extent permitted under applicable law by the Liquidating Trust for the outcome of his, her, or its decisions, other than those decisions constituting fraud, gross negligence, willful misconduct, bad faith or self-dealing. The Liquidating Trustee may incur any reasonable and necessary expenses in liquidating and converting the Liquidating Trust Assets to Cash. Other than as provided for in the Sale Documents, the Liquidating Trust is the successor to the Debtors, their Estates, their books and records, and their Privileges and protections (it being understood that to the extent the Liquidating Trustee is a successor with respect to documents subject to a common interest privilege with any third party, nothing herein shall relieve the Liquidating Trustee of any formal or informal obligations with respect to such common interest agreements). The Liquidating Trustee shall have standing, authority, power, and right to assert, prosecute, and/or settle the U.S. Litigation Claims, including, with respect to the Liquidating Trust, making a claim under Insurance Policies based upon its powers as a bankruptcy-appointed representative of the

Debtors' Estates with the same or similar abilities possessed by insolvency trustees, receivers, examiners, conservators, liquidators, rehabilitators, or similar officials. The U.S. Litigation Claims will vest in the Liquidating Trust as set forth in the Liquidating Trust Agreement; *however*, there can be no assurance as to the outcome of such U.S. Litigation Claims or the dollar amount of any recovery that will be obtained by the Liquidating Trust. With respect to the provisions of the Asset Purchase Agreement, which survive the Effective Date and Consummation of this Plan, the Liquidating Trustee shall be deemed a permitted assignee of the Debtors under the Asset Purchase Agreement and shall receive the benefit thereunder.

2. Books and Records

On the Effective Date, the Liquidating Trust shall: (a) take possession of all books, records, and files of the Debtors and the Estates that were not sold and transferred in connection with the Sale; and (b) provide for the retention and storage of such books, records, and files until such time as the Liquidating Trustee determines, after consultation with the Rockport Canada Plan Administrator, in accordance with the Liquidating Trust Agreement, that retention of same is no longer necessary or beneficial. The Liquidating Trustee shall cooperate and make commercially reasonable efforts to provide the Rockport Canada Plan Administrator with any books, records, and files of Rockport Canada or its Estate in the possession of the Liquidating Trust upon the request of the Rockport Canada Plan Administrator which shall be at the sole cost and expense of Rockport Canada.

3. Investments of Cash

The Liquidating Trust may invest Cash (including any earnings thereon or proceeds therefrom) as permitted by Section 345 of the Bankruptcy Code or in other prudent investments, *provided, however*, that such investments are permitted to be made by a liquidating trust within the meaning of Treasury Regulation Section 301.7701-4(d), as reflected therein, or under applicable IRS guidelines, rulings, or other controlling authorities.

4. Costs and Expenses of Administration of the Liquidating Trust

All Liquidating Trust Operating Expenses shall be the responsibility of and paid by the Liquidating Trust in accordance with the Liquidating Trust Agreement from the Post-Effective Date Trust Reserve or U.S. Avoidance Action Litigation Proceeds.

5. Reporting

In no event later than thirty (30) Business Days after the end of the first full quarter following the Effective Date and on a quarterly basis thereafter until all Cash in the Liquidating Trust has been released or paid out in accordance with this Combined Plan and Disclosure Statement, the Liquidating Trustee shall File reports setting forth the amounts, recipients, and dates of all Distributions through each applicable reporting period.

H. United States Federal Income Tax Treatment of the Liquidating Trust for the Liquidating Trust Assets

For federal income tax purposes, it is intended that the Liquidating Trust be classified as a liquidating trust under Section 301.7701-4 of the Treasury regulations and that the trust be owned by its Beneficiaries. Accordingly, for federal income tax purposes, it is intended that the Beneficiaries be treated as if they had received a distribution from the Estates of an undivided interest in the Liquidating Trust Assets (to the extent of the value of their respective share in the applicable Assets) and then contributed such interests to the Liquidating Trust, and the Liquidating Trust's Beneficiaries will be treated as the grantors and owners thereof.

The Liquidating Trustee shall be responsible for filing all federal, state, and local tax returns for the Liquidating Trust and for the Debtors. The Liquidating Trust shall comply with all withholding and reporting requirements imposed by any federal, state, or local taxing authority, and all Distributions made by the Liquidating Trust shall be subject to any such withholding and reporting requirements. The Liquidating Trustee shall be authorized to take any and all actions that may be necessary or appropriate to comply with such withholding and reporting requirements including, without limitation, requiring that, as a condition to the receipt of a Distribution, the Holder of an Allowed Claim complete the appropriate IRS Form W-8 or IRS Form W-9, as applicable to each Holder. Notwithstanding any other provision of this Combined Plan and Disclosure Statement, (a) each Holder of an Allowed Claim that is to receive a Distribution from a Liquidating Trust shall have the sole and exclusive responsibility for the satisfaction and payment of any tax obligations imposed on such Holder by any Governmental Unit, including income and other tax obligations, on account of such Distribution, and (b) no Distribution shall be made to or on behalf of such Holder under this Combined Plan and Disclosure Statement unless and until such Holder has made arrangements satisfactory to the Liquidating Trustee to allow it to comply with its tax withholding and reporting requirements. Any property to be distributed by the Liquidating Trust shall, pending the implementation of such arrangements, be treated as an undeliverable Distribution to be held by the Liquidating Trustee, as the case may be, until such time as Liquidating Trustee is satisfied with the Holder's arrangements for any withholding tax obligations.

I. Term of Liquidating Trust

The Liquidating Trustee shall be discharged and the Liquidating Trust shall be terminated at such time as (i) all Disputed Claims against the U.S. Debtors have been resolved, (ii) all of the U.S. Litigation Claims have been prosecuted to completion and the Liquidating Trust Assets have been collected and liquidated, (iii) all duties and obligations of the Liquidating Trustee under the Liquidating Trust Agreement have been fulfilled, (iv) all Distributions required to be made by the Liquidating Trust under this Combined Plan and Disclosure Statement and the Liquidating Trust Agreement have been made, and (v) the Chapter 11 Cases of the U.S. Debtors have been closed; *provided, however*, that in no event shall the Liquidating Trust be dissolved later than five (5) years from the Effective Date unless the Bankruptcy Court, upon motion within the six-month period prior to the fifth anniversary (or the end of any extension period approved by the Bankruptcy Court), determines that a fixed period extension (not to exceed one (1) year, together with any prior extensions, unless the Liquidating Trust has procured a favorable letter ruling from the Internal Revenue Service that any further extension would not

adversely affect the status of the Liquidating Trust as a liquidating trust for federal income tax purposes) is necessary to facilitate or complete the recovery and liquidation of the Liquidating Trust Assets.

J. Limitation of Liability of the Liquidating Trustee

The Liquidating Trust shall indemnify its Liquidating Trustee and its professionals against any losses, liabilities, expenses (including attorneys' fees and disbursements), damages, taxes, suits, or claims that the Liquidating Trustee or its professionals may incur or sustain by reason of being or having been a Liquidating Trustee or professionals of the Liquidating Trust for performing any functions incidental to such service; *provided, however*, the foregoing shall not relieve the Liquidating Trustee or its professionals from liability for bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud, or self-dealing, or, in the case of an attorney professional and, as required under Rule 1.8(h)(1) of the Delaware Layers' Rules of Professional Conduct, malpractice.

IX. PROVISIONS REGARDING THE ROCKPORT CANADA PLAN ADMINISTRATOR

A. Appointment of the Rockport Canada Plan Administrator

Rockport Canada shall designate a Person or Entity to serve as the Rockport Canada Plan Administrator pursuant to the Rockport Canada Plan Administrator Agreement and the Combined Plan and Disclosure Statement, until the resignation or discharge and the appointment of a successor Rockport Canada Plan Administrator in accordance with the Rockport Canada Plan Administrator Agreement and the Combined Plan and Disclosure Statement. The Rockport Canada Plan Administrator shall be identified by Rockport Canada in the Plan Supplement. Rockport Canada shall file a notice on a date that is not less than ten calendar days prior to the Confirmation Hearing designating the Person who it has selected as the Rockport Canada Plan Administrator. The appointment of the Rockport Canada Plan Administrator shall be approved in the Confirmation Order and such appointment shall be as of the Effective Date. The Rockport Canada Plan Administrator shall have and perform all of the duties, responsibilities, rights and obligations set forth in the Combined Plan and Disclosure Statement and the Rockport Canada Plan Administrator Agreement, as applicable.

B. The Rockport Canada Plan Administrator Agreement

Prior to or on the Effective Date, Rockport Canada shall execute a Rockport Canada Plan Administrator Agreement in substantially the same form as set forth in the Plan Supplement. Any nonmaterial modifications to the Rockport Canada Plan Administrator Agreement made by Rockport Canada prior to the Effective Date will be ratified. The Rockport Canada Plan Administrator Agreement will contain provisions permitting the amendment or modification of the Rockport Canada Plan Administrator Agreement necessary to implement the provisions of the Combined Plan and Disclosures Statement.

C. Vesting of the Rockport Canada Litigation Claims and Rockport Canada Litigation Proceeds

Under Section 1141(b) of the Bankruptcy Code, the Rockport Canada Litigation Claims shall be assigned, transferred and vest in Rockport Canada and any Rockport Canada Litigation Proceeds shall be assigned, transferred and vest in the Rockport Canada Fund for the benefit of Holders of Allowed Claims against Rockport Canada free and clear of all Claims and Liens.

D. Rights, Powers and Duties of Rockport Canada and the Rockport Canada Plan Administrator

Rockport Canada shall retain and have all the rights, powers and duties necessary to carry out its responsibilities under the Combined Plan and Disclosure Statement. Such rights, powers and duties, which shall be exercisable by the Rockport Canada Plan Administrator on behalf of Rockport Canada and its Estate pursuant to the Combined Plan and Disclosure Statement and the Rockport Canada Plan Administrator Agreement, shall include, among others, (i) receiving and administering the Rockport Canada Fund and taking all steps and executing all instruments and documents necessary to effectuate the Plan; (ii) resolving all Disputed Claims and any Claim objections with respect to Rockport Canada pending as of the Effective Date, including the power to object to Claims against Rockport Canada, and to subordinate and recharacterize Claims against Rockport Canada by objection, motion, or adversary proceeding; (iii) settling, without further order of the Bankruptcy Court, all Claims and any Claim objections with respect to Rockport Canada pending as of the Effective Date; (iv) seeking estimation of contingent or unliquidated Claims, under Section 502(c) of the Bankruptcy Code; (v) calculating and making Distributions to Holders of Allowed Claims against Rockport Canada as provided for in the Combined Plan and Disclosure Statement and the Rockport Canada Plan Administrator Agreement; (vi) paying any and all Allowed Rockport Canada Professional Fee Claims incurred after the Closing Date and any and all unpaid postpetition claims of the Information Officer and its professionals; (vii) investigating, prosecuting, compromising, or settling, in accordance with the specific terms of the Rockport Canada Plan Administrator Agreement and without further order of the Bankruptcy Court, the Rockport Canada Litigation Claims; (viii) making decisions regarding the retention, engagement, payment and replacement of professionals, employees, and consultants retained to assist the Rockport Canada Plan Administrator in administering the Plan with respect to Rockport Canada; (ix) undertaking administrative functions of Rockport Canada, including payment of Statutory Fees incurred post-Effective Date with respect to Rockport Canada and the ultimate closing of the Chapter 11 Case of Rockport Canada; (x) opening and maintain bank and other deposits accounts, escrows, reserves, and other accounts, and (xi) taking such other action as may be vested in or assumed by Rockport Canada consistent with this Combined Plan and Disclosure Statement, the Rockport Canada Plan Administrator Agreement, and any applicable Orders of the Bankruptcy Court, or as may be necessary and proper to carry out the provisions of this Combined Plan and Disclosure Statement. Notwithstanding anything herein to the contrary, the Prepetition Noteholders shall retain the ability to object to any claims filed against the U.S. Debtors that are to be paid from the Pre-Effective Date SAP Claims Reserve.

Except as expressly set forth in this Combined Plan and Disclosure Statement and in the Rockport Canada Plan Administrator Agreement, the Rockport Canada Plan Administrator shall have absolute discretion to pursue or not to pursue any Rockport Canada Litigation Claims as he/she/it determines is in the best interests of the Holders of Allowed Claims against Rockport Canada, and shall be indemnified to the fullest extent permitted under applicable law by Rockport Canada for the outcome of his, her, or its decisions found by a final judgment by a court of competent jurisdiction (not subject to appeal) to have resulted primarily and directly from fraud, gross negligence, willful misconduct, bad faith or self-dealing. The Rockport Canada Plan Administrator shall have authority, power, and right to assert, prosecute, and/or settle the Rockport Canada Litigation Claims on behalf of Rockport Canada, including, making a claim under Insurance Policies based upon its powers as a bankruptcy-appointed representative of the Rockport Canada's Estate with the same or similar abilities possessed by insolvency trustees, receivers, examiners, conservators, liquidators, rehabilitators, or similar officials. The Rockport Canada Litigation Claims will vest in Rockport Canada; however, there can be no assurance as to the outcome of such Rockport Canada Litigation Claims or the dollar amount of any recovery that will be obtained by the Rockport Canada Plan Administrator.

The Debtors retained Deloitte to prepare federal, state and local tax returns. The Rockport Canada Plan Administrator will make best efforts to file federal, state, and local tax returns for Rockport Canada whether through its retention of Deloitte or another tax service provider. Rockport Canada shall comply with all withholding and reporting requirements imposed by any federal, state, provincial or local taxing authority, and all Distributions made by Rockport Canada shall be subject to any such withholding and reporting requirements. The Rockport Canada Plan Administrator shall be authorized to take any and all actions that may be necessary or appropriate to comply with such withholding and reporting requirements including, without limitation, requiring that, as a condition to the receipt of a Distribution, the Holder of an Allowed Claim complete the appropriate IRS Form W-8 or IRS Form W-9, as applicable to each Holder. Notwithstanding any other provision of this Combined Plan and Disclosure Statement, (a) each Holder of an Allowed Claim that is to receive a Distribution from Rockport Canada shall have the sole and exclusive responsibility for the satisfaction and payment of any tax obligations imposed on such Holder by any Governmental Unit, including income and other tax obligations, on account of such Distribution, and (b) no Distribution shall be made to or on behalf of such Holder under this Combined Plan and Disclosure Statement unless and until such Holder has made arrangements satisfactory to Rockport Canada to allow it to comply with its tax withholding and reporting requirements. Any property to be distributed by Rockport Canada shall, pending the implementation of such arrangements, be treated as an undeliverable Distribution to be held by the Rockport Canada Plan Administrator, as the case may be, until such time as the Rockport Canada Plan Administrator is satisfied with the Holder's arrangements for any withholding tax obligations.

E. Compensation of the Rockport Canada Plan Administrator

The Rockport Canada Plan Administrator shall be compensated solely from the Rockport Canada Fund pursuant to the terms of the Rockport Canada Plan Administrator Agreement. Rockport Canada Plan Administrator Professionals shall be entitled to reasonable compensation for services rendered and reimbursement of expenses incurred from the Rockport Canada Fund. The payment of the fees and expenses of the Rockport Canada Plan Administrator

and the Rockport Canada Plan Administrator Professionals shall be made in the ordinary course of business and shall not be subject to the approval of the Bankruptcy Court; *provided*, that any disputes related to such fees and expenses shall be brought before the Bankruptcy Court. Notwithstanding anything contrary herein, Rockport Canada Plan Administrator and its Professionals shall not be compensated by Liquidating Trust Assets.

F. Limitation of Liability of the Rockport Canada Plan Administrator

Rockport Canada shall indemnify the Rockport Canada Plan Administrator and its professionals against any losses, liabilities, expenses (including attorneys' fees and disbursements), damages, taxes, suits, or claims that the Rockport Canada Plan Administrator or its professionals may incur or sustain by reason of being or having been the Rockport Canada Plan Administrator or professionals of the Rockport Canada Plan Administrator for performing any functions incidental to such service; *provided, however*, the foregoing shall not relieve the Rockport Canada Plan Administrator or its professionals from liability for bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud, or self-dealing, or, in the case of an attorney professional and, as required under Rule 1.8(h)(1) of the Delaware Lawyers' Rules of Professional Conduct, malpractice.

X. ADDITIONAL MEANS FOR IMPLEMENTATION

A. Substantive Consolidation of the U.S. Debtors

1. The Basis for Substantive Consolidation

Substantive consolidation of the U.S. Debtors and their Estates is an important element of the Debtors' successful implementation of the Plan. The U.S. Debtors' proposed substantive consolidation structure is supported by the applicable legal standards, practical considerations, and available information regarding the U.S. Debtors' prepetition financial affairs.

Substantive consolidation is an equitable remedy that a bankruptcy court may apply in the cases of affiliated debtors, among other instances. When debtors are substantively consolidated, the assets and liabilities of such debtors are pooled and essentially treated as the assets and liabilities of a single debtor. The United States Court of Appeals for the Third Circuit (the "**Third Circuit Court of Appeals**"), the circuit in which the Chapter 11 Cases are pending, articulated a test in *In re Owens Corning*, 419 F.3d 195 (3d Cir. 2005), for determining whether substantive consolidation is warranted. In setting forth the test, the Third Circuit Court of Appeals looked to five principles behind substantive consolidation: (i) limiting the cross-creep of liability by respecting entity separateness is a fundamental ground rule; (ii) the harms substantive consolidation addresses are nearly always those caused by debtors; (iii) mere benefit of administration of the case is hardly a harm calling for substantive consolidation into play; (iv) substantive consolidation should be a rare remedy and one of last resort after considering and rejecting other remedies; and (v) while substantive consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively. *Id.* at 211. Based on these principles, the Third Circuit Court of Appeals held that, in the Third Circuit, the party calling for substantive consolidation must prove: (i) that prepetition, the entities

to be consolidated disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one legal entity or (ii) that postpetition, their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors. *Id.* Substantive consolidation is appropriate if either factor is justified. *Id.*

The U.S. Debtors believe that the substantive consolidation provided for under the Plan is appropriate under the standards set forth by the Third Circuit Court of Appeals in the *Owens Corning* case, for several reasons. First, the U.S. Debtors believe that, prepetition, many of their creditors effectively treated the U.S. Debtors as a single entity. Second, the U.S. Debtors believe that while they did observe appropriate corporate formalities and separateness during the prepetition period, as a practical matter the U.S. Debtors' business was operated as an integrated enterprise. Third, the Plan provides substantial benefits to creditors, available only to the extent that substantive consolidation provided for in the Plan occurs. Fourth, to the extent that individual U.S. Debtors have little or no assets, and the recovery to the creditors of such U.S. Debtors is comprised largely of proceeds of the Sale, individual restructurings of these U.S. Debtors would not be a viable option. Accordingly, the U.S. Debtors believe that the Plan's partial substantive consolidation structure is beneficial to creditors.

The Plan does not provide for substantive consolidation of Rockport Canada and its estates with the U.S. Debtors. Unlike the U.S. Debtors, Rockport Canada is not an obligor or guarantor for the Prepetition Notes pursuant to the Prepetition Note Purchase Agreement. As a result, Holders of Prepetition Note Claims are not entitled to Distributions on account of Assets of Rockport Canada. Accordingly, the Plan shall constitute a separate Plan for Rockport Canada. In addition, as set forth herein, the Rockport Canada Fund will be established for the benefit of Holders of Claims against Rockport Canada.

2. Impracticality of Separate Entity Plans

Substantive consolidation will avoid the onerous costs and substantial delay that would result from attempting to confirm individual plans of liquidation for each of the U.S. Debtors, which separate plans of liquidation will be prone to inaccuracies that may prejudice certain creditors. Separate plans for each entity will inevitably rest on certain assumptions; for instance, as the U.S. Debtors were not managed operationally on an individual entity basis, it is difficult to allocate value and operational costs and benefits on a legal entity basis. In addition, many financial obligations of the U.S. Debtors are based on the U.S. Debtors as a whole or other combinations of entities that make allocation to legal entities difficult, fact-intensive and subject to challenge. Seeking to overcome the inherent limitations of separate plans of liquidation for each of the U.S. Debtors would entail the U.S. Debtors' dedication of enormous resources and significant time to the project – and it cannot be assured, even after such an endeavor, that such plan of liquidation would be free of such assumptions, or free of potential prejudice to certain creditors resulting from such assumptions.

The assumptions that the U.S. Debtors would necessarily adopt to confirm separate plans of liquidation would likely be the focus of protracted and lengthy litigation. The attendant delay from such litigation could threaten the U.S. Debtors' consummation of the plans of liquidation in a timely manner. Even if the Estates were exposed to such a risk and cost, there would still be no assurances that the information contained therein would be accurate on an

entity-by-entity basis (if even available at such time). The U.S. Debtors believe that substantive consolidation is warranted in these Chapter 11 Cases because of the connection of assets and liabilities of the U.S. Debtors.

3. Basis for Substantive Consolidation

Given the significant roadblocks to the proposal of separate, confirmable plans of liquidation, the U.S. Debtors reviewed their organizational, operational, and financial history in order to determine the substantive consolidation structure that best meets the application of the existing case law governing substantive consolidation. This Plan is a result of that lengthy and wide-ranging analysis, which revealed that significant creditors conducted business (including extending credit) to the U.S. Debtors as consolidated entities, while other creditors extended credit to a single entity.

The factors supporting substantive consolidation are satisfied. The *Owens Corning* court specifically found that entanglement among affiliated debtors provides a basis for substantive consolidation, where, as here, creditors disregarded entity separateness and separating debtor entities would harm creditors.

4. The Effect of Substantive Consolidation

Substantive consolidation of the estates of multiple debtors in a bankruptcy case effectively combines the assets and liabilities of the multiple debtors for certain purposes. The effect of substantive consolidation is the pooling of the assets of, and claims against, consolidated debtors, satisfying liabilities from a common fund and combining the creditors of consolidated debtors without duplication for purposes of voting on the reorganization plan.

On and after the Effective Date, each of the U.S. Debtors will be deemed consolidated for the following purposes under the Plan:

- all assets and liabilities of each of the U.S. Debtors will be treated as though they were merged with the assets and liabilities of each other U.S. Debtor,
- no Distributions will be made under the Plan on account of any Claim held by a U.S. Debtor against any other U.S. Debtor,
- except as otherwise set forth in the Plan, no Distributions will be made under the Plan on account of any Equity Interest held by a U.S. Debtor in any other U.S. Debtor,
- all guaranties of any U.S. Debtor of the obligations of any other U.S. Debtor will be eliminated so that any Claim against any U.S. Debtor and any guaranty thereof executed by any other U.S. Debtor and any joint or several liability of any of the U.S. Debtors will be one obligation of the U.S. Debtors, and

- each and every Claim filed or to be filed in the Chapter 11 Cases against any of the U.S. Debtors will be deemed filed against all of the U.S. Debtors, and will be one Claim against, and obligation of, the U.S. Debtors.

The Plan shall serve as a motion of the U.S. Debtors seeking entry of a Bankruptcy Court order approving the substantive consolidation of the U.S. Debtors' Estates provided for in the Plan as well as any additional consolidation that may be proposed by the U.S. Debtors in connection with confirmation and consummation of the Plan. The U.S. Debtors reserve the right to file appropriate alternative pleadings in support of the proposed substantive consolidation in connection with the Plan Confirmation Hearing. Unless an objection to consolidation is made in writing by any creditor affected by the Plan on or before 4:00 p.m. (prevailing Eastern Time), on the date fixed by the Bankruptcy Court for objections to confirmation of the Plan, the substantive consolidation proposed by the Plan may be approved by the Bankruptcy Court at the Plan Confirmation Hearing.

On or about the Effective Date, the Debtors and/or the Liquidating Trustee, as applicable, intend to close all of the Chapter 11 Cases, with the exception of the Chapter 11 Cases for Rockport and Rockport Canada, by separate motion in accordance with Local Rule 3017-2. Such relief shall be without prejudice to the rights of any party in interest to seek to reopen any of the Chapter 11 Cases under Section 350(b) of the Bankruptcy Code. The Chapter 11 Cases of Rockport and Rockport Canada shall be separately administered such that (i) all motions, contested matters, adversary proceedings and other matters relating to the U.S. Debtors shall be administered under Rockport's Chapter 11 Case; and (ii) all motions, contested matters, adversary proceedings and other matters relating to Rockport Canada shall be administered under Rockport Canada's Chapter 11 Case. All motions, contested matters, adversary proceedings or other matters pending on the Effective Date and relating to a U.S. Debtor whose Chapter 11 Case has been closed shall be administered in the open Chapter 11 Case for Rockport without prejudice to the rights of any party in interest. The Chapter 11 Cases for Rockport and Rockport Canada shall remain open until such time as the Liquidating Trustee (with respect to Rockport) or the Rockport Canada Plan Administrator (for Rockport Canada) obtain a final decree closing their respective Chapter 11 Case.

B. Preservation of Right to Conduct Investigations

The preservation for the Liquidating Trust of any and all rights to conduct investigations under Bankruptcy Rule 2004 is necessary and relevant to the Liquidating Trust and with respect to the prosecution of U.S. Litigation Claims and the administration of the Liquidating Trust Assets. Accordingly, any and all rights to conduct investigations under Bankruptcy Rule 2004 held by the U.S. Debtors prior to the Effective Date shall vest with the Liquidating Trust and shall continue until dissolution of the Liquidating Trust.

C. Prosecution and Resolution of U.S. Litigation Claims

From and after the Effective Date, the Liquidating Trust shall have the sole responsibility, standing (including derivative standing), and authority to prosecute and settle all U.S. Litigation Claims under this Combined Plan and Disclosure Statement and the Plan

Confirmation Order. From and after the Effective Date, the Liquidating Trust shall have exclusive rights, powers, and interests of the U.S. Debtors' Estates, subject to the provisions of the Plan Documents and the Sale Documents, to pursue, settle, or abandon such U.S. Litigation Claims as the sole representatives of the U.S. Debtors' Estates under Section 1123(b)(3) of the Bankruptcy Code. The Liquidating Trustee shall have the exclusive right, authority, and discretion to determine to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigation to judgment any U.S. Litigation Claims, and to decline to do any of the foregoing without the consent or approval of any third party or further notice to or action, order, or approval of the Court; provided, however, that notwithstanding the foregoing any settlement of the Expeditors Litigation Claims shall require the consent and approval of the Prepetition Noteholders. Any and all U.S. Litigation Claims that are not expressly released or waived under this Combined Plan and Disclosure Statement are reserved and preserved and vest in the Liquidating Trust in accordance with this Combined Plan and Disclosure Statement. No Person may rely on the absence of a specific reference in this Combined Plan and Disclosure Statement or the Plan Supplements to any U.S. Litigation Claim against it as any indication that the U.S. Debtors or Liquidating Trustee will not investigate or pursue any and all available U.S. Litigation Claims against such Person. Such U.S. Litigation Claims may include, but are not limited to, claims grounded in tort, claims for negligence, claims based upon breach of contract, and/or claims for professional malpractice to the fullest extent permitted by law. The Liquidating Trustee expressly reserves all U.S. Litigation Claims, except for U.S. Litigation Claims against any Person that are expressly released or waived under this Combined Plan and Disclosure Statement or have otherwise been released under any agreement or Final Order, and, therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such U.S. Litigation Claims upon, after, or as a consequence of Confirmation or substantial consummation of this Combined Plan and Disclosure Statement.

D. Prosecution and Resolution of Rockport Canada Litigation Claims

From and after the Effective Date, the Rockport Canada Plan Administrator on behalf of Rockport Canada shall have the sole responsibility and authority to prosecute and settle all Rockport Canada Litigation Claims under this Combined Plan and Disclosure Statement and the Plan Confirmation Order. From and after the Effective Date, the Rockport Canada Plan Administrator shall have exclusive rights, powers, and interests of Rockport Canada's Estates, subject to the provisions of the Plan Documents and the Sale Documents, to pursue, settle, or abandon such Rockport Canada Litigation Claims as the sole representatives of the Rockport Canada's Estates under Section 1123(b)(3) of the Bankruptcy Code. Any and all Rockport Canada Litigation Claims that are not expressly released or waived under this Combined Plan and Disclosure Statement are reserved and preserved and vest in Rockport Canada in accordance with this Combined Plan and Disclosure Statement. No Person may rely on the absence of a specific reference in this Combined Plan and Disclosure Statement or the Plan Supplements to any Rockport Canada Litigation Claim against it as any indication that the Rockport Canada or the Rockport Canada Plan Administrator will not investigate or pursue any and all available Rockport Canada Litigation Claims against such Person. Such Rockport Canada Litigation Claims may include, but are not limited to, claims grounded in tort, claims for negligence, claims based upon breach of contract, and/or claims for professional malpractice to the fullest extent permitted by law. Rockport Canada expressly reserves all Rockport Canada Litigation Claims,

except for Rockport Canada Litigation Claims against any Person that are expressly released or waived under this Combined Plan and Disclosure Statement or have otherwise been released under any agreement or Final Order, and, therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Rockport Canada Litigation Claims upon, after, or as a consequence of Confirmation or substantial consummation of this Combined Plan and Disclosure Statement.

Unless otherwise provided in this Plan, for the avoidance of doubt, the Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, expressly reserve the right to pursue all claims and Causes of Action other than Causes of Action transferred to the Purchaser under the terms of the Asset Purchase Agreement.

E. Effectuating Documents and Further Transactions

Upon entry of the Plan Confirmation Order, the Debtors, the Liquidating Trustee and the Rockport Canada Plan Administrator shall be authorized to execute, deliver, file, or record such contracts, instruments, releases, consents, certificates, notices, resolutions, programs, and other agreements, instruments, and/or documents, and take such acts and actions as may be reasonably necessary or appropriate to effectuate, implement, substantially consummate, and/or further evidence the terms and conditions of this Combined Plan and Disclosure Statement and any transactions described in or contemplated by this Combined Plan and Disclosure Statement. The Debtors, Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, may, and all Holders of Allowed Claims or Allowed Equity Interests receiving Distributions under this Combined Plan and Disclosure Statement or as Beneficiaries of the Liquidating Trust, at the request or direction of the Debtors or Liquidating Trustee, as applicable, shall, from time to time, prepare, execute, and deliver any agreements or documents, and take any other actions as may be necessary or advisable to effectuate the provisions and intent of this Combined Plan and Disclosure Statement.

F. Authority to Act

Prior to, on, or after the Effective Date (as appropriate), all matters expressly provided for under this Combined Plan and Disclosure Statement that would otherwise require approval of the members, managers, or other owners, direct or indirect, of the Debtors shall be deemed to have occurred and shall be in effect prior to, on, or after the Effective Date (as applicable) under applicable law, without any further vote, consent, approval, authorization, or other action by such members, managers, or other owners of the Debtors or notice to, order of, or hearing before, the Bankruptcy Court.

G. Cancellation of Documents

On the Effective Date, except to the extent otherwise provided in this Combined Plan and Disclosure Statement, any and all notes, instruments, debentures, certificates and other documents evidencing Claims against and Equity Interests in the Debtors shall be deemed automatically extinguished, canceled, and of no further effect with the Debtors having no continuing obligations thereunder, and shall be deemed rejected and terminated; *provided*, that

notwithstanding Confirmation or the occurrence of the Effective Date, the Prepetition Note Purchase Agreement shall continue in effect solely for purposes of enabling Prepetition Noteholders to receive Distributions under the Plan on account of the Allowed Prepetition Note Claims as provided herein; *provided, further*, that the preceding proviso shall not affect the discharge of Allowed Prepetition Note Claims pursuant to the Bankruptcy Code, the Confirmation Order, or the Plan or result in any expense or liability to the Debtors or to the Liquidating Trust, except to the extent set forth in or provided for under this Combined Plan and Disclosure Statement; *provided, further*, that nothing in this section shall effect a cancellation of any Warrants.

H. Termination of Debtors' Plans

Upon the entry of an order of the Bankruptcy Court confirming this Combined Plan and Disclosure Statement, all Employee Benefit Plans not assumed by the Purchaser under the Sale Order shall automatically terminate.

I. Corporate Action; Effectuating Documents; Further Transactions

On the Effective Date, all matters and actions provided for under this Combined Plan and Disclosure Statement that would otherwise require approval of the directors, officers, members, or managers of the Debtors shall be deemed to have been authorized and effective in all respects as provided herein and shall be taken without any requirement for further action by the directors, officers, members, and managers of the Debtors. The Debtors, the Liquidating Trustee and the Rockport Canada Plan Administrator are authorized to execute, deliver, file, or record such contracts, instruments, releases, and other agreements or documents and to take such actions as may be necessary or appropriate to effectuate and further evidence the terms and conditions of this Combined Plan and Disclosure Statement.

J. Release of Liens

Except as otherwise provided in this Combined Plan and Disclosure Statement, or in any contract, instrument, release, or other agreement or document created under this Combined Plan and Disclosure Statement, on the Effective Date, all mortgages, deeds of trust, Liens, pledges, or other interests in or against any property of the Estates shall be deemed fully released without any further action of any party, including, but not limited to, further Order of the Bankruptcy Court or filing updated schedules or statements typically filed under the Uniform Commercial Code or other applicable law.

K. Exemption from Securities Laws

The offering, issuance and distribution of (a) beneficial interests in the Liquidating Trust under this Combined Plan and Disclosure Statement, (b) the Warrants under this Combined Plan and Disclosure Statement, and (c) all Warrant Units or other securities issued upon exercise of the Warrants in accordance with the terms of the Warrant Agreement, in each such case, shall be exempt from, among other things, the registration and prospectus delivery requirements under the Securities Act or any similar federal, state, or local laws in reliance upon Section 1145 of the Bankruptcy Code to the maximum extent permitted and applicable.

In addition, any and all (x) beneficial interests in the Liquidating Trust issued or distributed under this Combined Plan and Disclosure Statement, (y) Warrants issued or distributed under this Combined Plan and Disclosure Statement, and (z) Warrant Units or other securities issued upon exercise of the Warrants in accordance with the terms of the Warrant Agreement, in each such case, will be freely tradable by the recipients thereof, subject to: (A) the provisions of Bankruptcy Code Section 1145(b)(1) relating to the definition of an underwriter in Section 2(a)(11) of the Securities Act, and compliance with any rules and regulations of the United States Securities and Exchange Commission, if any, applicable at the time of any future transfer of such securities or instruments; (B) in the case of the beneficial interests in the Liquidating Trust, the provisions of the Liquidating Trust Agreement; (C) in the case of the Warrants, the provisions of the Warrant Agreement; and (D) in the case of the Warrant Units and any other securities issued upon exercise of the Warrants in accordance with the terms of the Warrant Agreement, the provisions of the CB Marathon Holdings LLC Agreement.

L. Exemption from Certain Taxes and Fees

Under Section 1146(a) of the Bankruptcy Code, the making or delivery of any instrument or transfer from a Debtor to the Liquidating Trust, or to any other Person under this Combined Plan and Disclosure Statement, shall not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax or other similar tax or governmental assessment, and the Plan Confirmation Order shall direct the appropriate state or local governmental officials or agents to forego the collection of any such tax or governmental assessment and to accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment.

M. Privileges as to Certain Causes of Action

Effective as of the Effective Date, all Privileges of the Debtors relating to the Liquidating Trust Assets shall be deemed transferred, assigned, and delivered to the Liquidating Trust, without waiver or release, and shall vest with the Liquidating Trust. The Liquidating Trustee shall hold and be the beneficiary of all such Privileges and is entitled to assert such Privileges. No such Privilege shall be waived by disclosures to the Liquidating Trustee of the Debtors' documents, information, or communications subject to attorney-client privileges, work product protections or other immunities (including those related to common interest or joint defense with third parties), or protections from disclosure held by the Debtors. The Debtors' Privileges relating to the Liquidating Trust Assets will remain subject to the rights of third parties under applicable law, including any rights arising from the common interest doctrine, the joint defense doctrine, joint attorney-client representation, or any agreement. Nothing contained herein or in the Plan Confirmation Order, nor any Professional's compliance herewith and therewith, shall constitute a breach of any Privileges of the Debtors.

N. Preservation of Causes of Action

Unless any Causes of Action against an entity are expressly waived, relinquished, exculpated, released, compromised, or settled in this Combined Plan and Disclosure Statement, or the Plan Confirmation Order, in accordance with Section 1123(b) of the Bankruptcy Code, the

Debtors and the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, shall retain and may enforce all rights to commence and pursue any and all Causes of Action, whether arising before or after the Petition Date, and the Debtors' rights to commence, prosecute or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date. **No entity may rely on the absence of a specific reference in this Combined Plan and Disclosure Statement, the Plan Supplement, or the Plan Confirmation Order to any Cause of Action against them as any indication that the Debtors the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, will not pursue any and all available Causes of Action against them. The Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, expressly reserve all rights to prosecute any and all Causes of Action against any entity, except as otherwise expressly provided herein.** Unless any Causes of Action against an entity are expressly waived, relinquished, exculpated, released, compromised, or settled in this Combined Plan and Disclosure Statement, the Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, expressly reserve all Causes of Action, for later adjudication and, therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Causes of Action upon, after, or as a consequence of the confirmation of this Combined Plan and Disclosure Statement.

In accordance with Section 1123(b)(3) of the Bankruptcy Code, any Causes of Action preserved pursuant to this Section X.N that any of the U.S. Debtors may hold against any entity shall be transferred to the Liquidating Trust upon the Effective Date and any Causes of Action preserved pursuant to this Section X.N that Rockport Canada may hold against an entity shall vest in Rockport Canada. The Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, through its authorized agents or representatives, shall retain and may exclusively enforce any and all such Causes of Action. The Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, shall have the exclusive right, authority and discretion to determine and to initiate, file, prosecute, enforce, abandon, settle, compromise, release, withdraw, or litigate to judgment any such Causes of Action, or to decline to do any of the foregoing, without the consent or approval of any third party or any further notice to or action, order, or approval of the Bankruptcy Court, except for as otherwise expressly set forth in this Combined Plan and Disclosure Statement. For the avoidance of doubt, the Liquidating Trustee may not settle the Expeditors Litigation Claims without the approval of the Prepetition Noteholders.

For the avoidance of doubt, the Expeditors Litigation Claims and the Attune Litigation Claims are preserved Causes of Action pursuant to the Plan and shall be transferred to the Liquidating Trust upon the Effective Date and shall constitute U.S. Litigation Claims.

O. Insurance Policies

Nothing in this Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement, alters the rights and obligations of the Debtors (and their Estates) and the Debtors' insurers (and third-party claims administrators) under the Insurance Policies or modifies the coverage or benefits provided thereunder or the terms and conditions thereof or diminishes or impairs the

enforceability of the Insurance Policies, including any replacement or tail policies or coverages following the Effective Date. All of the U.S. Debtors' Estates' benefits, rights, interests and proceeds under any Insurance Policy to which the U.S. Debtors and/or the U.S. Debtors' Estates may be insureds or beneficiaries shall vest with the Liquidating Trust for the benefit of the Beneficiaries of the Liquidating Trust and all of the beneficiaries of such policies. All of Rockport Canada's benefits, rights, interests and proceeds under any Insurance Policy to which Rockport Canada and/or Rockport Canada's Estate may be insureds or beneficiaries shall vest with Rockport Canada for the benefit of Holders of Allowed Claims against Rockport Canada.

1. Chubb Insurance Policies

(x) Except as set forth in paragraphs (y) and (z) of this section, notwithstanding anything in this Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement, the Rockport Canada Plan Administrator Agreement, any other document related to any of the foregoing or any other order of the Bankruptcy Court (including, without limitation, any other provision that purports to be preemptory or supervening, grants an injunction or release, or requires a party to opt out of any releases): (i) nothing alters, modifies, amends, affects, impairs or prejudices the rights and obligations of the Debtors (and their Estates) and the Chubb Companies under the Chubb Insurance Policies, (ii) nothing modifies the coverage or benefits provided under any Chubb Insurance Policies or the terms and conditions thereof or diminishes or impairs the enforceability of the Chubb Insurance Policies, including any replacement or tail policies or coverages except that, on and after the Effective Date, the rights of the U.S. Debtors, if any, shall be transferred to the Liquidating Trust and rights of Rockport Canada, if any, shall be transferred to the Rockport Canada Plan Administrator under the Chubb Insurance Policies, and (iii) the automatic stay of Bankruptcy Code section 362(a) and the injunctions set forth in Article XIII of the Plan, if and to the extent applicable, shall be deemed lifted without further order of the Bankruptcy Court, solely to permit: (A) claimants with valid workers' compensation claims or with valid direct action claims against a Chubb Company under applicable non-bankruptcy law to proceed with their claims; and (B) the Chubb Companies to administer, handle, defend, settle, and/or pay, in the ordinary course of business and without further order of this Bankruptcy Court, (1) workers' compensation claims, (2) claims where a claimant asserts a direct claim against any Chubb Company under applicable non-bankruptcy law, or an order has been entered by this Bankruptcy Court granting a claimant relief from the automatic stay or the injunctions set forth in Article XIII of the Plan to proceed with its claim, and (3) all costs in relation to each of the foregoing. For the avoidance of doubt, except as set forth in paragraphs (y) and (z) of this section, all rights and obligations under the Chubb Insurance Policies shall be determined under the applicable Chubb Insurance Policies and applicable non-bankruptcy law.

(y) To the extent that the Chubb Companies believe a Claim against the Debtors has become liquidated and due and owing (regardless of whether such Claims arise before or after the Effective Date and notwithstanding any release provisions in the Plan or Confirmation Order) under the Chubb Insurance Policies, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, and the Chubb Companies each reserve their rights with respect to whether such Claim shall be treated as an Administrative Expense Claim or a General Unsecured Claim in accordance with the Plan Confirmation Order and the Combined

Plan and Disclosure Statement and should the Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, and the Chubb Companies not agree upon such treatment, the dispute shall be submitted to the Bankruptcy Court for determination thereon; provided, however, the Chubb Companies shall not be required or need to file a proof of Claim or Administrative Expense Claim or object to any cure amount or Cure Notice; provided further, however, that the Liquidating Trustee and/or Rockport Canada Plan Administrator, as applicable, agrees to provide the Chubb Companies' counsel of record in the Chapter 11 Cases with sixty (60) days' notice of its intention to make a distribution and/or close the Chapter 11 Case of Rockport or Rockport Canada and the Chubb Companies shall advise counsel to the Liquidating Trust or counsel to the Rockport Canada Plan Administrator, as applicable, within thirty (30) days thereof of any amounts that are or are estimated to become due and owing in the future pursuant to the Chubb Insurance Policies; provided further however, that neither the Liquidating Trustee nor the Rockport Canada Plan Administrator, as applicable, shall be required to provide the Chubb Companies with advance notice of any distributions that are anticipated to be made on or around the Effective Date in accordance with the terms of the Plan, including, but not limited to, any distribution to the Holders of Allowed Prepetition Secured Noteholder Claims; and provided further, that neither the Liquidating Trustee nor the Rockport Canada Plan Administrator is required to establish any reserve as of the Effective Date on account of any claims that may be asserted by the Chubb Companies pursuant to the Chubb Insurance Policies.

(z)

(I) The Debtors have represented to the Chubb Companies that all of their records with respect to claims covered by the Chubb Insurance Policies are in the possession, custody or control of the Purchaser and/or the Debtors' third party administrator and the Debtors and the Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, agree that within five (5) calendar days of receiving a written request from the Chubb Companies requesting access to such materials, the Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, will provide any consents reasonably requested by the Chubb Companies in furtherance of the Chubb Companies' efforts to obtain records and/or claims files in the possession, custody or control of the Purchaser and/or the Debtors' third party administrator.

(II) Without in any way altering Article X.O.(z)(I), the Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, shall reasonably cooperate with the Chubb Companies in accordance with the terms of the Chubb Insurance Policies, to the extent practicable, through the date that the Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, is discharged of their respective duties in accordance with the terms of the Plan, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement; provided, however, that to the extent such cooperation requires the Liquidating Trustee or Rockport Canada Plan Administrator to incur costs, the Chubb Companies shall be solely responsible for bearing such costs; provided further, however, that the Liquidating Trustee and/or the Rockport Canada Plan

Administrator must obtain the Chubb Companies' written consent prior to incurring such costs, and no costs shall be incurred by the Liquidating Trustee and/or the Rockport Canada Plan Administrator unless and until the Chubb Companies agree in writing to such particular costs being incurred.

P. Filing of Monthly and Quarterly Reports and Payment of Statutory Fees

The Filing of the final monthly operating report (for the month in which the Effective Date occurs) and all subsequent quarterly Liquidating Trust or Rockport Canada Plan Administrator reports shall be the responsibility of the Liquidating Trustee (with regards to the Chapter 11 case of Rockport) or the Rockport Canada Plan Administrator (with regards to the Chapter 11 case of Rockport Canada), as applicable. All Statutory Fees shall be payable as set forth in Section V.C. hereof and such obligation shall continue until such time as the Chapter 11 Cases of Rockport and Rockport Canada are closed, dismissed, or converted. All monthly operating reports covering pre- Effective Date periods shall be prepared and filed by the Debtors or Liquidating Trustee, as applicable.

Q. Closing of the Chapter 11 Cases and the Canadian Proceeding

The Debtors intend to file a motion seeking separate administration of the Chapter 11 Cases of Rockport and Rockport Canada upon the Effective Date or as soon as the Court can rule on the motion thereafter. The Liquidating Trustee (with respect to Rockport) and the Rockport Canada Plan Administrator (with respect to Rockport Canada) may close their respective Chapter 11 Cases only after they have been "fully administered" pursuant to the Bankruptcy Code, Bankruptcy Rules and Local Rules.

**XI. PROVISIONS GOVERNING DISTRIBUTIONS UNDER
THIS COMBINED PLAN AND DISCLOSURE STATEMENT**

A. Distribution Record Date; Transferability

With respect to Distributions to Beneficiaries of the Liquidating Trust, the Liquidating Trustee shall set such Distribution Record Dates as may be necessary in accordance with the terms of the Liquidating Trust Agreement. To the fullest extent permitted by applicable law, the beneficial interests in the Liquidating Trust may be assigned or otherwise transferred by any Beneficiary to any Person, subject to the terms of the Liquidating Trust Agreement.

With respect to Distributions to Holders of Allowed Claims against Rockport Canada, the Rockport Canada Plan Administrator shall set such Distribution Record Dates as may be necessary in accordance with the Rockport Canada Plan Administrator Agreement.

B. Method of Payment

Unless otherwise expressly agreed, in writing, all Cash payments to be made under this Combined Plan and Disclosure Statement shall be made by check drawn on a domestic or Canadian bank or an electronic wire transfer.

C. Claims Administration Responsibilities

Except as otherwise specifically provided in the Plan, the Liquidating Trustee (solely with respect to Claims against the U.S. Debtors) and the Rockport Canada Plan Administrator (solely with respect to Claims against Rockport Canada) shall have the sole authority to, but is not required to: (1) file, withdraw or litigate to judgment objections to Claims; (2) settle or compromise any Disputed Claim without any further notice to or action, order or approval by the Court; and (3) administer and adjust the claims register to reflect any such settlements or compromises without any further notice to or action, order or approval by the Court, provided, however, that any settlement of U.S. Priority Tax Claims shall require the approval of the Prepetition Noteholders.

D. Claims Objection Deadline

The Liquidating Trustee (with respect to Claims against U.S. Debtors), the Rockport Canada Plan Administrator (with respect to Claims against Rockport Canada) and any other party in interest to the extent permitted under Section 502(a) of the Bankruptcy Code, shall File and serve any objection to any Claim no later than the Claims Objection Deadline; *provided, however*, the Claims Objection Deadline may be extended by the Bankruptcy Court from time to time upon motion and notice by the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable. The filing of such a motion shall automatically extend the Claims Objection Deadline until entry of an order on account of such motion, in accord with Local Rule 9006-2.

E. No Distribution Pending Allowance

Notwithstanding any other provision of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement, no Distribution of Cash or other property shall be made with respect to any portion of a Disputed Claim unless and until all objections to such Claim are resolved by Final Order or as otherwise permitted by this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement. For the avoidance of doubt, the Prepetition Note Claims are not Disputed Claims. The procedures with respect to resolution of Disputed Claims shall be set forth in the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement.

F. Reserve of Cash Distributions

On any date that Distributions are to be made under the terms of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement, the Liquidating Trustee (with respect to Claims against the U.S. Debtors) and the Rockport Canada Plan Administrator (with respect to Claims against Rockport Canada) shall reserve Cash or property equal to 100% of the Cash or property that would be distributed on such date on account of Disputed Claims as if each such Disputed Claim were an Allowed Claim but for the pendency of a dispute with respect thereto. Such Cash or property shall be held in trust for the benefit of the Holders of all such Disputed Claims pending determination of their entitlement thereto.

G. Distribution After Allowance

Within the later of (i) as soon as reasonably practicable after such Claim becomes an Allowed Claim and (ii) thirty (30) days after the expiration of the Claims Objection Deadline, the Liquidating Trustee (with respect to Claims against the U.S. Debtors) and the Rockport Canada Plan Administrator (with respect to Claims against Rockport Canada) shall distribute, to the extent available, all distributable Cash or other property, including any interest, dividends or proceeds thereof, to which a Holder of an Allowed Claim is then entitled; *provided*, that to the extent any Liquidating Trust Assets have not yet been collected or liquidated by the Liquidating Trustee, including any U.S. Litigation Proceeds, such Liquidating Trust Assets shall be distributed to Holders of Allowed Claims as soon as reasonably practicable following the collection and liquidation thereof.

H. Delivery of Distributions

Except as provided herein, Distributions to Holders of Allowed Claims shall be made: (i) at the addresses set forth on the respective proofs of Claim last Filed by such Holders; (ii) at the addresses set forth in any written notices of address changes delivered to the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, after the date of any related proof of Claim; or (iii) at the address reflected in the Schedules if no proof of Claim is Filed and the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, has not received a written notice of a change of address.

If the Distribution to the Holder of any Claim is returned to the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, as undeliverable, no further Distribution shall be made to such Holder unless and until the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, is notified in writing of such Holder's then current address. Undeliverable Distributions shall remain in the possession of the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, until the earlier of (i) such time as a Distribution becomes deliverable or (ii) such undeliverable Distribution becomes an Unclaimed Distribution under Section XI.H of this Combined Plan and Disclosure Statement.

Until such time as an undeliverable Distribution becomes an Unclaimed Distribution, within thirty (30) days after the end of each calendar quarter following the Effective Date, or upon such other interval as the Bankruptcy Court may order, but in no event less frequently than annually, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, shall make Distributions of all Cash and property that has become deliverable during the preceding quarter. Each such Distribution shall include the net return yielded from the investment of any undeliverable Cash, from the date such Distribution would have been due had it then been deliverable to the date that such Distribution becomes deliverable.

The Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, shall make reasonable efforts to update or correct contact information for recipients of undeliverable Distributions, *provided, however*, nothing contained in this Combined Plan and Disclosure Statement shall require the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, to locate any Holder of an Allowed Claim.

I. Unclaimed Distributions

Any Cash or other property to be distributed under this Combined Plan and Disclosure Statement shall revert to the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, if it is not claimed by the Holder within one hundred and twenty (120) days after the date of such Distribution. If such Cash or other property is not claimed on or before such date, the Distribution made to such Holder shall be deemed to be reduced to zero and such returned, undeliverable, or unclaimed Distributions shall be deemed unclaimed property under Section 347(b) of the Bankruptcy Code.

J. Set-Off

Except as otherwise provided herein, the Debtors, Liquidating Trustee and Rockport Canada Plan Administrator, as applicable, retain the right to reduce any Claim by way of setoff in accordance with the Debtors' books and records. Rights of a setoff of any Entity or Person are preserved for the purpose of asserting such rights as a defense to any Claims or Causes of Action of the Debtors, their Estates, the Liquidating Trustee or the Rockport Canada Plan Administrator and regardless of whether such Entity or Person is the Holder of an Allowed Claim.

K. Postpetition Interest

Interest shall not accrue on any Claim, and no Holder of a Claim shall be entitled to interest accruing on or after the Petition Date. No prepetition Claim shall be Allowed to the extent it is for postpetition interest or other similar charges, except to the extent permitted for Holders of Allowed secured claims under Section 506(b) of the Bankruptcy Code.

L. Distributions After Effective Date

For Disputed Claims as of the Effective Date, any Distributions made after the Effective Date to Holders of such Disputed Claims (which later become Allowed Claims after the Effective Date) shall be deemed to have been made on the Effective Date.

M. Distributions Free and Clear

Except as may be otherwise provided in this Combined Plan and Disclosure Statement, all Distributions hereunder shall be free and clear of any Liens, Claims, encumbrances, and other interests.

N. Allocation of Distributions Between Principal and Interest

To the extent that any Allowed Claim entitled to a Distribution under this Combined Plan and Disclosure Statement comprises indebtedness and accrued but unpaid interest thereon, such Distribution shall be allocated to the principal amount of the Claim first and then, to the extent the consideration exceeds the principal amount of the Claim, to accrued but unpaid interest.

O. De-Minimis Distribution and Donation

There shall be no Distribution on account of Allowed General Unsecured Claims to the extent such Distribution will result in a payment of less than \$50.00 to the Holder of such Claim, and such amount otherwise payable upon such Claim shall revert back to the Liquidating Trust or the Rockport Canada Plan Administrator, as applicable. Unless otherwise set forth in this Plan, the Liquidating Trustee or the Rockport Canada Plan Administrator, as applicable, may donate remaining Assets of the Liquidating Trust or the Rockport Canada Fund to a charitable institution if the Distribution of such Assets is too costly, too burdensome, or impracticable.

P. Prepayment

Except as otherwise provided herein or the Plan Confirmation Order, the Debtors the Liquidating Trustee, and/or the Rockport Canada Plan Administrator, as applicable, shall have the right to prepay, without penalty, all or any portion of an Allowed Claim.

XII. EXECUTORY CONTRACTS

A. Rejection of Executory Contracts

On the Effective Date, all Executory Contracts not previously assumed and/or assigned (including in connection with the Sale and under the Sale Order), not subject to a pending motion to assume and/or assign as of the Effective Date, or not rejected before the Effective Date, will be deemed rejected. The Plan Confirmation Order shall constitute an order approving such rejection as of the Effective Date.

Unless otherwise specified, each Executory Contract assumed or rejected by the Debtors shall be assumed or rejected *cum onere*, to include any and all modifications, amendments, supplements, restatements, or other agreements made directly or indirectly to any agreement, instrument, or other document that in any manner affects such Executory Contract.

B. Deadline for Filing Proofs of Claim Relating to Executory Contracts Rejected Under this Combined Plan and Disclosure Statement

If the rejection by the Debtors, under this Combined Plan and Disclosure Statement or otherwise, of an Executory Contract gives rise to a Claim for rejection damages in accordance with Section 502(g) of the Bankruptcy Code, a proof of Claim must be filed with the Claims Agent at the following address: The Rockport Company, LLC Claims Processing Center c/o Prime Clerk LLC, 850 Third Avenue, Suite 412 Brooklyn, New York 11232, by no later than thirty (30) days after the earlier of (i) the Effective Date or (ii) the date provided in any other applicable Order of the Bankruptcy Court. Any proofs of Claim with respect to a Rejection Damages Claim not filed within such time shall be forever barred from assertion against the Debtors, the Estates, the Liquidating Trust, the Liquidating Trust Assets, the Rockport Canada Plan Administrator or the Rockport Canada Fund, and their property and such Persons holding such Claims will not receive and will be barred from receiving any Distributions on account of such untimely Rejection Damages Claims, absent further order of the Bankruptcy Court. All Rejection Damages Claims will be treated as General Unsecured Claims under this Combined

Plan and Disclosure Statement and, to the extent they are deemed Allowed General Unsecured Claims, will receive the treatment afforded Allowed General Unsecured Claims.

XIII. INJUNCTION, EXCULPATION AND RELEASES

A. Injunction to Protect Estate Assets

From and after the Effective Date, all Persons and Entities who have held, hold, or may hold Claims or rights giving rise to any equitable relief against the Assets or any Equity Interests in the Debtors arising prior to the Effective Date are permanently enjoined from taking any of the following actions against the Estates, the Released Parties, any member of the Creditors' Committee in its capacity as such, the Liquidating Trust, the Liquidating Trustee, the Rockport Canada Fund, the Rockport Canada Plan Administrator or any of their respective property or Assets (collectively, the "Estate Assets") on account of any such Claims or Equity Interests: (a) commencing or continuing, in any manner or in any place, any action or proceeding seeking to collect or to recover in any manner against, or assert control or dominion over, the Estate Assets; (b) enforcing, attaching, collecting, or recovering in any manner against the Estate Assets, any judgment, award, decree or order; (c) creating, perfecting, or enforcing any Lien or encumbrance against the Estate Assets; (d) asserting recoupment unless such recoupment was formally asserted in a timely Filed proof of Claim or in a pleading Filed with the Bankruptcy Court prior to entry of the Plan Confirmation Order (notwithstanding any indication in any proof of Claim or otherwise that such Holder asserts, has, or intends to preserve any right of recoupment) or right of subrogation of any kind against any debt, liability, or obligation due to the Debtors; and (e) commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with or with respect to any such Claims or Interests, released, excused, or settled pursuant to the Plan or that is otherwise inconsistent with the provisions of the Plan; *provided, however*, that such Persons and Entities shall not be precluded from exercising their rights under and consistent with the terms of this Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement.

B. Discharge

Given the complete liquidation of the Debtors' property pursuant to the terms of the Plan, the Debtors are not receiving a discharge pursuant to Section 1141(d)(3) of the Bankruptcy Code.

C. Term of Injunctions or Stays

Unless otherwise provided in this Combined Plan and Disclosure Statement or Plan Confirmation Order, all injunctions or stays in the Chapter 11 Cases (pursuant to Sections 105 or 362 of the Bankruptcy Code or any Order of the Bankruptcy Court) and existing on the Plan Confirmation Date (excluding any injunctions or stays contained in the Plan or the Confirmation Order) shall remain in full force and effect until the later of the Effective Date and the date indicated in the Order providing for such injunction or stay and to the extent consistent with the terms and provisions of this Combined Plan and Disclosure Statement or the Plan

Confirmation Order, as applicable. All injunctions or stays contained in the Plan or the Confirmation Order shall remain in full force and effect in accordance with their terms.

D. Injunction Against Interference with Plan

Upon the Bankruptcy Court's entry of the Plan Confirmation Order, all Holders of Claims and Equity Interests, and other parties in interest, along with their respective Related Persons, shall be enjoined from taking any actions to interfere with the Debtors', the Liquidating Trust's, the Liquidating Trustee's, the Rockport Canada Plan Administrator's and their respective Related Persons' implementation or substantial Consummation of this Combined Plan and Disclosure Statement.

E. Exculpation

The Exculpated Parties shall not have or incur any liability for, and each Exculpated Party is hereby released and exculpated from, any Claim, action, proceeding, Cause of Action, suit, account, controversy, agreement, promise, right to legal remedies, right to equitable remedies, setoff, or right to payment arising or accruing on or after the Petition Date, or the decision to initiate these Chapter 11 Cases or the Canadian Proceeding, whether known, unknown, reduced to judgment, not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, Disputed, admitted, secured, or unsecured, with or without priority, and whether asserted or assertable directly or derivatively, in law, equity, or otherwise to one another or to any Claim Holder or Holder of an Equity Interest, or any other party in interest, or any of their respective Related Persons, for any act or omission in connection with, relating to, or arising out of the Chapter 11 Cases or the Canadian Proceeding, the negotiation, solicitation, Filing, and confirmation of this Combined Plan and Disclosure Statement, the pursuit of confirmation of this Combined Plan and Disclosure Statement, the substantial Consummation or Consummation of this Combined Plan and Disclosure Statement, the administration of this Combined Plan and Disclosure Statement, or the property to be liquidated and/or distributed under this Combined Plan and Disclosure Statement, except for their fraud, willful misconduct or gross negligence as determined by a Final Order of a court of competent jurisdiction, and in all respects shall be entitled to rely reasonably upon the advice of counsel with respect to their duties and responsibilities under this Combined Plan and Disclosure Statement.

F. Releases

1. Debtor Releases

Except as may otherwise be expressly provided in this Combined Plan and Disclosure Statement, as of the Effective Date, for good and valuable consideration provided by each of the Released Parties and each member of the Creditors' Committee (solely in its capacity as such), the adequacy of which is hereby confirmed, on the Plan Confirmation Date and effective as of the Effective Date, to the fullest extent permitted under applicable law, the Released Parties shall be deemed released and discharged by the Debtors and the Estates of and from any and all Claims and Causes of Action and all other

interests, obligations, suits, judgments, damages, demands, debts, rights, remedies, setoffs and liabilities (other than the rights of the Debtors to enforce this Combined Plan and Disclosure Statement, and the contracts, instruments, releases, and other agreement or documents delivered hereunder), whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity, tort, contract, or otherwise that are based in whole or part on any act or omission, transaction, event, or other occurrences or circumstances, whether direct or derivative, taking place on or prior to the Effective Date arising from or related in any way to, (i) the Debtors or their operations; (ii) the Chapter 11 Cases or the Canadian Proceeding; (iii) any investment by any Releasing Party or Released Party in the Debtors or the purchase, sale, transfer, or rescission of the purchase, sale, or transfer of any security, asset, right, or interest in the Debtors, including the 2017 Transaction; (iv) any action or omission with respect to any indebtedness under which the Debtors are or were a borrower or guarantor, or any equity investment in the Debtors; (v) the subject matter of, or the transactions or events giving rise to, any Claim or Interest in the Chapter 11 Cases or the Canadian Proceeding; (vi) the negotiation, formulation, preparation, entry into, administration of or dissemination of the (a) the Prepetition ABL Credit Agreement, (b) the Prepetition Note Purchase Agreement, (c) the Sale Documents; (d) the DIP ABL Credit Agreement; (e) the DIP Note Purchase Agreement; (f) the Combined Plan and Disclosure Statement; and (g) any other action or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date, including the 2017 Transaction, other than with respect to Claims, Causes of Action or liabilities arising out of or relating to any act or omission of a Released Party that is determined by a Final Order of a court of competent jurisdiction to constitute actual fraud, willful misconduct, or gross negligence.

2. Releases by Holders of Claims

To the fullest extent permitted under applicable law, all of the Releasing Parties shall be deemed fully, completely, unconditionally, irrevocably, and forever to release the Released Parties of and from any and all Claims and Causes of Action and any other all other interests, obligations, suits, judgments, damages, demands, debts, rights, remedies, setoffs and liabilities whatsoever, whether accrued or unaccrued, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, whether known or unknown, foreseen or unforeseen, existing before the Effective Date, as of the Effective Date or arising thereafter, in law, at equity, whether for tort, contract, violations of statutes (including but not limited to the federal or state securities laws), or otherwise, based in whole or in part upon any act or omission, transaction, event, or other occurrence or circumstances, whether direct or derivative, existing or taking place prior to or on the Effective Date arising from or related in any way to (i) the Debtors or their operations; (ii) the Chapter 11 Cases or the Canadian Proceeding; (iii) any investment by any Releasing Party or Released Party in the Debtors or the purchase, sale, transfer, or rescission of the purchase, sale, or transfer of any security, asset, right, or interest in the Debtors; (iv) any action or omission with respect to any indebtedness under which the Debtors are or were a borrower or guarantor, or any equity investment in the Debtors, including the 2017 Transaction; (v) the subject matter of, or the transactions or events giving rise to, any Claim or Interest in the Chapter 11 Cases or the Canadian Proceeding; (vi) the negotiation,

formulation, preparation, entry into, administration of, or dissemination of the (a) the Prepetition ABL Credit Agreement, (b) the Prepetition Note Purchase Agreement, (c) the Sale Documents; (d) the DIP ABL Credit Agreement; (e) the DIP Note Purchase Agreement; (f) the Combined Plan and Disclosure Statement; and (g) any other action or omission, transaction, agreement, event or other occurrence taking place on or before the Effective Date, including the 2017 Transaction, other than with respect to Claims, Causes of Action or liabilities arising out of or relating to any act or omission of a Released Party that is determined by a Final Order of a court of competent jurisdiction to constitute actual fraud, willful misconduct, or gross negligence.

Notwithstanding the foregoing, or any of the releases, discharges, injunctions or waivers set forth herein, nothing in the Plan or the Confirmation Order shall modify the rights, if any, of any counterparty to an unexpired lease of non-residential real property to assert any right of setoff or recoupment that such counterparty may have under applicable bankruptcy or non-bankruptcy law, including, but not limited to, the ability, if any, of such counterparties to setoff or recoup a security deposit held pursuant to the terms of their unexpired lease with the Debtors.

Notwithstanding any language to the contrary contained in the Plan or the Confirmation Order, no provision of this Plan or the Confirmation Order shall (i) preclude the United States Securities and Exchange Commission ("SEC") from enforcing its police or regulatory powers; or (ii) enjoin, limit, impair or delay the SEC from commencing or continuing any claims, causes of action, proceedings or investigations against any non-debtor person or non-debtor entity in any forum.

3. Waiver of Statutory Limitations on Releases

Each of the parties providing the releases contained in Sections XIII.F.1 and XIII.F.2 above expressly acknowledges that although ordinarily a general release may not extend to Claims or Causes of Action that the Releasing Party does not know or suspect to exist in its favor, which if known by it may have materially affected its settlement with the party released, they have carefully considered and taken into account in determining to enter into the above releases the possible existence of such unknown losses or claims. Without limiting the generality of the foregoing, each Releasing Party expressly waives any and all rights conferred upon it by any statute or rule of law which provides that a release does not extend to claims which the claimant does not know or suspect to exist in its favor at the time of providing the release, which if known by it may have materially affected its settlement with the Released Party. The releases contained in this Combined Plan and Disclosure Statement are effective regardless of whether those released matters are presently known, unknown, suspected or unsuspected, foreseen or unforeseen.

G. Necessity and Approval of Releases and Injunctions

The releases, exculpations, and injunctions set forth in Section XIII of this Combined Plan and Disclosure Statement are not severable and are appropriately tailored and constitute integral consideration and critical parts of this Combined Plan and Disclosure Statement, and the Released Parties have relied on the efficacy and conclusive effects of such

releases and injunctions and on the Bankruptcy Court's retention of jurisdiction to enforce such releases and injunctions when making concessions and exchanging consideration in connection with the Chapter 11 Cases and under this Combined Plan and Disclosure Statement. Under Bankruptcy Code Sections 1123(a)(5), 1123(b)(3), and 1123(b)(6) entry of the Plan Confirmation Order shall constitute the Bankruptcy Court's approval of the releases, exculpations, and injunctions set forth in Section XIII of this Combined Plan and Disclosure Statement and shall constitute the Bankruptcy Court's finding that such releases, exculpations, and injunctions are: (i) in exchange for the good, valuable, and reasonably equivalent consideration provided by the Released Parties; (ii) in the best interests of the Debtors, the Estates, and Holders of Claims and Interests; (iii) fair, equitable, and reasonable; and (iv) a bar to all Persons barred as set forth in this Combined Plan and Disclosure Statement asserting any Claims or Causes of Action released under the Plan in favor of the Released Parties.

XIV. CERTAIN UNITED STATES FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN

A. General

The following discussion summarizes certain material United States federal income tax consequences of the implementation of the Plan to the Debtors and to certain Holders of Allowed Claims. This summary does not address the federal income tax consequences to Holders of Claims who are deemed to have rejected the Plan in accordance with the provisions of Section 1126(g) of the Bankruptcy Code, or Holders whose Claims are entitled to payment in full in Cash.

This summary is based on the Internal Revenue Code ("IRC"), existing and proposed Treasury Regulations, judicial decisions, and published administrative rules and pronouncements of the IRS as in effect on the date hereof, all of which are subject to change, possibly on a retroactive basis. Any such change could significantly affect the federal income tax consequences described below.

The Debtors have not requested an opinion of counsel or a ruling from the IRS with respect to any of the tax aspects of the Plan. This summary does not address state, local or foreign income or other tax consequences of the Plan. Creditors who are non-U.S. Holders should consult their own tax advisors with respect to the tax consequences of the Plan applicable to them.

The following discussion generally assumes that the Plan will be treated as a plan of liquidation of the Debtors for U.S. federal income tax purposes, and that all Distributions to Holders of Claims will be taxed accordingly.

ACCORDINGLY, THE FOLLOWING SUMMARY IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT A SUBSTITUTE FOR CAREFUL TAX PLANNING OR FOR ADVICE BASED UPON THE PARTICULAR CIRCUMSTANCES PERTAINING TO A HOLDER OF A CLAIM. EACH HOLDER OF A CLAIM OR EQUITY INTEREST IS URGED TO CONSULT ITS OWN TAX ADVISORS FOR THE FEDERAL,

STATE, LOCAL AND FOREIGN INCOME AND OTHER TAX CONSEQUENCES APPLICABLE TO IT UNDER THE PLAN.

B. Consequences to the Debtors

1. Cancellation of Debt

The Debtors may realize cancellation of debt ("COD") income by reason of the discharge of the Debtors' indebtedness. COD is the amount by which the adjusted issue price of indebtedness discharged exceeds the sum of the amount of Cash, the issue price of any debt instrument and the fair market value of any other property given in exchange therefor, subject to certain statutory or judicial exceptions that can apply to limit the amount of COD (such as where the payment of the canceled debt would have given rise to a tax deduction). Consistent with the intended treatment of the Plan as a plan of liquidation for federal income tax purposes, the Debtors do not expect to incur COD as a result of the implementation of the Plan prior to the distribution of all or substantially all of its Assets (other than to the extent any Allowed Claim's Distribution is subject to a maximum or has been or is separately settled for less than its carrying value). However, the Debtors do not expect to recognize any income.

2. Transfer of Assets to Liquidating Trust

The Debtors' transfer of Assets to the Liquidating Trust may result in the recognition of gain or loss by the Debtors, depending in part on the value of such Assets on the date of such transfer to the Liquidating Trust relative to the Debtors' tax basis in such Assets.

C. Consequences to Holders of Claims and Equity Interests

1. Realization and Recognition of Gain or Loss, In General

The federal income tax consequences of the implementation of the Plan to a Holder of a Claim or Equity Interest will depend, among other things, upon the origin of the Holder's Claim, when the Holder receives payment in respect of such Claim or Equity Interest, whether the Holder reports income using the accrual or cash method of tax accounting, whether the Holder acquired its Claim at a discount, whether the Holder has taken a bad debt deduction or worthless security deduction with respect to such Claim or Equity Interest, and whether (as intended and herein assumed) the Plan is treated as a plan of liquidation for federal income tax purposes. A Holder of an Equity Interest should consult its tax advisor regarding the timing and amount of any potential worthless stock loss.

Generally, a Holder of an Allowed Claim will realize gain or loss on the exchange under the Plan of its Allowed Claim for Cash or other property (including any Liquidating Trust Interests and Pro Rata share of the Warrants), in an amount equal to the difference between (i) the sum of the amount of any Cash and the fair market value on the date of the exchange of any other property received by the Holder, including, as discussed below, any beneficial interests in a Liquidating Trust or Pro Rata share of the Warrants (other than any consideration attributable to a Claim for accrued but unpaid interest) and (ii) the adjusted tax basis of the Allowed Claim exchanged therefor (other than basis attributable to accrued but unpaid interest previously included in the Holder's taxable income).

When gain or loss is recognized as discussed below, such gain or loss may be long-term capital gain or loss if the Claim or Equity Interest disposed of is a capital asset in the hands of the Holder and has been held for more than one year. Each Holder of an Allowed Claim or Equity Interest should consult its own tax advisor to determine whether gain or loss recognized by such Holder will be long-term capital gain or loss and the specific tax effect thereof on such Holder.

As discussed below, each Holder of an Allowed Claim that receives a beneficial interest in the Liquidating Trust will be treated for U.S. federal income tax purposes as directly receiving, and as a direct owner of, its respective share of the Liquidating Trust Assets (consistent with its economic rights in the trust). Pursuant to the Plan, the Liquidating Trustee will in good faith value the Assets transferred to the Liquidating Trust, and all parties to the Liquidating Trust (including Holders of Claims receiving Liquidating Trust Interests) must consistently use such valuation for all U.S. federal income tax purposes.

A Holder's share of any proceeds received by a Liquidating Trust upon the sale or other disposition of the Assets of the Liquidating Trust should not be included, for federal income tax purposes, in the Holder's amount realized in respect of its Allowed Claim but should be separately treated as amounts realized in respect of such Holder's ownership interest in the underlying Assets of the Liquidating Trust.

A Holder's tax basis in its respective share of the Liquidating Trust Assets will equal the fair market value of such interest, and the Holder's holding period generally will begin the day following the establishment of a Liquidating Trust. A Holder's tax basis in the Warrants should equal the fair market value of the Holder's Pro Rata share of the Warrants and the holding period of the Warrants received on the Effective Date would begin on the date following the Effective Date.

2. Allocation of Consideration to Interest

Pursuant to the Section XI.M of the Plan, all Distributions in respect of Allowed Claims will be allocated first to the principal amount of the Allowed Claim (as determined for federal income tax purposes), with any excess allocated to accrued but unpaid interest. However, there is no assurance that such allocation would be respected by the IRS for federal income tax purposes. In general, to the extent any amount received (whether stock, Cash, or other property) by a Holder of a debt instrument is received in satisfaction of accrued interest during its holding period, such amount will be taxable to the Holder as interest income (if not previously included in the Holder's gross income under the Holder's normal method of accounting). Conversely, a Holder generally recognizes a deductible loss to the extent any accrued interest claimed was previously included in its gross income and is not paid in full. Each Holder of an Allowed Claim is urged to consult its own tax advisor regarding the allocation of consideration and the taxation or deductibility of unpaid interest for tax purposes.

D. Tax Treatment of a Liquidating Trust and Holders of Beneficial Interests

1. Classification of the Liquidating Trust

A Liquidating Trust, if created pursuant to the Plan, is intended to qualify as a "liquidating trust" for U.S. federal income tax purposes. In general, a liquidating trust is not a separate taxable entity, but rather is treated for U.S. federal income tax purposes as a "grantor trust" (i.e., all income and loss is taxed directly to the Liquidating Trust Beneficiaries). However, merely establishing a trust as a liquidating trust does not ensure that it will be treated as a grantor trust for U.S. federal income tax purposes. The IRS, in Revenue Procedure 94-45, 1994-2 C.B. 684, set forth the general criteria for obtaining an IRS ruling as to the grantor trust status of a liquidating trust under a chapter 11 plan. Any Liquidating Trust will be structured to comply with such general criteria. Pursuant to the Plan, and in conformity with Revenue Procedure 94-45, all parties (including, without limitation, the Debtors, the Liquidating Trustee, Holders of Allowed Claims, and the Liquidating Trust Beneficiaries) will be required to treat, for U.S. federal income tax purposes, the Liquidating Trust as a grantor trust of which the Liquidating Trust Beneficiaries are the owners and grantors. The following discussion assumes that any Liquidating Trust will be so respected for U.S. federal income tax purposes. However, no opinion of counsel has been requested, and the Debtors or Liquidating Trustee may or may not obtain a ruling from the IRS, concerning the tax status of the Liquidating Trust as a grantor trust. Accordingly, there can be no assurance that the IRS would not take a contrary position. If the IRS were to challenge successfully the classification of a Liquidating Trust, the U.S. federal income tax consequences to the Liquidating Trust, the Liquidating Trust Beneficiaries and the Debtors could vary from those discussed herein (including the potential for an entity-level tax on income of the Liquidating Trust).

2. General Tax Reporting by the Liquidating Trust and Beneficiaries

For all U.S. federal income tax purposes, all parties (including, without limitation, the Debtors, the Liquidating Trustee, Holders of Allowed Claims, and the Liquidating Trust Beneficiaries) must treat the transfer of the Liquidating Trust Assets to the Liquidating Trust in accordance with the terms of the Plan. Pursuant to the Plan, the Liquidating Trust Assets are treated, for U.S. federal income tax purposes, as having been transferred, subject to any obligations relating to those Assets, directly to the Holders of the respective Claims receiving Liquidating Trust Interests (with each Holder receiving an undivided interest in such assets in accordance with their economic interests in such assets), followed by the transfer by the Holders of such Assets to the Liquidating Trust in exchange for the Liquidating Trust Interests. Accordingly, all parties must treat the Liquidating Trust as a grantor trust of which the Holders of Liquidating Trust Interests are the owners and grantors, and treat the Liquidating Trust Beneficiaries as the direct owners of an undivided interest in the Liquidating Trust Assets, consistent with their economic interests therein, for all U.S. federal income tax purposes.

Allocations of taxable income of the Liquidating Trust among the Liquidating Trust Beneficiaries shall be determined by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (were such Cash permitted to be distributed at such time) if, immediately prior to such deemed Distribution, the Liquidating Trust had distributed all its Assets (valued at their tax book value, and other than Assets allocable to Disputed Claims) to the Liquidating Trust Beneficiaries, adjusted for prior taxable income and loss and taking into account all prior and concurrent Distributions from the Liquidating Trust. Similarly, taxable loss of the Liquidating Trust shall be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating Distribution of the

remaining Liquidating Trust Assets. The tax book value of the Liquidating Trust Assets for this purpose shall equal their fair market value on the date of the transfer of the Liquidating Trust Assets to the Liquidating Trust, adjusted in accordance with tax accounting principles prescribed by the IRC, applicable Treasury Regulations, and other applicable administrative and judicial authorities and pronouncements.

As soon as reasonably practicable after the transfer of the Liquidating Trust Assets to the Liquidating Trust, the Liquidating Trustee shall make a good faith valuation of the Liquidating Trust Assets. All parties to the Liquidating Trust (including, without limitation, the Debtors, Holders of Allowed Claims, and the Liquidating Trust Beneficiaries) must consistently use such valuation for all U.S. federal income tax purposes. The valuation will be made available, from time to time, as relevant for tax reporting purposes.

Taxable income or loss allocated to a Liquidating Trust Beneficiary will be treated as income or loss with respect to Liquidating Trust Beneficiary's undivided interest in the Liquidating Trust Assets, and not as income or loss with respect to its prior Allowed Claim. The character of any income and the character and ability to use any loss will depend on the particular situation of the Liquidating Trust Beneficiary. It is currently unknown whether and to what extent the Liquidating Trust Interests will be transferable.

The U.S. federal income tax obligations of a Holder with respect to its Liquidating Trust Interest are not dependent on the Liquidating Trust distributing any Cash or other proceeds. Thus, a Holder may incur a U.S. federal income tax liability with respect to its allocable share of Liquidating Trust income even if the Liquidating Trust does not make a concurrent Distribution to the Holder. In general, a Distribution of Cash by the Liquidating Trust will not be separately taxable to a Liquidating Trust Beneficiary since the Beneficiary is already regarded for federal income tax purposes as owning the underlying assets (and was taxed at the time the cash was earned or received by the Liquidating Trust).

The Liquidating Trustee will comply with all applicable governmental withholding requirements. Thus, in the case of any Liquidating Trust Beneficiaries that are not U.S. persons, the Liquidating Trustee may be required to withhold up to 30% of the income or proceeds allocable to such persons, depending on the circumstances (including whether the type of income is subject to a lower treaty rate). As indicated above, the foregoing discussion of the U.S. federal income tax consequences of the Plan does not generally address the consequences to non-U.S. Holders; accordingly, such Holders should consult their tax advisors with respect to the U.S. federal income tax consequences of the Plan, including owning an interest in the Liquidating Trust.

The Liquidating Trustee will file with the IRS tax returns for the Liquidating Trust consistent with its classification as a grantor trust pursuant to Treasury Regulation Section 1.671-4(a). The Liquidating Trustee also will send annually to each holder of a Liquidating Trust Interest a separate statement regarding the receipts and expenditures of the Liquidating Trust as relevant for U.S. federal income tax purposes and will instruct all such holders to use such information in preparing their U.S. federal income tax returns or to forward the appropriate information to such holder's underlying beneficial holders with instructions to utilize such information in preparing their U.S. federal income tax returns.

E. Tax Treatments of Holders of Warrants

As described above, certain Holders of Allowed Claims that receive a Pro Rata share of the Warrants and other consideration should be treated as exchanging such Allowed Claim for the Warrants and other consideration in fully taxable exchange.

Holders of Warrants generally will not realize gain or loss upon the exercise of the Warrants into Warrant Units. A Holder's basis in the Warrant Units received upon the exercise of such Holder's Warrants will equal the sum of (i) the exercised portion of the fair market value of such Holder's Pro Rata share of the Warrants on the Effective Date and (ii) the aggregate exercise price of the exercised Warrants. A Holder's holding period in the Warrant Units acquired through exercise of Warrants will begin on the date of exercise of the Warrants.

Sales or other taxable dispositions (including lapse of unexercised Warrants) by Holders of Warrants generally will give rise to gain or loss equal to the difference between the amount realized on the disposition, if any, and the Holder's tax basis in such Warrants. In general, gain or loss recognized on the sale or exchange of Warrants may be long-term capital gain or loss if the Warrants disposed of are capital assets in the hands of the Holder and have been held for more than one year. Each Holder should consult its own tax advisor to determine whether gain or loss recognized by such Holder will be long-term capital gain or loss and the specific tax effect thereof on such Holder.

F. Withholding on Distributions, and Information Reporting

All Distributions to Holders of Allowed Claims under the Plan are subject to any applicable tax withholding, including employment tax withholding. Under federal income tax law, interest, dividends, and other reportable payments may, under certain circumstances, be subject to "backup withholding" at the then applicable withholding rate (currently 24%). Backup withholding generally applies if the Holder (a) fails to furnish its social security number or other taxpayer identification number, (b) furnishes an incorrect taxpayer identification number, (c) fails properly to report interest or dividends, or (d) under certain circumstances, fails to provide a certified statement, signed under penalty of perjury, that the tax identification number provided is its correct number and that it is not subject to backup withholding. Backup withholding is not an additional tax but merely an advance payment, which may be refunded to the extent it results in an overpayment of tax. Certain persons are exempt from backup withholding, including, in certain circumstances, corporations and financial institutions. These categories are very broad; however, there are numerous exceptions. Holders of Allowed Claims are urged to consult their tax advisors regarding the Treasury Regulations governing backup withholding and whether the transactions contemplated by the Plan would be subject to these Treasury Regulations.

In addition, a Holder of an Allowed Claim or a Liquidating Trust Beneficiary that is *not* a U.S. person may be subject to up to 30% withholding, depending on, among other things, the particular type of income and whether the type of income is subject to a lower treaty rate. As to certain Claims, it is possible that withholding may be required with respect to Distributions by the Debtors even if no withholding would have been required if payment was made prior to the Chapter 11 Cases. *A non-U.S. Holder may also be subject to other adverse consequences in connection with the implementation of the Plan. As discussed above, the*

foregoing discussion of the U.S. federal income tax consequences of the Plan does not generally address the consequences to non-U.S. Holders. Holders are urged to consult their tax advisors regarding potential withholding on Distributions by the Debtors or payments from the Liquidating Trustee.

In addition, Treasury Regulations generally require disclosure by a taxpayer on its U.S. federal income tax return of certain types of transactions in which the taxpayer participated, including, among other types of transactions, certain transactions that result in the taxpayer's claiming a loss in excess of specified thresholds. Holders are urged to consult their tax advisors regarding these Treasury Regulations and whether the transactions contemplated by the Plan would be subject to these Treasury Regulations and require disclosure on the Holder's tax returns.

XV. CONDITIONS PRECEDENT TO AND OCCURRENCE OF CONFIRMATION AND THE EFFECTIVE DATE

A. Conditions Precedent to Confirmation

Confirmation of this Combined Plan and Disclosure Statement shall not occur, and the Plan Confirmation Order shall not be entered, until each of the following conditions precedent have been satisfied or waived in accordance with Section XV.E of the Plan:

1. The proposed Plan Confirmation Order shall be reasonably acceptable in form and substance to the Debtors and the Prepetition Noteholders.
2. The Plan Supplements and any other exhibits or schedules incorporated as part of this Combined Plan and Disclosure Statement are in form and substance reasonably acceptable to the Debtors and the Prepetition Noteholders.

B. Conditions Precedent to the Effective Date

This Combined Plan and Disclosure Statement shall not become effective unless and until the following conditions shall have been satisfied or waived in accordance with Section XV.E of the Plan:

1. The Plan Confirmation Order shall have become a Final Order in full force and effect with no stay thereof then in effect, and shall be in form and substance reasonably acceptable to the Debtors, the Prepetition Noteholders and the Creditors' Committee.
2. The Plan Confirmation Date shall have occurred and no request for revocation of the Plan Confirmation Order under Section 1144 of the Bankruptcy Code shall have been made, or, if made, shall remain pending.
3. The Canadian Court shall have made an order in the Canadian Proceeding recognizing the Plan Confirmation Order (the "**Plan Confirmation Recognition Order**") and the Plan Confirmation Order shall have become a Final Order in full force and effect with no stay thereof in effect, and shall be in the form and substance reasonably acceptable to the Debtors and the Prepetition Noteholders.

4. All actions, documents, and agreements necessary to implement this Combined Plan and Disclosure Statement, including, without limitation, all actions, documents, and agreements necessary to implement any transactions contemplated under this Combined Plan and Disclosure Statement, including the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement, shall have been effectuated or executed.

5. The absence of any pending or threatened government action or any law that has the effect of or actually does prevent Consummation of any transaction contemplated under this Combined Plan and Disclosure Statement.

6. All Statutory Fees incurred for periods arising prior to the Effective Date shall be paid by the Debtors or placed in a reserve for such purpose.

7. The Liquidating Trust Agreement shall have been executed by the Liquidating Trustee in form and substance reasonably acceptable to the Prepetition Noteholders and the Creditors' Committee.

8. The Rockport Canada Plan Administrator Agreement shall have been executed by the Rockport Canada Plan Administrator.

C. Establishing the Effective Date

The calendar date to serve as the Effective Date shall be a Business Day of, on, or promptly following the satisfaction or waiver of all conditions the Effective Date, which date will be selected by the Debtors in consultation with the Prepetition Noteholders and the Creditors' Committee.

D. Effect of Failure of Conditions

If each condition to the Effective Date has not been satisfied or duly waived within one hundred and twenty (120) days after the Plan Confirmation Date, then upon motion by any party in interest if applicable, and upon notice to such parties in interest as the Bankruptcy Court may direct, the Plan Confirmation Order may be vacated by the Bankruptcy Court; *provided, however*, that notwithstanding the Filing of such motion, the Plan Confirmation Order shall not be vacated if each of the conditions to the Effective Date is either satisfied or duly waived by the Debtors, if applicable, before any Order granting such relief becomes a Final Order. If the Plan Confirmation Order is vacated, this Combined Plan and Disclosure Statement shall be deemed null and void in all respects and nothing contained herein shall (i) constitute an admission or a waiver or release of any Claims by or against the Debtors, or (ii) prejudice in any manner the rights of the Debtors.

E. Waiver of Conditions to Confirmation and Effective Date

Each of the conditions to the Effective Date may be waived, in whole or in part, by the Debtors with the consent of the Creditors' Committee, and the Prepetition Noteholders, and, in the case of the conditions set forth in Sections XV.A.1, XV.A.2, XV.B.1, XV.B.2, XV.B.3 and XV.B.4, without notice or an Order of the Bankruptcy Court.

XVI. RETENTION OF JURISDICTION

Following the Effective Date, the Bankruptcy Court shall retain jurisdiction to the fullest extent provided by law, including, without limitation over all matters arising in, arising under, and related to the Chapter 11 Cases as is legally permissible, including, without limitation, such jurisdiction as is necessary to ensure that the interests and purposes of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement are carried out. The Bankruptcy Court shall retain jurisdiction over all matters arising in, arising under, and related to the Chapter 11 Cases, this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement, and the Rockport Canada Plan Administrator Agreement for, among other things, the following purposes:

1. To hear and determine any objections to Claims and to address any issues relating to Disputed Claims;
2. To enter and implement such Orders as may be appropriate in the event the Plan Confirmation Order is for any reason stayed, revoked, modified, or vacated;
3. To issue such Orders in aid of execution and Consummation of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement;
4. To consider any amendments to or modifications of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement, to cure any defect or omission, or reconcile any inconsistency in any Order of the Bankruptcy Court, including, without limitation, the Plan Confirmation Order;
5. To hear and determine all requests for compensation and reimbursement of expenses under Section 330 or 503 of the Bankruptcy Code;
6. To hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement, including the releases, exculpations, and injunctions provided hereunder;
7. To hear and determine matters concerning state, local, and federal taxes in accordance with Sections 346, 505, and 1146 of the Bankruptcy Code;
8. To hear any other matter not inconsistent with the Bankruptcy Code;
9. To enter a final decree closing the Chapter 11 Cases;
10. To ensure that Distributions to Holders of Allowed Claims are accomplished under the provisions of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement;
11. To decide or resolve any motions, adversary proceedings, contested or litigated matters arising out of, under, or related to, the Chapter 11 Cases, including those

brought by the Liquidating Trustee on behalf of the Liquidating Trust or the Rockport Canada Plan Administrator on behalf of Rockport Canada;

12. To issue injunctions, enter and implement other Orders, or take such other actions as may be necessary or appropriate to restrain interference by any Person or Entity with the occurrence of the Effective Date or enforcement of this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement and the Rockport Canada Plan Administrator Agreement;

13. To approve, as may be necessary or appropriate, any Claims settlement entered into or offset exercised by the Liquidating Trust or the Rockport Canada Plan Administrator;

14. To resolve any dispute or matter arising under or in connection with the Liquidating Trust or the Rockport Canada Plan Administrator Agreement, including any request for an extension of the term of the Liquidating Trust;

15. To determine any other matters that may arise in connection with or related to this Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement, the Rockport Canada Plan Administrator Agreement, or any contract, instrument, release, indenture or other agreement or document created or implemented in connection with this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement or the Rockport Canada Plan Administrator Agreement;

16. To enforce, interpret, and determine any disputes arising in connection with any stipulations, orders, judgments, injunctions, exculpations, and rulings entered in connection with the Chapter 11 Cases (whether or not the Chapter 11 Cases have been closed);

17. To resolve disputes concerning any reserves with respect to Disputed Claims or the administration thereof;

18. To hear, decide and resolve any motions, adversary proceedings, contested or litigated matters involving or related to Causes of Action; and

19. To resolve any other matter or for any purpose specified in this Combined Plan and Disclosure Statement, the Plan Confirmation Order, the Liquidating Trust Agreement, the Rockport Canada Plan Administrator Agreement or any other document entered into in connection with any of the foregoing.

XVII. MISCELLANEOUS PROVISIONS

A. Amendment or Modification of this Combined Plan and Disclosure Statement

This Combined Plan and Disclosure Statement or any exhibits hereto, including, without limitation, the Plan Supplement, may be amended, modified, or supplemented by the Plan Proponents with the consent of the Creditors' Committee and the Prepetition Noteholders and consistent with the terms of the Final DIP Order Supplement in the manner provided for by

Section 1127 of the Bankruptcy Code or as otherwise permitted by law without additional disclosure under Section 1125 of the Bankruptcy Code. In addition, after the Plan Confirmation Date, the Debtors, Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, with the consent of the Prepetition Noteholders and the Creditors' Committee and consistent with the terms of the Final DIP Order Supplement, may institute proceedings in the Bankruptcy Court to remedy any defect or omission or reconcile any inconsistencies in this Combined Plan and Disclosure Statement or the Plan Confirmation Order with respect to such matters as may be necessary to carry out the purposes and effects of this Combined Plan and Disclosure Statement. The Debtors may make appropriate technical adjustments and modifications to this Combined Plan and Disclosure Statement prior to the Effective Date without further order or approval of the Bankruptcy Court. Notwithstanding the foregoing, any amendment, modification, supplement or adjustment to this Combined Plan and Disclosure Statement, any exhibits thereto, or the Plan Confirmation Order that adversely affect a Released Party, shall require the prior written consent of such Released Party.

B. Severability

This Combined Plan and Disclosure Statement is not severable; all of the terms and conditions are fully integrated. Nevertheless, if, prior to the entry of the Plan Confirmation Order, any term or provision of this Combined Plan and Disclosure Statement is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court, at the request of the Debtors, shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of this Combined Plan and Disclosure Statement will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Plan Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of this Combined Plan and Disclosure Statement, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable under its terms.

C. Revocation or Withdrawal of this Combined Plan and Disclosure Statement

The Plan Proponents reserve the right to revoke or withdraw this Combined Plan and Disclosure Statement before the Plan Confirmation Date. If the Plan Proponents revoke or withdraw this Combined Plan and Disclosure Statement before the Plan Confirmation Date, then this Combined Plan and Disclosure Statement shall be deemed null and void. In such event, nothing contained herein shall constitute or be deemed a waiver or release of any Claims by or against the Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator or to prejudice in any manner the rights of the Debtors, the Liquidating Trustee or the Rockport Canada Plan Administrator in any further proceedings involving the Debtors.

D. Binding Effect

This Combined Plan and Disclosure Statement shall be binding upon and inure to the benefit of the Debtors, the Holders of Claims, the Holders of Interests, and the Released Parties and their respective successors and assigns.

E. Notices

All notices to or requests of the Plan Proponents, Liquidating Trustee or the Rockport Canada Plan Administrator by parties in interest in connection with this Combined Plan and Disclosure Statement shall be in writing and delivered either by (a) certified mail, return receipt requested, postage prepaid, (b) hand delivery, or (c) overnight delivery, all charges prepaid, and shall be deemed to have been given when received by:

If to the Debtors (prior to the Effective Date):

The Rockport Company, LLC
1220 Washington Street
West Newton, Massachusetts 02465
Attn: Paul Kosturos

-with a copy to-

Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Attn: Mark D. Collins, Michael J. Merchant and Amanda R. Steele

If to the Prepetition Noteholders:

Pachulski Stang Ziehl & Jones
919 N. Market Street, 17th Floor
PO Box 8505
Wilmington, Delaware 19899
Attn: Bradford J. Sandler and James E. O'Neill

-and-

Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
Attn: My Chi To and Daniel E. Stroik

If to the Liquidating Trustee and the Debtors (after the Effective Date):

The Relay Shoe Company, LLC

Liquidating Trustee c/o MHR Advisory Group
6701 Bay Parkway
3rd Floor
Brooklyn, New York 11204
Attn: Steve Balasiano

-with a copy to-

COOLEY LLP
The Grace Building
1114 Avenue of the Americas
New York, New York 10036-7798
Attn: Jay R. Indyke and Robert Winning

If to the Rockport Canada Plan Administrator and Rockport Canada (after the Effective Date)

Rockport Canada Plan Administrator c/o Richter Advisory Group
181 Bay Street, Suite 3320
Bay Wellington Tower
Toronto, ON M5J 2T3
Attn: Adam Sherman and Pritesh Patel

-with a copy to-

Chipman Brown Cicero & Cole LLP
Hercules Plaza
1313 N. Market Street
Suite 5400
Wilmington, Delaware 19801
Attn: Mark L. Desgrosseilliers

F. Governing Law

Except to the extent the Bankruptcy Code, Bankruptcy Rules, or other federal law is applicable, or to the extent an exhibit to this Combined Plan and Disclosure Statement provides otherwise, the rights and obligations arising under this Combined Plan and Disclosure Statement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, without giving effect to the principles of conflicts of law of such jurisdiction.

G. Withholding and Reporting Requirements

In connection with the Consummation of this Combined Plan and Disclosure Statement, the Debtors, the Liquidating Trustee and the Rockport Canada Plan Administrator shall comply with all withholding and reporting requirements imposed by any United States or Canadian federal, state, provincial, territorial or local taxing authority and all Distributions

hereunder shall be subject to any such withholding and reporting requirements. All Beneficiaries, as a condition to receiving any Distribution, shall provide the Liquidating Trustee with a completed and executed Form W-9 and shall provide to the Liquidating Trustee and the Rockport Canada Plan Administrator such other documentation they may request for the purposes of complying with any applicable withholding or reporting obligations. Failure to timely provide the Liquidating Trustee or the Rockport Canada Plan Administrator with any of the foregoing documentation may result, at the option of the Liquidating Trustee or the Rockport Canada Plan Administrator, as the case may be, in the forfeiture by a Holder of Claim of its Distribution under the Plan, the Liquidating Trust Agreement and the Rockport Canada Administrator Agreement.

H. Headings

Headings are used in this Combined Plan and Disclosure Statement for convenience and reference only, and shall not constitute a part of this Combined Plan and Disclosure Statement for any other purpose.

I. Exhibits/Schedules

The Plan Documents are an integral part of this Combined Plan and Disclosure Statement, and are hereby incorporated by reference and made a part thereof.

J. Filing of Additional Documents

On or before substantial Consummation of this Combined Plan and Disclosure Statement, the Debtors, Liquidating Trustee or Rockport Canada Plan Administrator, as applicable, shall File such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of this Combined Plan and Disclosure Statement; *provided that* the Plan Supplement shall be Filed on or before November 9, 2018.

K. No Admissions

Notwithstanding anything herein to the contrary, nothing contained in this Combined Plan and Disclosure Statement shall be deemed as an admission by any Entity with respect to any matter set forth herein.

L. Successors and Assigns

The rights, benefits, and obligations of any Person or Entity named or referred to in this Combined Plan and Disclosure Statement shall be binding on, and shall inure to the benefit of any heir, executor, administrator, successor, or assignee of such Person or Entity.

M. Reservation of Rights

Except as expressly set forth herein, this Combined Plan and Disclosure Statement shall have no force or effect unless the Bankruptcy Court shall enter the Plan Confirmation Order. None of the Filing of this Combined Plan and Disclosure Statement, any statement or provision contained herein, or the taking of any action by the Debtors with respect

to this Combined Plan and Disclosure Statement shall be or shall be deemed to be an admission or waiver of any rights or Causes of Action of the Debtors, Holders of Claims, or Equity Interest before the Effective Date.

N. Inconsistency

In the event of any inconsistency among this Combined Plan and Disclosure Statement, the Liquidating Trust Agreement, the Rockport Canada Plan Administrator Agreement or any other instrument or document created or executed under this Combined Plan and Disclosure Statement, the provisions of this Combined Plan and Disclosure Statement shall govern; provided that in the event of any inconsistency among this Combined Plan and Disclosure Statement and the Plan Confirmation Order, the provisions of the Plan Confirmation Order shall govern.

O. Dissolution of the U.S. Debtors

Immediately following the Distribution of all of the Debtors' and the Estates' property under the terms of this Combined Plan and Disclosure Statement, on the Effective Date, the Debtors' members, directors, managers, and officers and any remaining employees shall be deemed to have resigned, and, as to all U.S. Debtors other than Rockport, the entity dissolved for all purposes and of no further legal existence under any applicable state or federal law, without the need to take any further action or file any plan of dissolution, notice, or application with the Secretary of State of the State of Delaware or any other state or government authority, and, as to Rockport, upon termination of the Liquidating Trustee or the wind down of the Liquidating Trust, Rockport shall be deemed dissolved for all purposes and of no further legal existence under any applicable state or federal law, without the need to take any further action or file any plan of dissolution, notice, or application with the Secretary of State of the Delaware or any other authority.

P. Dissolution of the Creditors' Committee

Upon the occurrence of the Effective Date, the Creditors' Committee shall dissolve automatically, whereupon its members, professionals, and agents shall be discharged and released from any duties and responsibilities in the Chapter 11 Cases and under the Bankruptcy Code, except with respect to (i) obligations arising under confidentiality agreements, which shall remain in full force and effect, (ii) prosecuting applications for payment of fees and reimbursement of expenses of Professionals or attending to any other issues related to applications for payment of fees and reimbursement of expenses of Professionals, (iii) any motions or motions for other actions seeking enforcement of implementation of the provisions of this Combined Plan and Disclosure Statement, and (iv) prosecuting or participating in any appeal of the Plan Confirmation Order or any request for reconsideration thereof.

XVIII. RISKS AND OTHER CONSIDERATIONS

A. Bankruptcy Considerations

Although the Plan Proponents believe that this Combined Plan and Disclosure Statement will satisfy all requirements necessary for confirmation by the Bankruptcy Court,

there can be no assurance that the Bankruptcy Court will confirm this Combined Plan and Disclosure Statement as proposed. Moreover, there can be no assurance that modifications of this Combined Plan and Disclosure Statement will not be required for confirmation or that such modifications would not necessitate the re-solicitation of votes.

In addition, the occurrence of the Effective Date is conditioned on the satisfaction (or waiver) of the conditions precedent specified herein, and there can be no assurance that such conditions will be satisfied or waived. In the event such conditions precedent have not been satisfied or waived (to the extent possible hereunder) within one hundred and twenty (120) days after the Plan Confirmation Date, which period may be extended by the Plan Proponents, then the Plan Confirmation Order may be vacated, no Distributions will be made under this Combined Plan and Disclosure Statement, and the Debtors and all Holders of Claims and Interests will be restored to the *status quo ante* as of the day immediately preceding the Plan Confirmation Date as though the Plan Confirmation Date had never occurred.

Section 1122 of the Bankruptcy Code provides that a plan may place a claim or an equity interest in a particular class only if such claim or equity interest is substantially similar to the other claims or equity interests in such class. The Plan Proponents believe that the classification of Claims and Interests under the Plan complies with the requirements set forth in the Bankruptcy Code because each Class of Claims and Interests encompass Claims or Interests, as applicable, that are substantially similar to the other Claims and Interests in each such Class. Nevertheless, there can be no assurance that the Bankruptcy Court will reach the same conclusion.

While the Plan Proponents believe that there are sufficient Liquidating Trust Assets to make Distributions to Liquidating Trust Beneficiaries, there can be no assurance that the Liquidating Trust Assets will be sufficient to pay all Liquidating Trust Operating Expenses or make Distributions to the Liquidating Trust Beneficiaries.

B. No Duty to Update Disclosures

The Plan Proponents have no duty to update the information contained in this Combined Plan and Disclosure Statement as of the date hereof, unless otherwise specified herein, or unless the Plan Proponents are required to do so under an Order of the Bankruptcy Court. Delivery of this Combined Plan and Disclosure Statement after the date hereof does not imply that the information contained herein has remained unchanged.

C. Alternatives to Confirmation and Consummation of the Plan

1. Alternate Plan

If this Combined Plan and Disclosure Statement is not confirmed, the Debtors or any other party in interest (if, under Section 1121 of the Bankruptcy Code, the Debtors have not Filed a plan within the time period prescribed under the Bankruptcy Code) could attempt to formulate and propose a different plan. Such a plan likely would result in additional costs, including, among other things, additional professional fees or potential asserted substantial contribution claims, all of which would likely constitute Administrative Expense Claims (subject to allowance). The Plan Proponents believe that this Combined Plan and Disclosure Statement,

which is the result of extensive negotiations provides for an orderly and efficient liquidation of the Debtors' remaining Assets and enables creditors to realize the best return under the circumstances.

2. Chapter 7 Liquidation

If a plan under Chapter 11 of the Bankruptcy Code is not confirmed by the Bankruptcy Court, the Chapter 11 Cases may be converted to liquidation cases under Chapter 7 of the Bankruptcy Code in which a trustee would be elected or appointed, under applicable provisions of Chapter 7 of the Bankruptcy Code, to liquidate the Assets of the Debtors for Distribution in accordance with the priorities established by the Bankruptcy Code. The Plan Proponents believe that such a liquidation would result in smaller Distributions being made to the Debtors' creditors than those provided for in this Combined Plan and Disclosure Statement because (a) the likelihood that other Assets of the Debtors would have to be sold or otherwise disposed of in a less orderly fashion, (b) additional administrative expenses attendant to the appointment of a trustee and the trustee's employment of attorneys and other professionals, and (c) additional expenses and Claims, some of which would be entitled to priority, that would be generated during the liquidation. See Liquidation Analysis, attached to this Plan as Exhibit C.

XIX. RECOMMENDATION AND CONCLUSION

The Debtors believe that this Combined Plan and Disclosure Statement is in the best interests of the Estates and the Creditors and urge the Holders of impaired Claims entitled to vote to vote to accept this Combined Plan and Disclosure Statement and to evidence such acceptance by properly voting and timely returning their Ballots.

The Relay Shoe Company, LLC

By: /s/ Paul Kosturos

Name: Paul Kosturos

Title: Restructuring Officer

Relay Blocker, LLC

By: /s/ Paul Kosturos

Name: Paul Kosturos

Title: Restructuring Officer

The Relay Group Holdings, LLC

By: /s/ Paul Kosturos

Name: Paul Kosturos

Title: Restructuring Officer

Relay 1-P Holdings, LLC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

Relay Intermediate Holdings, LLC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

Relay Class D, LLC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

The Relay Group, LLC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

Drydock Footwear, LLC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

DD Management Services LLC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

Relay Opco Canada ULC

By: /s/ Paul Kosturos
Name: Paul Kosturos
Title: Restructuring Officer

Exhibit A

Pre-Sale Organizational Structure

The Rockport Group, LLC
Structure Chart

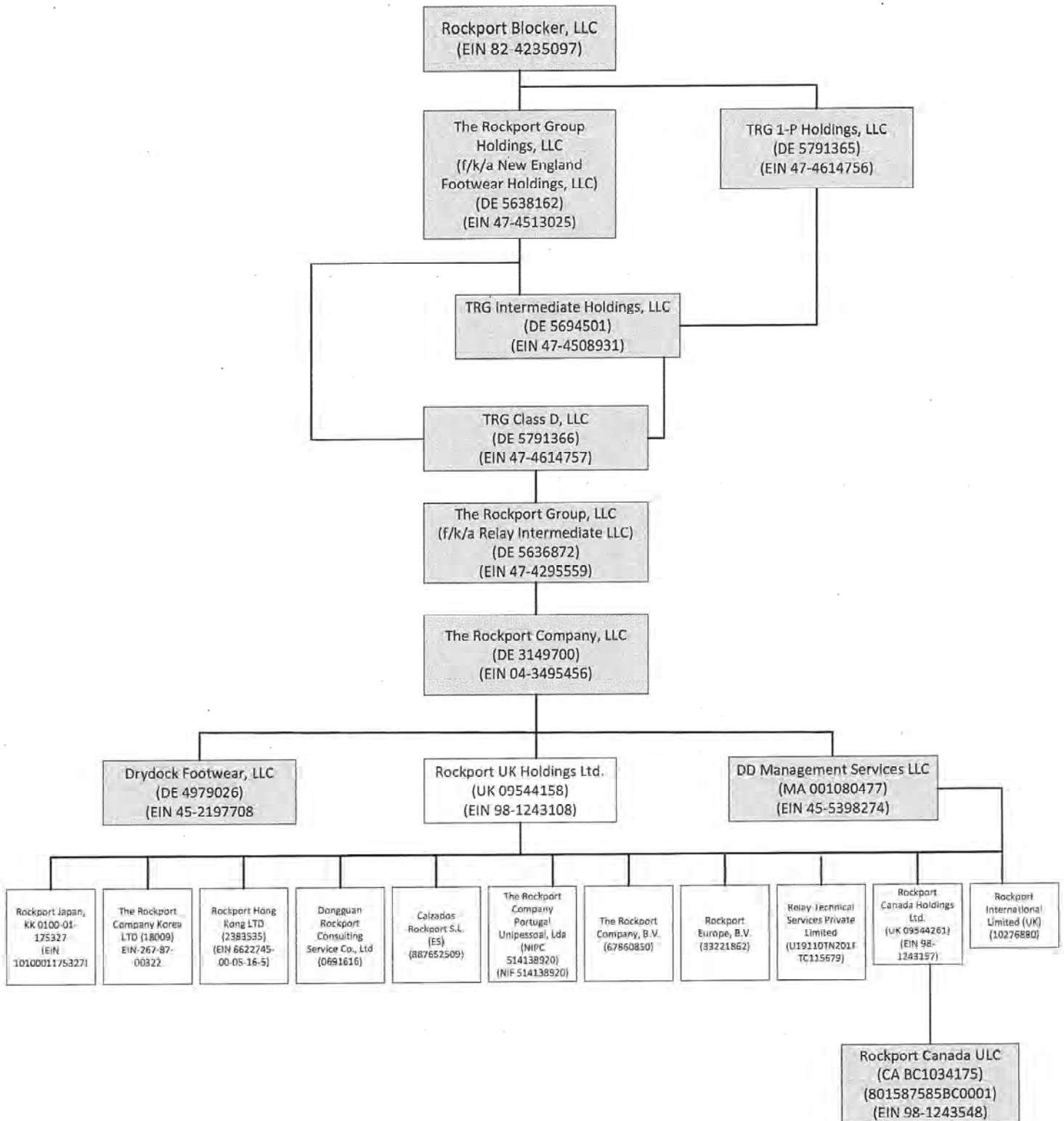


Exhibit B

Post-Sale Organizational Structure

The Rockport Group, LLC
Structure Chart

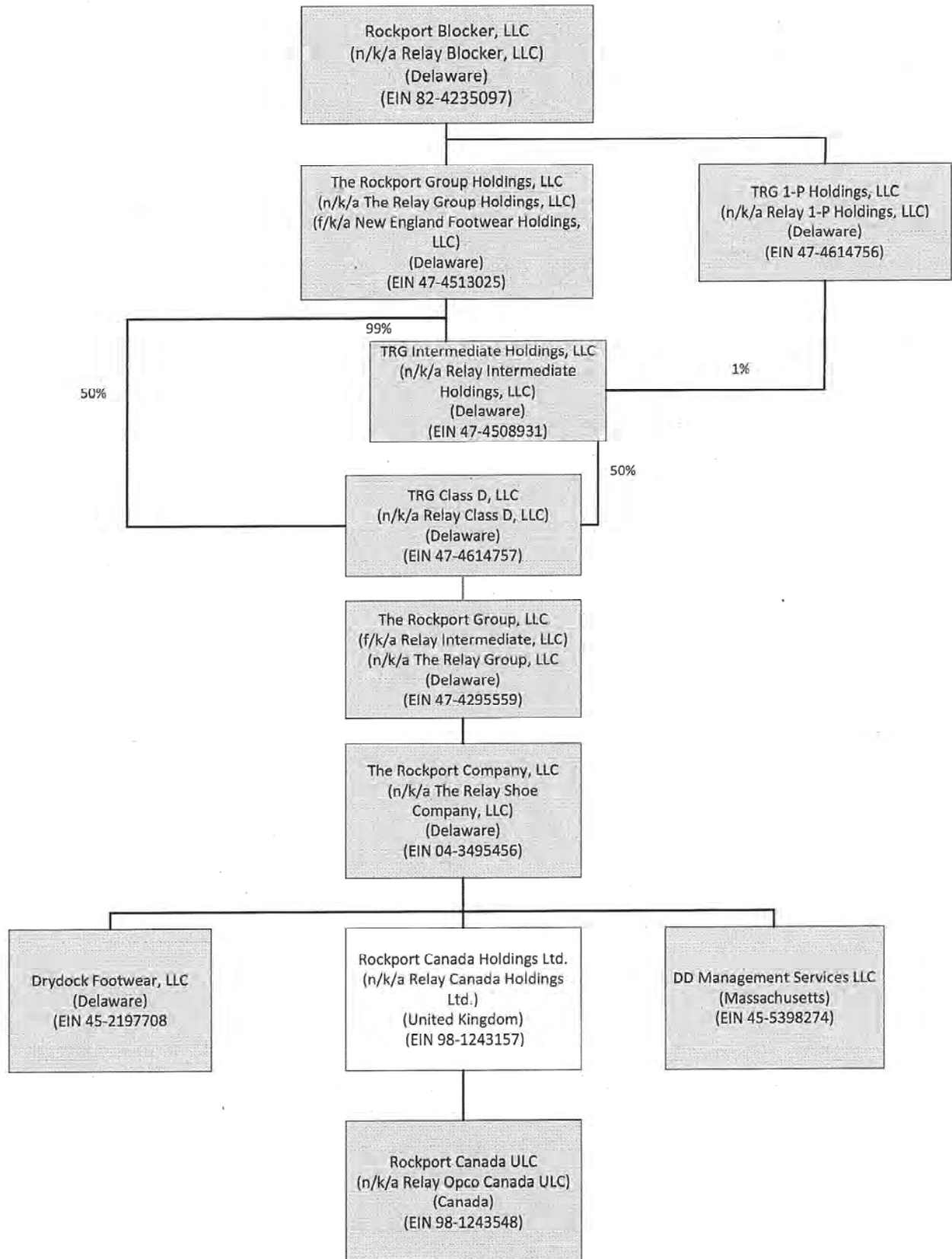


Exhibit C

Liquidation Analysis

Rockport**Liquidation Summary**

Dated: October 10, 2018

(\$USD in 000s)

Privileged and Confidential

DRAFT - Subject to Change

Attorney-Client Work Product

Chapter 7

	Notes	United States	Canada
Cash on Hand	(1)	\$ 57,948	\$ 6,800
<u>Chapter 7 Trustee Related Fees and Wind Down Costs</u>			
Chapter 7 Trustee Fees & Trustee Professional Fees	(2)	2,000	500
Insurance Costs	(3)	128	
Tax-Preparation Costs	(3)	229	16
Post-Sale Professional Fees	(3)	1,625	650
Plan Administrator Fee	(3)		
Liquidating Trustee Professionals	(3)		
Total Chapter 7 Trustee Related Fees and Wind Down Costs		3,981	1,166
% Recovery - Chapter 7 Trustee Related Fees and Wind Down Costs		100%	100%
Proceeds Available to Priority Claims		53,966	5,634
<u>Priority Claims</u>			
503(b)(9)	(4)	116	7
Priority	(4)	55	2,160
Admin	(4)	26	
Secured	(4)	16	7
Total Priority Claims		212	2,164
% Recovery - Priority Claims		100%	100%
Proceeds Available to Additional Administrative Claims		53,754	3,470
<u>Additional Administrative Claims</u>			
Accrued Professional Fees as of August 1, 2018	(5)	8,250	400
US Trustee Fees	(6)	505	62
Post-Petition Accounts Payable	(7)	1,000	520
Escrow Payments		877	15
Total Additional Administrative Claims		10,633	997
% Recovery - Additional Administrative Claims		100%	100%
Proceeds Available for Secured Noteholders		43,121	2,473
Less: Wind Down Reserve Carve-Out	(8)		
Net Proceeds Available for Secured Noteholders		43,121	2,473
Noteholder Outstanding Principle		168,253	
% Recovery - Noteholders		25.6%	n/a
Net Proceeds Available for General Unsecured Claims			2,473
<u>General Unsecured Claims</u>			
Filed Claims and remaining Scheduled Amounts	(9)	19,633	5,567
Intercompany Claims	(10)	154,637	
Total General Unsecured Claims		174,270	5,567
% Recovery - General Unsecureds		0%	44%

Liquidation Analyses

NOTHING CONTAINED IN THE FOLLOWING LIQUIDATION ANALYSES (THE "ANALYSES") IS INTENDED TO BE OR CONSTITUTES A CONCESSION OR ADMISSION OF THE DEBTORS. THE ESTIMATED AMOUNT OF ALLOWED CLAIMS SET FORTH HEREIN SHOULD NOT BE RELIED UPON FOR ANY PURPOSE OTHER THAN AN ANALYSIS UNDER SECTION 1129(a)(7) OF THE BANKRUPTCY CODE, INCLUDING ANY DETERMINATION OF THE VALUE OF ANY DISTRIBUTION TO BE MADE ON ACCOUNT OF ALLOWED CLAIMS UNDER THE PLAN. THE ACTUAL AMOUNT OF ALLOWED CLAIMS AND RECOVERIES THEREON IN THESE CHAPTER 11 CASES COULD DIFFER MATERIALLY FROM THE ESTIMATED AMOUNTS SET FORTH IN THE ANALYSES.

1. Introduction

Often called the "best interests" test, Section 1129(a)(7) of the Bankruptcy Code requires that the Bankruptcy Court find, as a condition to confirmation of the Plan, that each holder of a Claim or Equity Interest in each impaired Class: (i) has accepted the Plan; or (ii) will receive or retain under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under Chapter 7 of the Bankruptcy Code on such date. To make these findings, the Bankruptcy Court must: (a) estimate the cash proceeds (the "Net Estimated Chapter 7 Liquidation Proceeds") that a Chapter 7 trustee would generate if each Debtor's Chapter 11 case was converted to a Chapter 7 case on the Effective Date and the assets of such Debtor's estate were liquidated in a Chapter 7 bankruptcy proceeding rather than through the Plan; (b) estimate the Claims that would result from a hypothetical liquidation of the Debtors in a Chapter 7 bankruptcy proceeding; (c) determine the distribution (the "Estimated Recovery in Chapter 7 Liquidation") that each Holder of a Claim or Equity Interest would receive from the Net Estimated Chapter 7 Liquidation Proceeds under the priority scheme dictated in Chapter 7; and (d) compare each Holder's Estimated Recovery in Chapter 7 Liquidation to the distribution that such Holder would receive under the Plan (the "Plan Recovery") if the Plan was confirmed and consummated.

Based on the Analyses, the Debtors believe the Plan satisfies Section 1129(a)(7) of the Bankruptcy Code and that each Holder of an impaired Claim or Equity Interest will receive value under the Plan on the Effective Date that is equal to or more than the value such Holder would receive if the Debtors liquidated under Chapter 7 of the Bankruptcy Code. The Debtors believe that the Analyses and conclusions set forth herein are fair and represent management's best judgment regarding the results of a liquidation of the Debtors under Chapter 7 of the Bankruptcy Code. The Analyses were prepared for the sole purpose of assisting the Bankruptcy Court and Holders of impaired Claims or Equity Interests in making this determination, and should not be used for any other purpose. Accordingly, cash proceeds and claim amounts included herein may be different than amounts referred to in the Plan. The Analyses are based upon certain assumptions discussed herein.

Global Notes to the Analyses

1. On May 14, 2018, The Rockport Company, LLC and its affiliated debtors (collectively, "Rockport" or the "Debtors") filed for protection under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware. On May 16, 2018, the Debtors also commenced a recognition proceeding under Canada's Companies' Creditors Arrangement Act in the Ontario Superior Court of Justice to, among other things, recognize the Debtors' Chapter 11 Cases as a "foreign main proceeding."
2. On August 2, 2018, the Debtors completed the sale of substantially all of the assets to an affiliate of Charlesbank Capital Partners for the base purchase price of \$150 million in aggregate (the "Sale"), subject to certain adjustments, and the assumption of related pre- and post-petition operating liabilities. As a result of the Sale, the Debtors have no future operations.
3. The Analyses, which were prepared for each of the Debtors, assume that the Debtors' Chapter 7 liquidation would commence on or about October 31, 2018 (the "Conversion Date"), under the direction of a Chapter 7 trustee and would continue for a period of up to 12 months, during which time the cash proceeds (net of liquidation-related costs) would then be distributed to creditors in accordance with the priority scheme established under the Bankruptcy Code. The Analyses assume litigation costs incurred in connection with the allocation process that would be required absent the settlement and concessions embodied in the Plan and that the Chapter 7 trustee would retain professionals to defend or prosecute litigation pending against the Debtors in other courts.
4. The Analyses are based on several estimates and assumptions that, although developed and considered reasonable by the Debtors' management and advisors, are inherently subject to significant economic, business, regulatory, and competitive uncertainties and contingencies beyond the control of the Debtors. Accordingly, there can be no assurance that the values reflected in the Analyses would be realized if the Debtors were, in fact, to undergo such a Chapter 7 liquidation and actual results could vary materially and adversely from those contained herein.
5. The Analyses assume that there will be neither a cost or recovery from the normal course litigation that the Debtors are currently engaged.
6. The Analyses do not include estimates for any tax consequences, either foreign and domestic, that may be triggered upon the Chapter 7 liquidation events.
7. The Analyses are dependent on an unaudited consolidating balance sheet and the Debtors do not provide a forecasted consolidating balance sheet. Actual balances could vary from the Debtors' estimates and additional legal or financial analysis could cause the Debtors' estimated recoveries in the Analyses to change.

The Debtors have determined, as summarized in the Analyses, that confirmation of the Plan will provide all Holders of impaired Claims and Equity Interests at each Debtor individually, and for all Debtors jointly, with a recovery (if any) that is not less than what they would otherwise receive pursuant to a liquidation of the Debtors under Chapter 7 of the Bankruptcy Code. Accordingly, each Debtor satisfies the best interest test on an individual basis, and all the Debtors, collectively, satisfy the best interest test.

Specific Notes to the Assumptions Contained in the Analyses

1. Cash on Hand

Cash on Hand represents the Debtors cash as of the Closing Date including funds held in escrow related to estimated cure-related payments (for both The Rockport Company, LLC and Rockport Canada ULC), intercompany trade receivables and cash adjustments related to the allocation of purchase price among the Debtors (in the Chapter 7 context, the allocation of Sale Proceeds would likely be litigated as there would not be a consensual allocation of such proceeds as between the U.S. Debtors and Rockport Canada).

2. Chapter 7 Trustee Fees & Trustee Professional Fees

Chapter 7 Trustee Fees & Trustee Professional Fees represent the estimated Chapter 7 trustee expenses plus the cost of the trustee's professionals. The Liquidation Analyses assume that the Chapter 7 trustee would be compensated in accordance with the guidelines of Section 326 of the Bankruptcy Code, which is generally 3% of the assets administered, and the remainder represents fees of the Chapter 7 trustee's professionals. The Analyses assume that the Chapter 7 trustee would retain U.S. bankruptcy counsel, Canadian bankruptcy counsel, a single financial advisory firm, and special counsels as needed to address litigation pending against the Debtors in other courts. The Analyses also assume litigation costs incurred in connection with the allocation process that would be required absent the settlement and concessions embodied in the Plan, as well as costs of administration that are larger than a typical Chapter 7 bankruptcy case due to the nature of the Debtors' cross-border operations.

3. Wind Down Costs

The Wind Down Costs include the expenses incurred in order to wind down the Debtors' Estates. Expenses include insurance costs, tax preparation costs, post sale professional fees, and Liquidating Trustee Professional Fees. As of September 30, 2018, the Debtors have paid \$128k in insurance costs.

4. Priority Claims

Priority Claims include 503(b)9 claims, priority wage and tax claims, administrative claims, and secured claims, if any.

5. Accrued Chapter 11 Professional Fees

Reflects the Debtors Chapter 11 Professional Fee Accrual as of August 2, 2018 based upon estimates provided to the Debtors from professionals, including the Success Fee payable to Houlihan Lokey. As of September 30, 2018, the Debtors have paid

\$2.9M of the \$8.3M of Accrued (Pre-Close) Chapter 11 Professional Fees in the US and \$0.4M of the \$0.4M of Accrued (Pre-Close) Chapter 11 Professional Fees in Canada.

6. U.S. Trustee Fees

Reflects estimated amounts payable to the U.S. Trustee for Q3 & Q4 2018 based on anticipated disbursements from the Debtors' Estates.

7. Post-petition Accounts Payable

Reflects vendor payables (administrative claims) not assumed by the Purchaser paid out in the normal course following the Closing Date. As of September 30, 2018, the Debtors have paid \$341k of the \$1.0M of Post-Petition Accounts Payable in the US and \$481k of the \$520k of Post-Petition Accounts Payable in Canada.

8. Wind Down Reserve Carve Out

The Final DIP Order Supplement provided, among other things, for the establishment of a Wind Down Reserve. The Wind Down Reserve is reduced by the post-closing date professional fees, fees incurred by Committee advisors in excess of budget and Liquidating Trustee fees and expenses, as well as the costs to wind down the US Debtors Estate (insurance, tax return, UST fees) and the priority claims (503(b)9, secured, administrative & priority).

9. Filed Claims and remaining Scheduled Amounts

The estimate of filed Claims is based on the latest claims register (filed claims, including all lease rejection damages 502(b)(6) claims, plus scheduled claims). As of the filing of this Analyses, the Debtors are awaiting detailed schedules from the Purchaser to confirm remaining Debtors liabilities.

10. Intercompany Claims

Intercompany Claims include all known valid claims among the Debtors as well as claims between the Debtors and non-Debtors as of the Petition Date.

EXHIBIT B

(Notice of Effective Date)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

THE RELAY COMPANY, LLC, *et al.*,

Debtors.¹

)
) Chapter 11
)
)
) Case No. 18-11145 (LSS)
)
)
) Jointly Administered
)
)
)
)

**NOTICE OF (A) ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER (I) APPROVING COMBINED
DISCLOSURE STATEMENT AND CHAPTER 11 PLAN OF LIQUIDATION
AS CONTAINING ADEQUATE INFORMATION ON A FINAL BASIS
AND (II) CONFIRMING COMBINED DISCLOSURE STATEMENT
AND CHAPTER 11 PLAN OF LIQUIDATION AND (B) EFFECTIVE DATE**

PLEASE TAKE NOTICE that an order (the “**Confirmation Order**”) of the Honorable Laurie Selber Silverstein, United States Bankruptcy Judge for the District of Delaware, confirming and approving the *Combined Disclosure Statement and Chapter 11 Plan of Liquidation* [Docket No. ___] (including all exhibits thereto and as the same may be amended, modified or supplemented from time to time, the “**Combined Plan and Disclosure Statement**”)² was entered on December __, 2018 [Docket No. ___].

PLEASE TAKE FURTHER NOTICE that, on December __, 2018, the Ontario Superior Court of Justice (Commercial List) granted an order recognizing and enforcing the Confirmation Order in Canada.

PLEASE TAKE FURTHER NOTICE that all conditions precedent to effectiveness pursuant to Article XV.B of the Combined Plan and Disclosure Statement have been satisfied or waived. Therefore, today, December __ 2018, is the Effective Date of the Combined Plan and Disclosure Statement.

¹ The debtors and debtors in possession in these cases and the last four digits of their respective Employer Identification Numbers are: Relay Blocker, LLC (f/k/a Rockport Blocker, LLC) (5097), The Relay Group Holdings, LLC (f/k/a The Rockport Group Holdings, LLC) (3025), Relay 1-P Holdings, LLC (f/k/a TRG 1-P Holdings, LLC) (4756), Relay Intermediate Holdings, LLC (f/k/a TRG Intermediate Holdings, LLC) (8931), Relay Class D, LLC (f/k/a TRG Class D, LLC) (4757), The Relay Group, LLC (f/k/a The Rockport Group, LLC) (5559), The Relay Company, LLC (f/k/a The Rockport Company, LLC) (5456), Drydock Footwear, LLC (7708), DD Management Services LLC (8274), and Relay Opeo Canada ULC (f/k/a Rockport Canada ULC) (3548). The debtors’ mailing address is 1220 Washington Street, West Newton, Massachusetts 02465.

² Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Combined Plan and Disclosure Statement.

PLEASE TAKE FURTHER NOTICE that the Combined Plan and Disclosure Statement and its provisions are binding on, among others, the Debtors, all holders of Claims and Interests (irrespective of whether such Claims or Interests are impaired under the Combined Plan and Disclosure Statement or whether the Holders of such Claims or Interests have accepted the Combined Plan and Disclosure Statement), and any and all non-Debtor parties to executory contracts and unexpired leases with the Debtors, as provided in the Combined Plan and Disclosure Statement.

PLEASE TAKE FURTHER NOTICE that any Holder of a Claim arising from the rejection of an executory contract or unexpired lease pursuant to the Combined Plan and Disclosure Statement must submit a Proof of Claim on account of such Claim by no later than _____, 2019 at 5:00 p.m. (prevailing Eastern Time) to the Claims Agent at the following address: The Rockport Company, LLC Claims Processing Center c/o Prime Clerk LLC, 850 Third Avenue, Suite 412 Brooklyn, New York 11232. **Any Proofs of Claim not submitted and actually received by the Claims Agent by such date will be forever barred from assertion against the Debtors and their Estates.**

PLEASE TAKE FURTHER NOTICE that the Administrative Expense Claim Bar Date is _____, 2019 at 4:00 p.m. (prevailing Eastern Time). Unless otherwise ordered by the Bankruptcy Court, Holders of Administrative Expense Claims (other than the Holders of Professional Fee Administrative Claims and the Claims of Governmental Units arising under Section 503(b)(1)(B), (C), or (D) of the Bankruptcy Code) that do not file requests for allowance and payment thereof on or before the Administrative Expense Claim Bar Date shall forever be barred from asserting such Administrative Expense Claims against the Debtors and their Estates.

PLEASE TAKE FURTHER NOTICE that all requests for compensation or reimbursement of Professionals retained in these Chapter 11 Cases for services performed and expenses incurred prior to the Effective Date shall be filed and served on (a) the Debtors' counsel, Richards, Layton & Finger, P.A., One Rodney Square, 920 N. King Street, Wilmington, DE 19801, Attn: Mark D. Collins, Michael J. Merchant and Amanda R. Steele, (b) the United States Trustee, 844 King Street, Suite 2207, Lockbox #35, Wilmington, DE 19801, Attn: Brya Keilson, and (c) counsel to the Creditors' Committee (i) Cooley LLP, 1114 Avenue of the Americas, New York, New York 10036 Attn: Jay Indyke, jindyke@cooley.com, and (ii) Whiteford, Taylor & Preston LLC, 405 North King Street, Suite 500, Wilmington, Delaware 19801, Attn: Christopher M. Samis, csamis@wtplaw.com, and such other entities who are designated by the Bankruptcy Rules, the Confirmation Order, or other order of the Bankruptcy Court, by no later than _____, 2019 at 4:00 p.m. (prevailing Eastern Time), unless otherwise agreed by the Debtors.

PLEASE TAKE FURTHER NOTICE that, after the Effective Date, all notices previously provided to the U.S. Debtors shall be addressed to the Liquidating Trustee at the following address:

The Relay Shoe Company, LLC
Liquidating Trustee c/o MHR Advisory Group
6701 Bay Parkway
3rd Floor
Brooklyn, New York 11204
Attn: Steve Balasiano

PLEASE TAKE FURTHER NOTICE that, after the Effective Date, all notices previously provided to Rockport Canada shall be addressed to the Rockport Canada Plan Administrator at the following address:

Richter Advisory Group Inc.
Adam Sherman
Pritesh Patel
Richter Advisory Group Inc.
181 Bay Street, Suite 3320
Bay Wellington Tower
Toronto ON M5J 2T3
Telephone: (416) 488-2345
Email: asherman@richter.ca
ppatel@richter.ca

PLEASE TAKE FURTHER NOTICE that the copies of the Confirmation Order and the Combined Plan and Disclosure Statement may be obtained and/or are available for review without charge at the website of the Claims Agent, <https://cases.primeclerk.com/rockport>, or by contacting the Claims Agent via telephone ((844) 224-1137).

Dated: _____, 2018
Wilmington, Delaware

Respectfully submitted,
RICHARDS, LAYTON & FINGER, P.A.

/s/ Draft

Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
Amanda R. Steele (No. 5530)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Tel.: (302) 651-7700
Fax: (302) 651-7701
collins@rlf.com
merchant@rlf.com
steele@rlf.com

Counsel to the Debtors and Debtors in Possession

SCHEDULE "B" - FORM OF IMPLEMENTATION CERTIFICATE

Court File No. CV-18-597987-00CL

**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 ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP
HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS,
LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT
COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES
LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")**

**APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

INFORMATION OFFICER'S PLAN IMPLEMENTATION CERTIFICATE

A. Pursuant to the Supplemental Order (Foreign Main Proceeding) dated May 16, 2018, made by Mr. Justice McEwen of the Ontario Superior Court of Justice (Commercial List) (the "**Court**"), Richter Advisory Group Inc. ("**Richter**") was appointed as the information officer (the "**Information Officer**").

B. Pursuant to an Order of the Court dated December 21, 2018 (the "**Plan Approval Order**"), the Court recognized an order, *inter alia*, (i) confirming the Debtors' plan of liquidation pursuant to Chapter 11 of the United States Bankruptcy Code as filed with the United States Bankruptcy Court for the District of Delaware (the "**US Court**") on September 21, 2018, as filed in revised form with the US Court on October 16, 2018, as filed in further revised form with the US Court on December 17, 2018 and as filed in further revised form with the US Court on December 19, 2018 (including all amendments, modifications and supplements, the "**Plan**"), and (ii) approving the Debtors' disclosure statement in respect of the Plan (the "**Confirmation Order**").

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Plan Approval Order.

THE INFORMATION OFFICER HEREBY CERTIFIES the following:

I. The Information Officer is satisfied, in its discretion, that the Plan has been implemented and met its Effective Date (as defined in the Plan).

This Certificate was delivered by the Information Officer at _____ (time) on _____ (date).

RICHTER ADVISORY GROUP INC.

in its capacity as Court-appointed Information Officer of Rockport Blocker, LLC, The Rockport Group Holdings, LLC, TRG 1-P Holdings, LLC, TRG Intermediate Holdings, LLC, TRG Class D, LLC, The Rockport Group, LLC, The Rockport Company, LLC, Drydock Footwear, LLC, DD Management Services LLC and Rockport Canada ULC

Per: _____

Name:

Title:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")

APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDINGS COMMENCED AT TORONTO

**INFORMATION OFFICER'S PLAN IMPLEMENTATION
CERTIFICATE**

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C

Tel: 416-367-6266
rjaipargas@blg.com

Alex MacFarlane – LSO No. 28133Q

Tel: 416-367-6305
amacfarlane@blg.com

Evita Ferreira – LSO No. 69967K

Tel: 416-367-6708
eferreira@blg.com

Lawyers for Rockport Blocker, LLC, The Rockport Group Holdings, LLC, TRG 1-P Holdings, LLC, TRG Intermediate Holdings, LLC, TRG Class D, LLC, The Rockport Group, LLC, The Rockport Company, LLC, Drydock Footwear, LLC, DD Management Services LLC and Rockport Canada ULC

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF ROCKPORT BLOCKER, LLC, THE ROCKPORT GROUP HOLDINGS, LLC, TRG 1-P HOLDINGS, LLC, TRG
INTERMEDIATE HOLDINGS, LLC, TRG CLASS D, LLC, THE ROCKPORT GROUP, LLC, THE ROCKPORT COMPANY, LLC, DRYDOCK
FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC AND ROCKPORT CANADA ULC (THE "DEBTORS")

APPLICATION OF ROCKPORT BLOCKER, LLC, UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.
C-36, AS AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

ORDER
(December 21, 2018)

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C

Tel: 416-367-6266
rjaipargas@blg.com

Alex MacFarlane – LSO No. 28133Q

Tel: 416-367-6305
amacfarlane@blg.com

Evita Ferreira – LSO No. 69967K

Tel: 416-367-6708
eferreira@blg.com

Lawyers for Rockport Blocker, LLC, The Rockport Group Holdings,
LLC, TRG 1-P Holdings, LLC, TRG Intermediate Holdings, LLC,
TRG Class D, LLC, The Rockport Group, LLC, The Rockport
Company, LLC, Drydock Footwear, LLC, DD Management Services
LLC and Rockport Canada ULC

Tab 30



Court File No.: CV-22-00682880-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE	)	MONDAY, THE 20 TH
	)	
JUSTICE CONWAY	)	DAY OF JUNE, 2022

**IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF REVLON, INC., ALMAY, INC., ART & SCIENCE, LTD., BARI COSMETICS, LTD., BEAUTYGE BRANDS USA, INC., BEAUTYGE I, BEAUTYGE II, LLC, BEAUTYGE U.S.A., INC., BRANDCO ALMAY 2020 LLC, BRANDCO CHARLIE 2020 LLC, BRANDCO CND 2020 LLC, BRANDCO CURVE 2020 LLC, BRANDCO ELIZABETH ARDEN 2020 LLC, BRANDCO GIORGIO BEVERLY HILLS 2020 LLC, BRANDCO HALSTON 2020 LLC, BRANDCO JEAN NATE 2020 LLC, BRANDCO MITCHUM 2020 LLC, BRANDCO MULTICULTURAL GROUP 2020 LLC, BRANDCO PS 2020 LLC, BRANDCO WHITE SHOULDERS 2020 LLC, CHARLES REVSON INC., CREATIVE NAIL DESIGN, INC., CUTEX, INC., DF ENTERPRISES, INC., ELIZABETH ARDEN (CANADA) LIMITED, ELIZABETH ARDEN (FINANCING), INC., ELIZABETH ARDEN (UK) LTD., ELIZABETH ARDEN INVESTMENTS, LLC, ELIZABETH ARDEN NM, LLC, ELIZABETH ARDEN TRAVEL RETAIL, INC., ELIZABETH ARDEN USC, LLC, ELIZABETH ARDEN, INC., FD MANAGEMENT, INC., NORTH AMERICA REVSALE INC., OPP PRODUCTS, INC., PPI TWO CORPORATION, RDN MANAGEMENT, INC., REALISTIC ROUX PROFESSIONAL PRODUCTS INC., REVLON CANADA INC., REVLON CONSUMER PRODUCTS CORPORATION, REVLON DEVELOPMENT CORP., REVLON PROFESSIONAL HOLDING COMPANY LLC, REVLON GOVERNMENT SALES, INC., REVLON INTERNATIONAL CORPORATION, REVLON (PUERTO RICO) INC., RIROS CORPORATION, RIROS GROUP INC., RML, LLC, ROUX LABORATORIES, INC., ROUX PROPERTIES JACKSONVILLE, LLC, AND SINFULCOLORS INC.

**APPLICATION OF REVLON, INC. UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS
AMENDED**

**SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)**

THIS APPLICATION, made by Revlon, Inc. in its capacity as the foreign representative (the "**Foreign Representative**") of Revlon, Inc., Almay, Inc., Art & Science, Ltd.,

Bari Cosmetics, Ltd., Beautyge Brands USA, Inc., Beautyge I, Beautyge II, LLC, Beautyge U.S.A., Inc, BrandCo Almay 2020 LLC, BrandCo Charlie 2020 LLC, BrandCo CND 2020 LLC, BrandCo Curve 2020 LLC, BrandCo Elizabeth Arden 2020 LLC, BrandCo Giorgio Beverly Hills 2020 LLC, BrandCo Halston 2020 LLC, BrandCo Jean Nate 2020 LLC, BrandCo Mitchum 2020 LLC, BrandCo Multicultural Group 2020 LLC, BrandCo PS 2020 LLC, BrandCo White Shoulders 2020 LLC, Charles Revson Inc., Creative Nail Design, Inc., Cutex, Inc., DF Enterprises, Inc., Elizabeth Arden (Canada) Limited, Elizabeth Arden (Financing), Inc., Elizabeth Arden (UK) Ltd., Elizabeth Arden Investments, LLC, Elizabeth Arden NM, LLC, Elizabeth Arden Travel Retail, Inc., Elizabeth Arden USC, LLC, Elizabeth Arden, Inc., FD Management, Inc., North America Revsale Inc., OPP Products, Inc., PPI Two Corporation, RDEN Management, Inc., Realistic Roux Professional Products Inc., Revlon Canada Inc., Revlon Consumer Products Corporation, Revlon Development Corp., Revlon Professional Holding Company LLC, Revlon Government Sales, Inc., Revlon International Corporation, Revlon (Puerto Rico) Inc., Riros Corporation, Riros Group Inc., RML, LLC, Roux Laboratories, Inc., Roux Properties Jacksonville, LLC, and SinfulColors Inc. (collectively, the “**Chapter 11 Debtors**”), pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) for an Order substantially in the form enclosed in the Application Record, was heard this day by judicial videoconference via Zoom at Toronto, Ontario.

ON READING the Notice of Application, the affidavit of Robert M. Caruso affirmed June 19, 2022 (the “**Caruso Affidavit**”), filed,

AND UPON HEARING the submissions of counsel for the Foreign Representative, and those other parties present, no one else appearing although duly served as appears from the affidavit of service of Marleigh Dick affirmed June 20, 2022, and on reading the consent of KSV Restructuring Inc. to act as the information officer:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meaning given to them in the Caruso Affidavit.

INITIAL RECOGNITION ORDER

3. **THIS COURT ORDERS** that the provisions of this Order shall be interpreted in a manner complementary and supplementary to the provisions of the Initial Recognition Order (Foreign Main Proceeding) dated as of June 20, 2022 (the “**Recognition Order**”), provided that in the event of a conflict between the provisions of this Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. **THIS COURT ORDERS** that the following orders of the United States Bankruptcy Court for the Southern District of New York (the “**U.S. Bankruptcy Court**”) made in the Foreign Proceeding (as defined in the Recognition Order) (the “**Foreign Orders**”) are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to section 49 of the CCAA:

- (a) *Order (I) Authorizing Revlon, Inc. to Act as Foreign Representative, and (II) Granting Related Relief* (the “**Foreign Representative Order**”);
- (b) *Order (A) Directing Joint Administration of Chapter 11 Cases and (B) Granting Related Relief* (the “**Joint Administration Order**”);
- (c) *Interim Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* (the “**Interim DIP Order**”);
- (d) *Interim Order (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (B) Determining Adequate Assurance of Payment for Future Utility Services, (C) Establishing Procedures for Determining Adequate*

Assurance of Payment, and (D) Granting Related Relief (the “Interim Utilities Order”);

- (e) *Interim Order Approving Notification and Hearing Procedures for Certain Transfers of Common Stock or Options, Declarations of Worthlessness with respect to Common Stock and Claims Against the Debtors (the “Interim NOL Order”);*
- (f) *Interim Order (A) Authorizing the Payment of Certain Prepetition Taxes and Fees and (B) Granting Related Relief (the “Interim Taxes Order”);*
- (g) *Interim Order (I) Authorizing the Debtors to (A) Pay Prepetition Employee Wages, Salaries, Other Compensation, and Reimbursable Employee Expenses and (B) Continue Employee Benefits Programs and (II) Granting Related Relief (the “Interim Wages Order”);*
- (h) *Interim Order (A) Authorizing the Debtors to Continue and Renew their Surety Bond Program and (B) Granting Related Relief (the “Interim Surety Bond Order”);*
- (i) *Interim Order (I) Authorizing the Debtors to Pay Prepetition Claims of (A) Lien Claimants, (B) Import Claimants, (C) 503(B)(9) Claimants, (D) Foreign Vendors, and (E) Critical Vendors, (II) Confirming Administrative Expense Priority of Outstanding Orders and (III) Granting Related Relief (the “Interim Vendor Order”); and*
- (j) *Interim Order (I) Authorizing the Debtors to (A) Continue to Operate their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Continue to Perform Intercompany Transactions, and (II) Granting Related Relief (the “Interim Cash Management Order”);*
- (k) *Interim Order (A) Authorizing the Debtors to Maintain and Administer their Existing Customer Programs and Honor Certain Prepetition Obligations Related*

Thereto and (B) Granting Related Relief (the “Interim Customer Programs Order”);

- (l) *Interim Order (I) Authorizing the Debtors to (A) Continue Insurance Coverage Entered into Prepetition and Satisfy Prepetition Obligations Related Thereto, (B) Renew, Supplement, Modify, or Purchase Insurance Coverage, (C) Continue to Pay Brokerage Fees, (D) Honor the Terms of the Premium Financing Agreement and Pay Premiums Thereunder, (E) Enter into New Premium Financing Agreements in the Ordinary Course of Business, and (II) Granting Related Relief (the “Interim Insurance Order”); and*
- (m) *Order (I) Authorizing and Approving the Appointment of Kroll Restructuring Administration LLC as Claims and Noticing Agent to the Debtors and (II) Granting Related Relief (the “Kroll Retention Order”),*

(copies of which are attached as Schedules “A” to “M” hereto, respectively);

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to Property (as defined below) in Canada.

APPOINTMENT OF INFORMATION OFFICER

5. **THIS COURT ORDERS** that KSV Restructuring Inc. is hereby appointed as an officer of this Court (the “**Information Officer**”), with the powers and duties set out herein.

NO PROCEEDINGS AGAINST THE CHAPTER 11 DEBTORS OR THE PROPERTY

6. **THIS COURT ORDERS** that until such date as this Court may order (the “**Stay Period**”) no proceeding or enforcement process in any court or tribunal in Canada (each, a “**Proceeding**”) shall be commenced or continued against or in respect of the Chapter 11 Debtors, or their employees or representatives acting in such capacities, or affecting their business (the “**Business**”) or their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “**Property**”), except with the written consent of the Chapter 11 Debtors or with leave of this Court, and any and all

Proceedings currently under way against or in respect of any of the Chapter 11 Debtors or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

7. **THIS COURT ORDERS** that, without limiting the stay of proceedings provided for in the Recognition Order, during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “**Persons**” and each being a “**Person**”) against or in respect of the Chapter 11 Debtors or their employees and representatives acting in such capacities, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Chapter 11 Debtors or leave of this Court, provided that nothing in this Order shall (a) prevent the assertion of or the exercise of rights and remedies outside of Canada, (b) empower any of the Chapter 11 Debtors to carry on any business in Canada which that Chapter 11 Debtor is not lawfully entitled to carry on, (c) affect such investigations or Proceedings by a regulatory body as are permitted by section 11.1 of the CCAA, (d) prevent the filing of any registration to preserve or perfect a security interest, or (e) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

8. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Chapter 11 Debtors and affecting the Business in Canada, except with leave of this Court.

ADDITIONAL PROTECTIONS

9. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Chapter 11 Debtors or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services provided in respect of the Property or Business of the Chapter 11 Debtors, are hereby restrained until further Order of this Court from

discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Chapter 11 Debtors, and that the Chapter 11 Debtors shall be entitled to the continued use in Canada of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names.

10. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Chapter 11 Debtors with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Chapter 11 Debtors whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

11. **THIS COURT ORDERS** that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO INFORMATION OFFICER

12. **THIS COURT ORDERS** that the Information Officer:

- (a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;
- (b) shall report to this Court periodically with respect to the status of these proceedings and the status of the Foreign Proceeding, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;

- (c) in addition to the periodic reports referred to in paragraph 12(b) above, the Information Officer may report to this Court at such other times and intervals as the Information Officer may deem appropriate with respect to any of the matters referred to in paragraph 12(b) above;
- (d) shall have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Chapter 11 Debtors, to the extent that is necessary to perform its duties arising under this Order; and
- (e) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

13. **THIS COURT ORDERS** that the Chapter 11 Debtors and the Foreign Representative shall (a) advise the Information Officer of all material steps taken by the Chapter 11 Debtors or the Foreign Representative in these proceedings or in the Foreign Proceeding, (b) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (c) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

14. **THIS COURT ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

15. **THIS COURT ORDERS** that the Information Officer (a) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (b) may post on its website any other materials that the Information Officer deems appropriate.

16. **THIS COURT ORDERS** that the Information Officer may provide any creditor of a Chapter 11 Debtor with information provided by the Chapter 11 Debtors in response to reasonable requests for information made in writing by such creditor addressed to the

Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Chapter 11 Debtors is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative and the relevant Chapter 11 Debtors may agree.

17. **THIS COURT ORDERS** that the Information Officer and counsel to the Information Officer shall be paid by the Chapter 11 Debtors their reasonable fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The Chapter 11 Debtors are hereby authorized and directed to pay the accounts of the Information Officer and counsel for the Information Officer on such terms as such parties may agree.

18. **THIS COURT ORDERS** that the Information Officer and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Information Officer and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice, and the accounts of the Information Officer and its counsel shall not be subject to approval in the Foreign Proceeding.

19. **THIS COURT ORDERS** that Canadian counsel to the Chapter 11 Debtors, the Information Officer and counsel to the Information Officer, shall be entitled to the benefit of and are hereby granted a charge (the “**Administration Charge**”) on the Property in Canada, which charge shall not exceed an aggregate amount of C\$1,500,000 as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out in paragraphs 21 and 23 hereof.

INTERIM FINANCING

20. **THIS COURT ORDERS** that (i) the Term DIP Agent, for and on behalf of itself and the Term DIP Lenders (each as defined in the Interim DIP Order) shall be entitled to the benefit

of and is hereby granted a charge (the “**DIP Term Charge**”), (ii) the ABL DIP Agent, for and on behalf of itself and the ABL DIP Lenders (each as defined in the Interim DIP Order) shall be entitled to the benefit of and is hereby granted a charge (the “**DIP ABL Charge**”), and (iii) the Intercompany DIP Lenders (as defined in the Interim DIP Order) shall be entitled to the benefit of and is hereby granted a charge (the “**DIP Intercompany Charge**”, and together with the DIP Term Charge and the DIP ABL Charge, the “**DIP Charges**”) on the Property in Canada, in each case, consistent with the liens and charges created by the Interim DIP Order, provided however that, with respect to the Property in Canada, the DIP Charges shall have the priority set out in paragraphs 21 and 23 hereof, and further provided that, the DIP Charges shall not be enforced except with leave of this Court on notice to those parties on the service list established for these proceedings.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

21. **THIS COURT ORDERS** that the priorities of the Administration Charge and the DIP Charges (collectively, the “**Charges**”), as among them, shall be as follows:

- (a) First – Administration Charge (to the maximum of C\$1,500,000); and
- (b) Second – DIP Term Charge, DIP ABL Charge, and DIP Intercompany Charge, each having and subject to the relative priority of liens as set forth in the Interim DIP Order on the Property in Canada.

22. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect the Charges.

23. **THIS COURT ORDERS** that the Charges (as constituted and defined herein) shall constitute a charge on the Property in Canada and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, “**Encumbrances**”) in favour of any Person.

24. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Chapter 11 Debtors shall not grant any Encumbrances over any Property in Canada that rank in priority to, or *pari passu* with, the Charges.

25. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the “**Chargees**”) shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) which binds any Chapter 11 Debtor, and notwithstanding any provision to the contrary in any Agreement:

- (i) the creation of the Charges shall not create or be deemed to constitute a breach by a Chapter 11 Debtor of any Agreement to which it is a party;
- (ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and
- (iii) the payments made by the Chapter 11 Debtors to the Chargees pursuant to this Order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

26. **THIS COURT ORDERS** that the Charges created by this Order over leases of real property in Canada shall only be a Charge in the applicable Chapter 11 Debtors’ interest in such real property leases.

SERVICE AND NOTICE

27. **THIS COURT ORDERS** that any employee of any of the Chapter 11 Debtors who is sent a notice of termination of employment shall be deemed to have received such notice by no later than 8:00 a.m. Eastern Standard/Daylight Time on the fourth day following the date any such notice is sent, if such notice is sent by ordinary mail, expedited parcel or registered mail to the individual's address as reflected in the Chapter 11 Debtors' books and records; provided, however, that any notice of termination of employment that is sent to an employee of a Chapter 11 Debtor by electronic message to the individual's email address as last shown in the Chapter 11 Debtors' books and records shall be deemed to have been received 24 hours after the time such electronic message was sent, notwithstanding the mailing of any notices of termination of employment.

28. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: www.ksvadvisory.com/experience/case/revlon.

29. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol or the CCAA and the regulations thereunder is not practicable (including as a result of COVID-19), the Chapter 11 Debtors, the Foreign Representative and the Information Officer are at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or electronic transmission to the Chapter 11 Debtors' creditors or other interested parties at their respective addresses (including e-mail addresses) as last shown on the books and records of the Chapter 11 Debtors and that any

such service or distribution shall be deemed to be received on the earlier of (a) the date of forwarding thereof, if sent by electronic message on or prior to 5:00 p.m. Eastern Standard/Daylight Time (or on the next business day following the date of forwarding thereof if sent on a non-business day); (b) the next business day following the date of forwarding thereof, if sent by courier, personal delivery, facsimile transmission or electronic message sent after 5:00 p.m. Eastern Standard/Daylight Time; or (c) on the third business day following the date of forwarding thereof, if sent by ordinary mail.

30. **THIS COURT ORDERS** that the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Chapter 11 Debtors' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or judicial obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

31. **THIS COURT ORDERS** that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

32. **THIS COURT ORDERS** that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, a monitor, a proposal trustee, or a trustee in bankruptcy of any Chapter 11 Debtor, the Business or the Property.

33. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer, and their respective counsel and agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Chapter 11

Debtors, the Foreign Representative and the Information Officer, as may be necessary or desirable to give effect to this Order, or to assist the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel and agents in carrying out the terms of this Order.

34. **THIS COURT ORDERS** that each of the Chapter 11 Debtors, the Foreign Representative and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

35. **THIS COURT ORDERS** that the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters issued by the Judicial Insolvency Network and adopted by this Court and the U.S. Bankruptcy Court and attached as Schedule “N” hereto (the “**JIN Guidelines**”), are hereby adopted by this Court for the purposes of these recognition proceedings.

36. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days’ notice to the Chapter 11 Debtors, the Foreign Representative, the Information Officer and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

37. **THIS COURT ORDERS** that this Order shall be effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.



SCHEDULE “A”
Foreign Representative Order

Paul M. Basta, Esq.
 Alice Belisle Eaton, Esq.
 Robert A. Britton, Esq.
 Kyle J. Kimpler, Esq.
 Brian Bolin, Esq.
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
 1285 Avenue of the Americas
 New York, NY 10019
 Telephone: (212) 373-3000
 Facsimile: (212) 757-3990

Proposed Counsel to the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK**

	)	
In re:	)	Chapter 11
	)	
REVLON, INC., <i>et al.</i> , ¹	)	Case No. 22-10760 (DSJ)
	)	
Debtors.	)	(Jointly Administered)
	)	

**ORDER (I) AUTHORIZING REVLON, INC. TO
 ACT AS FOREIGN REPRESENTATIVE, AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”), (a) authorizing Revlon, Inc. (“Revlon”) to act as foreign representative on behalf of the Debtors’ estates pursuant to section 1505 of the Bankruptcy Code and (b) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter

¹ The last four digits of Debtor Revlon, Inc.’s tax identification number are 2955. Due to the large number of debtor entities in these Chapter 11 Cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://cases.ra.kroll.com/Revlon>. The location of the Debtors’ service address for purposes of these Chapter 11 Cases is: One New York Plaza, New York, NY 10004.

² Capitalized terms used but not otherwise defined herein shall have the meanings set forth to them in the Motion.

pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at the hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. Revlon is hereby authorized to act as the Foreign Representative on behalf of the Debtors' estates in connection with the Canadian Proceeding. As Foreign Representative, Revlon shall be authorized and shall have the power to act in any way permitted by applicable foreign law, including (a) seeking recognition of the Debtors' chapter 11 cases in the Canadian Proceeding, (b) requesting that the Canadian Court lend assistance to this Court in protecting the Debtors' property, and (c) seeking any other appropriate relief from the Canadian Court that Revlon deems just and proper in the furtherance of the protection of the Debtors' estates.
3. The Debtor or any other appropriate party is hereby authorized to request the aid and assistance of the Canadian Court to recognize the Debtors' chapter 11 cases as a "foreign main

proceeding” and Revlon as a “foreign representative” pursuant to the CCAA, and to recognize and give full force and effect in all provinces and territories of Canada to this Order.

4. For the purposes of communicating with the Canadian Court (should it be necessary), this Court may utilize the JIN Guidelines issued by the Judicial Insolvency Network as this Court determines is just and proper.

5. The Debtors are authorized to take all reasonable actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

6. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: New York, New York
June 17, 2022

s/ David S. Jones
Honorable David S. Jones
United States Bankruptcy Judge

SCHEDULE “B”
Joint Administration Order

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

REVLON, INC.,

Debtor.

Tax I.D. No. 13-3662955

) Chapter 11

) Case No. 22-10760 (DSJ)

In re:

ALMAY, INC.,

Debtor.

Tax I.D. No. 13-3721920

) Chapter 11

) Case No. 22-10770 (DSJ)

In re:

ART & SCIENCE, LTD.,

Debtor.

Tax I.D. No. 36-4237044

) Chapter 11

) Case No. 22-10774 (DSJ)

In re:

BARI COSMETICS, LTD.,

Debtor.

Tax I.D. No. 45-5569710

) Chapter 11

) Case No. 22-10786 (DSJ)

In re:

BEAUTYGE BRANDS USA, INC.,

Debtor.

) Chapter 11

) Case No. 22-10795 (DSJ)

Tax I.D. No. 84-1445135	)	
	)	
In re:	)	Chapter 11
	)	
BEAUTYGE I,	)	Case No. 22-10801 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 98-4074486	)	
	)	
In re:	)	Chapter 11
	)	
BEAUTYGE II, LLC,	)	Case No. 22-10803 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 84-2555893	)	
	)	
In re:	)	Chapter 11
	)	
BEAUTYGE U.S.A., INC.,	)	Case No. 22-10800 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 52-2223071	)	
	)	
In re:	)	Chapter 11
	)	
BRANDCO ALMAY 2020 LLC,	)	Case No. 22-10762 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 85-2388643	)	
	)	
In re:	)	Chapter 11
	)	
BRANDCO CHARLIE 2020 LLC,	)	Case No. 22-10764 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 85-2402013	)	
	)	

In re:	)	Chapter 11
BRANDCO CND 2020 LLC,	)	Case No. 22-10767 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2417509	)	
In re:	)	Chapter 11
BRANDCO CURVE 2020 LLC,	)	Case No. 22-10771 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2454055	)	
In re:	)	Chapter 11
BRANDCO ELIZABETH ARDEN 2020 LLC,	)	Case No. 22-10773 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2473429	)	
In re:	)	Chapter 11
BRANDCO GIORGIO BEVERLY HILLS 2020 LLC,	)	Case No. 22-10777 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2498443	)	
In re:	)	Chapter 11
BRANDCO HALSTON 2020 LLC,	)	Case No. 22-10780 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2539931	)	

In re:	)	Chapter 11
BRANDCO JEAN NATE 2020 LLC,	)	Case No. 22-10783 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2568552	)	
In re:	)	Chapter 11
BRANDCO MITCHUM 2020 LLC,	)	Case No. 22-10789 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2598746	)	
In re:	)	Chapter 11
BRANDCO MULTICULTURAL GROUP 2020 LLC,	)	Case No. 22-10792 (DSJ)
Debtor.	)	
Tax I.D. No. 51-0406398	)	
In re:	)	Chapter 11
BRANDCO PS 2020 LLC,	)	Case No. 22-10797 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2649091	)	
In re:	)	Chapter 11
BRANDCO WHITE SHOULDERS 2020 LLC,	)	Case No. 22-10798 (DSJ)
Debtor.	)	
Tax I.D. No. 85-2656251	)	

In re:	)	Chapter 11
	)	
CHARLES REVSON INC.,	)	Case No. 22-10802 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 13-2577534	)	
	)	
	)	
In re:	)	Chapter 11
	)	
CREATIVE NAIL DESIGN, INC.,	)	Case No. 22-10804 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 95-3448148	)	
	)	
	)	
In re:	)	Chapter 11
	)	
CUTEX, INC.,	)	Case No. 22-10805 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 61-1812963	)	
	)	
	)	
In re:	)	Chapter 11
	)	
DF ENTERPRISES, INC.,	)	Case No. 22-10806 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 51-0406399	)	
	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN (CANADA) LIMITED,	)	Case No. 22-10796 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 98-0565605	)	
	)	
	)	
In re:	)	Chapter 11
	)	

ELIZABETH ARDEN (FINANCING), INC.,	)	Case No. 22-10807 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 80-0048222	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN (UK) LTD.,	)	Case No. 22-10793 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 98-0342936	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN INVESTMENTS, LLC,	)	Case No. 22-10808 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 46-1314739	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN NM, LLC,	)	Case No. 22-10809 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 46-3169592	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN TRAVEL RETAIL, INC.,	)	Case No. 22-10810 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 31-1815389	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN USC, LLC,	)	Case No. 22-10761 (DSJ)

	)	
Debtor.	)	
	)	
Tax I.D. No. 46-3104862	)	
	)	
In re:	)	Chapter 11
	)	
ELIZABETH ARDEN, INC.,	)	Case No. 22-10763 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 59-0914138	)	
	)	
In re:	)	Chapter 11
	)	
FD MANAGEMENT, INC.,	)	Case No. 22-10765 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 51-0406398	)	
	)	
In re:	)	Chapter 11
	)	
NORTH AMERICA REVSale INC.,	)	Case No. 22-10768 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 13-1953730	)	
	)	
In re:	)	Chapter 11
	)	
OPP PRODUCTS, INC.,	)	Case No. 22-10769 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 27-4403060	)	
	)	
In re:	)	Chapter 11
	)	
PPI TWO CORPORATION,	)	Case No. 22-10787 (DSJ)
	)	

Debtor.	)	
Tax I.D. No. N/A	)	
	)	
In re:	)	Chapter 11
RDEN MANAGEMENT, INC.,	)	Case No. 22-10772 (DSJ)
Debtor.	)	
Tax I.D. No. 90-0119805	)	
	)	
In re:	)	Chapter 11
REALISTIC ROUX PROFESSIONAL PRODUCTS INC.,	)	Case No. 22-10775 (DSJ)
Debtor.	)	
Tax I.D. No. 35-2519501	)	
	)	
In re:	)	Chapter 11
REVLON PROFESSIONAL HOLDING COMPANY LLC	)	Case No. 22-10788 (DSJ)
Debtor.	)	
Tax I.D. No. 11-3534535	)	
	)	
In re:	)	Chapter 11
REVLON CANADA INC.,	)	Case No. 22-10799 (DSJ)
Debtor.	)	
Tax I.D. No. N/A	)	
	)	
In re:	)	Chapter 11
REVLON CONSUMER PRODUCTS CORPORATION,	)	Case No. 22-10766 (DSJ)

	)	
Debtor.	)	
	)	
Tax I.D. No. 13-3662953	)	
	)	
In re:	)	Chapter 11
	)	
REVLON DEVELOPMENT CORP.,	)	Case No. 22-10778 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 48-1283986	)	
	)	
In re:	)	Chapter 11
	)	
REVLON GOVERNMENT SALES, INC.,	)	Case No. 22-10781 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 13-2893624	)	
	)	
In re:	)	Chapter 11
	)	
REVLON INTERNATIONAL CORPORATION,	)	Case No. 22-10785 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. 13-6157771	)	
	)	
In re:	)	Chapter 11
	)	
REVLON (PUERTO RICO) INC.,	)	Case No. 22-10790 (DSJ)
	)	
Debtor.	)	
	)	
Tax I.D. No. N/A	)	
	)	
In re:	)	Chapter 11
	)	
RIROS CORPORATION,	)	Case No. 22-10791 (DSJ)
	)	

Debtor.	)	
Tax I.D. No. 13-4030700	)	
	)	
In re:	)	Chapter 11
RIROS GROUP INC.,	)	Case No. 22-10794 (DSJ)
	)	
Debtor.	)	
Tax I.D. No. 13-4034499	)	
	)	
In re:	)	Chapter 11
RML, LLC,	)	Case No. 22-10784 (DSJ)
	)	
Debtor.	)	
Tax I.D. No. N/A	)	
	)	
In re:	)	Chapter 11
ROUX LABORATORIES, INC.,	)	Case No. 22-10776 (DSJ)
	)	
Debtor.	)	
Tax I.D. No. 13-1537427	)	
	)	
In re:	)	Chapter 11
ROUX PROPERTIES JACKSONVILLE, LLC,	)	Case No. 22-10779 (DSJ)
	)	
Debtor.	)	
Tax I.D. No. 46-3691132	)	
	)	
In re:	)	Chapter 11
SINFULCOLORS INC.,	)	Case No. 22-10782 (DSJ)
	)	
Debtor.	)	

Tax I.D. No. 27-4403478)
_____)

**ORDER (A) DIRECTING JOINT ADMINISTRATION
OF CHAPTER 11 CASES AND (B) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)¹ of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an order (this “Order”) (a) directing the joint administration of the Debtors’ chapter 11 cases for procedural purposes only and (b) granting related relief, all as more fully set forth in the Motion; and upon the First Day Declaration; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012; and this Court having the power to enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the Debtors’ notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the “Hearing”); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is granted as set forth herein.
2. The above-captioned chapter 11 cases are consolidated for procedural purposes only and shall be jointly administered by this Court under Case No. 22-10760 (DSJ).

¹ Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

3. The caption of the jointly administered cases should read as follows:

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

REVLON, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 22-10760 (DSJ)
)
) (Jointly Administered)
)

- ¹ The last four digits of Debtor Revlon, Inc.'s tax identification number are 2955. Due to the large number of debtor entities in these Chapter 11 Cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' proposed claims and noticing agent at <https://cases.ra.kroll.com/Revlon>. The location of the Debtors' service address for purposes of these Chapter 11 Cases is: One New York Plaza, New York, NY 10004.

4. The foregoing caption satisfies the requirements set forth in section 342(c)(1) of the Bankruptcy Code.

5. A docket entry, substantially similar to the following, shall be entered on the docket of each of the Debtors other than Revlon, Inc. to reflect the joint administration of these chapter 11 cases:

An order has been entered in accordance with rule 1015(b) of the Federal Rules of Bankruptcy Procedure directing the joint administration of the chapter 11 cases of: Revlon, Inc., Case No. 22-10760 (DSJ); Almay, Inc., Case No. 22-10770 (DSJ); Art & Science, Ltd., Case No. 22-10774 (DSJ); Bari Cosmetics, Ltd., Case No. 22-10786 (DSJ); Beautyge Brands USA, Inc., Case No. 22-10795 (DSJ); Beautyge I, Case No. 22-10801 (DSJ); Beautyge II, LLC, Case No. 22-10803; Beautyge U.S.A., Inc., Case No. 22-10800 (DSJ); BrandCo Almay 2020 LLC, Case No. 22-10762 (DSJ); BrandCo Charlie 2020 LLC, Case No. 22-10764 (DSJ); BrandCo CND 2020 LLC, Case No. 22-10767 (DSJ); BrandCo Curve 2020 LLC, Case No. 22-10771 (DSJ); BrandCo Elizabeth Arden 2020 LLC, Case No. 22-10773 (DSJ); BrandCo Giorgio Beverly Hills 2020 LLC, Case No. 22-10777 (DSJ); BrandCo Halston 2020 LLC, Case No. 22-10780 (DSJ); BrandCo Jean Nate

2020 LLC, Case No. 22-10783 (DSJ); BrandCo Mitchum 2020 LLC, Case No. 22-10789 (DSJ); BrandCo Multicultural Group 2020 LLC, Case No. 22-10792 (DSJ); BrandCo PS 2020 LLC, Case No. 22-10797 (DSJ); BrandCo White Shoulders 2020 LLC, Case No. 22-10798 (DSJ); Charles Revson Inc., Case No. 22-10802 (DSJ); Creative Nail Design, Inc., Case No. 22-10804 (DSJ); Cutex, Inc., Case No. 22-10805 (DSJ); DF Enterprises, Inc., Case No. 22-10806 (DSJ); Elizabeth Arden (Canada) Limited, Case No. 22-10796 (DSJ); Elizabeth Arden (Financing), Inc., Case No. 22-10807 (DSJ); Elizabeth Arden (UK) Ltd., Case No. 22-10793 (DSJ); Elizabeth Arden Investments, LLC, Case No. 22-10808 (DSJ); Elizabeth Arden NM, LLC, Case No. 22-10809 (DSJ); Elizabeth Arden Travel Retail, Inc., Case No. 22-10810 (DSJ); Elizabeth Arden USC, LLC, Case No. 22-10761 (DSJ); Elizabeth Arden, Inc., Case No. 22-10763 (DSJ); FD Management, Inc., Case No. 22-10765 (DSJ); North America Revsale Inc., Case No. 22-10768 (DSJ); PPI Two Corporation, Case No. 22-10787 (DSJ); OPP Products, Inc., Case No. 22-10769 (DSJ); RDEN Management, Inc., Case No. 22-10772 (DSJ); Realistic Roux Professional Products Inc., Case No. 22-10775 (DSJ); Revlon Canada Inc., Case No. 22-10799 (DSJ); Revlon Consumer Products Corporation, Case No. 22-10766 (DSJ); Revlon Development Corp., Case No. 22-10778 (DSJ); Revlon Government Sales, Inc., Case No. 22-10781 (DSJ); Revlon International Corporation, Case No. 22-10785 (DSJ); Revlon Professional Holding Company LLC, Case No. 22-10788 (DSJ); Revlon (Puerto Rico), Inc. Case No. 22-10790 (DSJ); Riros Corporation, Case No. 20-10791 (DSJ); Riros Group Inc., Case No. 22-10794 (DSJ); RML, LLC, Case No. 22-10784 (DSJ); Roux Laboratories, Inc., Case No. 22-10776 (DSJ); Roux Properties Jacksonville, LLC, Case No. 22-10779 (DSJ); SinfulColors Inc., Case No. 22-10782 (DSJ). All further pleadings and other papers shall be filed in and all further docket entries shall be made in Case No. 22-10760 (DSJ).

6. One consolidated docket, one file, and one consolidated service list shall be maintained by the Debtors and kept by the Clerk of the Court with the assistance of the claims and noticing agent retained by the Debtors in these chapter 11 cases.

7. The Debtors shall file their monthly operating reports required by the *Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees*, issued by the U.S. Trustee, in accordance with the applicable Instructions for UST Form 11-MOR: Monthly Operating Report and Supporting Documentation.

8. Nothing contained in the Motion or this Order shall be deemed or construed as directing or otherwise effecting a substantive consolidation of these chapter 11 cases and this Order shall be without prejudice to the rights of the Debtors to seek entry of an order substantively consolidating their respective cases.

9. Nothing contained in this Order shall be deemed or construed as conferring standing on any party in interest in any Debtor's chapter 11 case to appear in any other Debtor's chapter 11 case absent any such right under section 1109 of the Bankruptcy Code or other applicable law.

10. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rules and the Local Rules are satisfied by such notice.

11. The Debtors are authorized to take all reasonable actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

12. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: New York, New York
June 16, 2022

s/ David S. Jones
HONORABLE DAVID S. JONES
UNITED STATES BANKRUPTCY JUDGE

**SCHEDULE “C”
Interim DIP Order**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

REVLON, INC., *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 22-10760 (DSJ)
)
) (Jointly Administered)
)
)
)
)

**INTERIM ORDER (I) AUTHORIZING
THE DEBTORS TO (A) OBTAIN POSTPETITION
FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING
LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE
EXPENSE STATUS, (III) GRANTING ADEQUATE PROTECTION TO THE
PREPETITION SECURED PARTIES, (IV) MODIFYING THE AUTOMATIC STAY,
(V) SCHEDULING A FINAL HEARING, AND (VI) GRANTING RELATED RELIEF**

Upon the motion (the “**DIP Motion**”)² of Revlon, Inc. and each of its affiliates that are debtors and debtors-in-possession (each, a “**Debtor**” and collectively, the “**Debtors**”) in the above-captioned cases (the “**Chapter 11 Cases**”), pursuant to sections 105, 361, 362, 363(b), 363(c)(2), 363(m), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e), 503, 506(c) and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), Rules 2002, 4001, 6003, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and the Local Bankruptcy Rules for the Southern District of New York (the “**Local**

¹ The last four digits of Debtor Revlon, Inc.’s tax identification number are 2955. Due to the large number of debtor entities in these Chapter 11 Cases, for which the Debtors have requested joint administration, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://cases.kroll.com/revlon>. The location of the Debtors’ service address for purposes of these Chapter 11 Cases is: One New York Plaza, New York, NY 10004.

² Capitalized terms used but not defined herein are given the meanings ascribed to such terms in the Term DIP Credit Agreement (as defined herein) or ABL DIP Term Sheet (as defined herein), as applicable.

Bankruptcy Rules”), seeking entry of this interim order (this “**Interim Order**”) among other things:

- (i) authorizing Revlon Consumer Products Corporation (the “**Borrower**” or “**RCPC**”) to obtain postpetition financing (“**DIP Financing**”) pursuant to:
 - a. a superpriority, senior secured and priming debtor-in-possession term loan credit facility (the “**Term DIP Facility**”), subject to the terms and conditions set forth in that certain Superpriority Senior Secured Debtor-in-Possession Term Loan Credit Agreement attached hereto as **Exhibit 1** (as amended, supplemented, or otherwise modified from time to time, the “**Term DIP Credit Agreement**”), by and among, RCPC, as borrower, Revlon, Inc. (“**Holdings**”), the several banks and other financial institutions or entities from time to time party thereto as “**Lenders**” (as defined in the Term DIP Credit Agreement) (the “**Term DIP Lenders**”), Jefferies Finance LLC, as administrative agent and collateral agent (in such capacity, together with its successors and permitted assigns, the “**Term DIP Agent**” and, collectively, with the Term DIP Lenders, the “**Term DIP Secured Parties**”), in an aggregate principal amount not to exceed \$1.025 billion (the commitments in respect thereof, the “**Term DIP Commitments**”; the loans in respect thereof, the “**Term DIP Loans**”) from the Term DIP Lenders (as defined herein) (\$575 million of such amount being committed and \$450 million of such amount being uncommitted and available in the sole discretion of the Term DIP Lenders exclusively for the purpose of refinancing all or a portion of the ABL DIP Facility or the Prepetition ABL Credit Facility subject to the terms and conditions of the Term DIP Credit Agreement), of which \$375 million will be available immediately upon entry of this Interim Order (the “**Initial Draw**”) (including \$76.875 million of such Initial Draw amount available exclusively for the purpose of refinancing all or a portion of the Foreign ABTL Facility³), and the remainder to be available upon the date of entry of the Final Order;
 - b. a superpriority, senior secured and priming debtor-in-possession asset-based revolving credit facility (the “**ABL DIP Facility**”), subject to the terms and conditions set forth in that certain Summary of Terms and Conditions attached hereto as **Exhibit 2** (the “**ABL DIP Term Sheet**” and, together with any credit agreement to be entered into reflecting terms consistent with the ABL DIP Term Sheet and as the same may be amended, supplemented, or otherwise modified from time to time, the “**ABL DIP Credit Agreement**” and, together with the Term DIP Credit

³ The “**Foreign ABTL Facility**” refers to the credit facility consisting of “Term Loans” under that certain Asset-Based Term Loan Credit Agreement, dated as of March 2, 2021, by and among Revlon Finance LLC, as borrower, each other loan party, the several banks and other financial institutions or entities from time to time parties thereto as lenders, and Blue Torch Finance LLC, as administrative agent and collateral agent.

Agreement, the “**DIP Credit Agreements**”), by and among, RCPC, as borrower, Holdings, the several banks and other financial institutions or entities from time to time party thereto as “**Lenders**” (as defined in the ABL DIP Credit Agreement) (collectively, the “**ABL DIP Lenders**”; the Prepetition LIFO ABL Lenders that are also ABL DIP Lenders, the “**LIFO ABL DIP Lenders**”; the Prepetition SISO ABL Lenders that are also ABL DIP Lenders, the “**SISO ABL DIP Lenders**”), MidCap Funding IV Trust, as administrative agent and collateral agent (in such capacity, together with its successors and permitted assigns, the “**ABL DIP Agent**” and, together with the Term DIP Agent, the “**DIP Agents**”) and Crystal Financial LLC, d/b/a SLR Credit Solutions, as administrative agent for the SISO ABL DIP Lenders so long as Crystal Financial LLC or any of its affiliates is a SISO ABL DIP Lender (collectively with the ABL DIP Lenders and the ABL DIP Agent, the “**ABL DIP Secured Parties**”), consisting of (i) the roll-up and conversion of all Prepetition LIFO ABL Obligations and any unused Revolving Commitments (as defined in the Prepetition ABL Credit Agreement) into the ABL DIP Facility (the “**Prepetition LIFO ABL Roll-Up**”) pursuant to commitments of the LIFO ABL DIP Lenders in an aggregate principal amount equal to \$270 million (the “**LIFO ABL DIP Commitments**” and, the loans in respect thereof, the “**LIFO ABL DIP Loans**”), of which an aggregate principal amount equal to \$109 million will be deemed drawn automatically upon the date of entry of the Interim Order, to be applied automatically in satisfaction of the outstanding Prepetition LIFO ABL Obligations and (ii) the roll up and conversion of all Prepetition SISO ABL Obligations and any unused SISO Term Commitments (as defined in the Prepetition ABL Credit Agreement) into the ABL DIP Facility (the “**Prepetition SISO ABL Roll-Up**”) pursuant to term loan commitments of the SISO ABL DIP Lenders in an aggregate principal amount equal to \$130 million (the “**SISO ABL DIP Commitments**” and, together with the LIFO ABL DIP Commitments, the “**ABL DIP Commitments**”; the loans in respect thereof, the “**SISO ABL DIP Loans**” and, together with the LIFO ABL DIP Loans outstanding from time to time, the “**ABL DIP Loans**”), with the entire amount of the SISO ABL DIP Loans to be deemed drawn automatically upon the date of entry of the Interim Order, to be applied automatically in satisfaction of the outstanding Prepetition SISO ABL Obligations; and

- c. a superpriority junior secured debtor-in-possession intercompany credit facility (the “**Intercompany DIP Facility**” and, together with the Term DIP Facility and the ABL DIP Facility, the “**DIP Facilities**”), subject to the terms and conditions set forth in paragraph 22 below, in an aggregate principal amount not to exceed at any time the aggregate amount of the royalty payments (the “**Royalty Payments**”) owed to the BrandCos⁴ under

⁴ “**BrandCo(s)**” means each of (i) Beautyge II, LLC, a Delaware limited liability company, (ii) BrandCo Almay 2020 LLC, a Delaware limited liability company, (iii) BrandCo Charlie 2020 LLC, a Delaware limited liability

the BrandCo License Agreements (as defined in the Prepetition BrandCo Credit Agreement) that have become due and payable on or after the Petition Date (the commitments in respect thereof, the “**Intercompany DIP Commitments**” and, together with the Term DIP Commitments and the ABL DIP Commitments, the “**DIP Commitments**”; the loans in respect thereof, the “**Intercompany DIP Loans** and, together with the Term DIP Loans and the ABL DIP Loans, the “**DIP Loans**”), by and among, RCPC, as borrower, and the BrandCos, as lenders (the “**Intercompany DIP Lenders**” or the “**Intercompany DIP Secured Parties**” and, together with the Term DIP Lenders and the ABL DIP Lenders, the “**DIP Lenders**” and, collectively with the Term DIP Secured Parties and the ABL DIP Secured Parties, the “**DIP Secured Parties**”), which Royalty Payments shall be deemed to have been paid to the applicable BrandCo in satisfaction of the obligation to make such payments to the BrandCo as and when the Royalty Payments are due and then immediately loaned to RCPC.

- (ii) authorizing (a) the Debtors other than the Borrower (such Debtors, the “**Debtor DIP Guarantors**” and, together with the Borrower, the “**Debtor Term DIP Loan Parties**”) to jointly and severally guarantee the Term DIP Loans and the other Term DIP Obligations (as defined herein); and (b) the Debtor DIP Guarantors other than the BrandCo Entities⁵ (together with the Borrower, the “**Debtor ABL DIP Loan Parties**”) to jointly and severally guarantee the ABL DIP Loans and the other ABL DIP Obligations (as defined herein) and (c) the Debtor DIP Guarantors other than the BrandCos (together with the Borrower, the “**Debtor Intercompany DIP Loan Parties**” and, together with the Debtor Term DIP Loan Parties and the ABL DIP Loan Parties, the “**Debtor DIP Loan Parties**”) to jointly and severally guarantee the Intercompany DIP Loans and the other Intercompany DIP Obligations (as defined herein).
- (iii) authorizing the Debtor DIP Loan Parties, as applicable, to execute, deliver and perform under:
 - a. the Term DIP Credit Agreement and all other loan documentation related to the Term DIP Facility, including, without limitation, security agreements, pledge agreements, control agreements, mortgages, deeds, charges, guarantees, promissory notes, intercompany notes, certificates,

company, (iv) BrandCo CND 2020 LLC, a Delaware limited liability company, (v) BrandCo Curve 2020 LLC, a Delaware limited liability company, (vi) BrandCo Elizabeth Arden 2020 LLC, a Delaware limited liability company, (vii) BrandCo Giorgio Beverly Hills 2020 LLC, a Delaware limited liability company, (viii) BrandCo Halston 2020 LLC, a Delaware limited liability company, (ix) BrandCo Jean Nate 2020 LLC, a Delaware limited liability company, (x) BrandCo Mitchum 2020 LLC, a Delaware limited liability company, (xi) BrandCo Multicultural Group 2020 LLC, a Delaware limited liability company, (xii) BrandCo PS 2020 LLC, a Delaware limited liability company and (xiii) BrandCo White Shoulders 2020 LLC, a Delaware limited liability company.

⁵ “**BrandCo Entities**” means each BrandCo and Beautyge I, an exempted company incorporated in the Cayman Islands.

instruments, intellectual property security agreements, notes, fee and engagement letters related to the Term DIP Facility, including the Jefferies Fee Letter, the Jefferies Engagement Letter and such other documents that may be reasonably requested by the Term DIP Agent and the Term DIP Lenders, in each case, as amended, restated, supplemented, waived or otherwise modified from time to time in accordance with the terms thereof and hereof (collectively with the Term DIP Credit Agreement and this Interim Order and, upon entry thereof, the Final Order, the “**Term DIP Documents**”); and

- b. the ABL DIP Credit Agreement and all other loan documentation relating to the ABL DIP Facility, including, without limitation, security agreements, pledge agreements, control agreements, mortgages, deeds, charges, guarantees, promissory notes, intercompany notes, certificates, instruments, intellectual property security agreements, notes, fee letters, including the ABL Administrative Agent Fee Letter (together with the Jefferies Fee Letter, the “**Administrative Agent Fee Letters**”) and such other documents that may be reasonably requested by the ABL DIP Agent and the ABL DIP Lenders, in each case, as amended, restated, supplemented, waived or otherwise modified from time to time in accordance with the terms thereof and hereof (collectively with the ABL DIP Credit Agreement, this Interim Order and, upon entry thereof, the Final Order, the “**ABL DIP Documents**” and, together with the Term DIP Documents, the “**DIP Documents**”).

- (iv) authorizing the Debtor DIP Loan Parties, as applicable, to incur obligations with respect to:

- a. loans, advances, extensions of credit, financial accommodations, reimbursement obligations, fees (including, without limitation, commitment fees, administrative agency fees, closing fees, collateral management fees, exit fees, other fees and fees payable pursuant to the Jefferies Engagement Letter and the Jefferies Fee Letter), costs, expenses and other liabilities, all other obligations (including indemnities and similar obligations, whether contingent or absolute) and all other obligations due or payable under the Term DIP Documents (collectively, the “**Term DIP Obligations**”), including authorizing the Debtors to incur up to \$76.875 million of such Term DIP Obligations for the purpose of refinancing all or a portion of the Foreign ABTL Facility, and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith;
- b. loans, advances, extensions of credit, financial accommodations, reimbursement obligations, fees (including, without limitation, commitment fees, administrative agency fees, closing fees, collateral management fees, exit fees, other fees and fees payable pursuant to the ABL Administrative Agent Fee Letter), costs, expenses and other

liabilities, all other obligations (including indemnities and similar obligations, whether contingent or absolute) and all other obligations due or payable under the ABL DIP Documents (collectively, the “**ABL DIP Obligations**”), and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith; and

- c. loans, advances, extensions of credit, financial accommodations, reimbursement obligations, and other liabilities, all other obligations (including indemnities and similar obligations, whether contingent or absolute) and all other obligations due or payable under this Interim Order in connection with the Intercompany DIP Facility (collectively, the “**Intercompany DIP Obligations**” and, together with the Term DIP Obligations and the ABL DIP Obligations, the “**DIP Obligations**”), and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith.
- (v) subject to the Carve-Out (as defined herein), granting to the Term DIP Secured Parties and the Term DIP Agent, for itself and for the benefit of the Term DIP Secured Parties, allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code in respect of all Term DIP Obligations of the Debtor Term DIP Loan Parties;
- (vi) subject to the Carve-Out, granting to the ABL DIP Secured Parties and the ABL DIP Agent, for itself and for the benefit of the ABL DIP Secured Parties, allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code in respect of all ABL DIP Obligations of the Debtor ABL DIP Loan Parties;
- (vii) subject to the Carve-Out, granting to the Intercompany DIP Secured Parties allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code in respect of all Intercompany DIP Obligations of the Debtor Intercompany DIP Loan Parties;
- (viii) subject to the Carve-Out, granting to the Term DIP Secured Parties and the Term DIP Agent, for itself and for the benefit of the Term DIP Secured Parties, valid, enforceable, non-avoidable and automatically perfected liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code on all prepetition and postpetition property of the Debtor Term DIP Loan Parties’ estates (other than certain excluded property as expressly provided in the Term DIP Documents (the “**Term DIP Excluded Collateral**”)) and all proceeds thereof, including, subject only to and effective upon entry of the Final Order (as defined herein), any Avoidance Proceeds (as defined herein), in each case with the relative priorities set forth on **Exhibit 3** hereto;
- (ix) subject to the Carve-Out, granting to the ABL DIP Secured Parties and the ABL DIP Agent, for itself and for the benefit of the ABL DIP Secured Parties, valid,

enforceable, non-avoidable and automatically perfected liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code on all prepetition and postpetition property of the Debtor ABL DIP Loan Parties' estates (other than certain excluded property as expressly provided in the ABL DIP Documents (the "**ABL Excluded Collateral**" and, together with the Term DIP Excluded Collateral, the "**Excluded Collateral**")) and all proceeds thereof, including, subject only to and effective upon entry of the Final Order, any Avoidance Proceeds, in each case with the relative priorities set forth on **Exhibit 3** hereto;

- (x) subject to the Carve-Out, granting to the Intercompany DIP Secured Parties, valid, enforceable, non-avoidable and automatically perfected liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code on all prepetition and postpetition property of the Debtor Intercompany DIP Loan Parties' estates (other than Term DIP Excluded Collateral) and all proceeds thereof, including, subject only to and effective upon entry of the Final Order, any Avoidance Proceeds, in each case with the relative priorities set forth on **Exhibit 3** hereto;
- (xi) authorizing (a) the Term DIP Agent, acting at the direction of the Required Term DIP Lenders⁶ (as defined herein) to take all commercially reasonable actions to implement and effectuate the terms of this Interim Order, (b) the ABL DIP Agent, acting at the direction of the Required ABL DIP Lenders⁷ (as defined herein) to take all commercially reasonable actions to implement and effectuate the terms of this Interim Order and (c) the Intercompany DIP Lenders, to take all commercially reasonable actions to implement and effectuate the terms of this Interim Order;
- (xii) subject to the Carve-Out, authorizing the Debtors to waive (a) their right to surcharge the Prepetition Collateral (as defined herein) or the DIP Collateral (as defined herein) (together, but excluding any Excluded Collateral, the "**Collateral**") pursuant to section 506(c) of the Bankruptcy Code and (b) any "equities of the case" exception under section 552(b) of the Bankruptcy Code, in each case subject to and effective upon entry of the Final Order;
- (xiii) waiving the equitable doctrine of "marshaling" and other similar doctrines (a) with respect to the DIP Collateral for the benefit of any party other than the DIP Secured Parties and (b) subject only to and effective upon entry of the Final Order, with respect to any of the Prepetition Collateral (including the Cash Collateral) (as defined herein) for the benefit of any party other than the Prepetition BrandCo Secured Parties, Prepetition LIFO ABL Secured Parties and Prepetition SISO

⁶ "**Required Term DIP Lenders**" means the "Required Lenders" (as defined in the Term DIP Credit Agreement).

⁷ "**Required ABL DIP Lenders**" means, at any given time, the holders of more than 50% of the LIFO ABL DIP Commitments then in effect, or if the LIFO ABL DIP Commitments have been terminated, the LIFO ABL DIP Loans then outstanding and, together with the Required Term DIP Lenders, the "**Required DIP Lenders**").

ABL Secured Parties (each as defined herein), subject to the reservation of rights as set forth in paragraph 9;

- (xiv) authorizing the Debtors to use proceeds of the DIP Facilities solely in accordance with this Interim Order and the DIP Documents (including under the Administrative Agent Fee Letters), including the refinancing of the Foreign ABTL Facility;
- (xv) authorizing the Debtors to pay the principal, interest, fees, expenses and other amounts payable under the DIP Documents (including under the Administrative Agent Fee Letters) as such become earned, due and payable to the extent provided in, and in accordance with, the DIP Documents;
- (xvi) subject to the restrictions set forth in the DIP Documents and this Interim Order, authorizing the Debtors to use the Prepetition Collateral, including Cash Collateral of the Prepetition Secured Parties under the Prepetition Loan Documents (as defined herein), and provide adequate protection to the Prepetition Secured Parties for any diminution in value of their respective interests in the applicable Prepetition Collateral (including Cash Collateral), for any reason provided for under the Bankruptcy Code, including resulting from the imposition of the automatic stay under section 362 of the Bankruptcy Code (the “**Automatic Stay**”), the Debtors’ use, sale, or lease of the Prepetition Collateral (including Cash Collateral), and the priming of their respective interests in the Prepetition Collateral (including Cash Collateral);
- (xvii) vacating and modifying the Automatic Stay to the extent set forth herein to the extent necessary to permit the Debtors and their affiliates and the Prepetition Secured Parties to implement and effectuate the terms and provisions of this Interim Order, the DIP Documents and the Final Order and to deliver any notices of termination described below and as further set forth herein;
- (xviii) waiving any applicable stay (including under Bankruptcy Rule 6004) and providing for immediate effectiveness of this Interim Order and the Final Order; and
- (xix) scheduling a final hearing (the “**Final Hearing**”) to consider final approval of the DIP Facilities and use of Cash Collateral pursuant to a proposed final order (the “**Final Order**”), as set forth in the DIP Motion and the DIP Documents filed with this Court.

The Court having considered the interim relief requested in the DIP Motion, the exhibits attached thereto, the *Declaration of Steven M. Zelin in Support of Debtors’ Emergency Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Claims with*

Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Secured Parties, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief (the “**Zelin Declaration**”), and the *Declaration of Robert Caruso in Support of the Debtors’ Chapter 11 Petitions and First Day Relief* (the “**Caruso Declaration**”), the available DIP Documents, and the evidence submitted and arguments made at the interim hearings held on June 16, 2022 and June 17, 2022 (the “**Interim Hearings**”); and due and sufficient notice of the Interim Hearings having been given in accordance with Bankruptcy Rules 2002, 4001(b), (c) and (d), and all applicable Local Bankruptcy Rules; and the Interim Hearings having been held and concluded; and all objections, if any, to the interim relief requested in the DIP Motion having been withdrawn, resolved or overruled by the Court; and it appearing that approval of the interim relief requested in the DIP Motion is necessary to avoid immediate and irreparable harm to the Debtor DIP Loan Parties and their estates pending the Final Hearing, otherwise is fair and reasonable and in the best interests of the Debtor DIP Loan Parties and their estates, and is essential for the continued operation of the Debtor DIP Loan Parties’ businesses and the preservation of the value of the Debtor DIP Loan Parties’ assets; and it appearing that the Debtor DIP Loan Parties’ entry into the DIP Documents is a sound and prudent exercise of the Debtors’ business judgment; and after due deliberation and consideration, and good and sufficient cause appearing therefor.

**BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARINGS,
THE COURT MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS
OF LAW:⁸**

⁸ The findings and conclusions set forth herein constitute the Court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

A. *Petition Date.* On June 15, 2022 (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York (the “**Court**”). On June 16, 2022, this Court entered an order approving the joint administration of the Chapter 11 Cases.

B. *Debtors in Possession.* The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

C. *Jurisdiction and Venue.* This Court has core jurisdiction over the Chapter 11 Cases, the DIP Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(a)–(b) and 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of New York*, dated January 31, 2012. Consideration of the DIP Motion constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Court may enter a final order consistent with Article III of the United States Constitution. Venue for the Chapter 11 Cases and proceedings on the DIP Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief sought herein are sections 105, 361, 362, 363(c), 363(e), 363(m), 364(c), 364(d)(1), 364(e), and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6004 and 9014.

D. *Creditors’ Committee.* As of the date hereof, the United States Trustee for the Southern District of New York (the “**U.S. Trustee**”) has not yet appointed an official committee of unsecured creditors in these Chapter 11 Cases pursuant to section 1102 of the Bankruptcy Code (a “**Creditors’ Committee**”).

E. *Notice.* The Interim Hearings were held pursuant to Bankruptcy Rule 4001(b)(2) and (c)(2). Proper, timely, adequate and sufficient notice of the DIP Motion has been provided

in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules, and no other or further notice of the DIP Motion or the entry of this Interim Order shall be required.

F. *Cash Collateral.* As used herein, the term “**Cash Collateral**” shall mean all of the Debtors’ cash except for cash that is Excluded Collateral, wherever located and held, including cash in deposit accounts, that constitutes or will constitute “cash collateral” of the Prepetition BrandCo Secured Parties, Prepetition ABL Secured Parties and DIP Secured Parties within the meaning of section 363(a) of the Bankruptcy Code.

G. *Debtors’ Stipulations.* Subject to the limitations contained in paragraph 29 hereof, and after consultation with their attorneys and financial advisors, the Debtors admit, stipulate and agree that:

(i) *Prepetition BrandCo Credit Facilities.* Pursuant to that certain BrandCo Credit Agreement, dated as of May 7, 2020, as may be amended, restated, amended and restated, supplemented, waived or otherwise modified from time to time (the “**Prepetition BrandCo Credit Agreement**” and, collectively with the other “Loan Documents” (as defined in the Prepetition BrandCo Credit Agreement) and any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time, the “**Prepetition BrandCo Loan Documents**”), by and among (a) RCPC (in such capacity, the “**Prepetition BrandCo Borrower**”), (b) Jefferies Finance LLC, as administrative agent (in such capacity, the “**Prepetition BrandCo Administrative Agent**”) and each collateral agent (in such capacity as administrative or collateral agent, the “**Prepetition BrandCo Agent**”) and (c) the Lenders (as defined in the Prepetition BrandCo Credit Agreement) party thereto (collectively, the

“**Prepetition BrandCo Lenders**” and, together with the Prepetition BrandCo Agent, the “**Prepetition BrandCo Secured Parties**”), the Prepetition BrandCo Lenders provided the Term B-1 Loans, Term B-2 Loans and the Initial Term B-3 Loans, each as defined in the Prepetition BrandCo Credit Agreement, to the Prepetition BrandCo Borrower (collectively, the “**Prepetition BrandCo Credit Facilities**”).

(ii) *Prepetition BrandCo Guarantee and Security Agreements.* Pursuant to (a) that certain First Lien BrandCo Guarantee and Security Agreement, dated as of May 7, 2020 (as amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time) by and among the BrandCo Entities, the Prepetition BrandCo Administrative Agent and Jefferies Finance LLC, as the First Lien Collateral Agent (as defined in the Prepetition BrandCo Credit Agreement) (in such capacity, the “**BrandCo First Lien Collateral Agent**”), (b) that certain Second Lien BrandCo Guarantee and Security Agreement, dated as of May 7, 2020 (as amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time) by and among the BrandCo Entities, the Prepetition BrandCo Administrative Agent and Jefferies Finance LLC, as Second Lien Collateral Agent (as defined in the Prepetition BrandCo Credit Agreement) (in such capacity, the “**BrandCo Second Lien Collateral Agent**”), (c) that certain Third Lien BrandCo Guarantee and Security Agreement, dated as of May 7, 2020 (as amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time) by and among the BrandCo Entities, the Prepetition BrandCo Administrative Agent and Jefferies Finance LLC, as Third Lien Collateral Agent (as defined in the Prepetition BrandCo Credit Agreement) (in such capacity, the “**BrandCo Third Lien Collateral Agent**”) and (d) that certain Term Loan Guarantee and Collateral Agreement, dated as of May 7, 2020 (as amended, restated, amended and restated, supplemented, waived, or otherwise modified from

time to time) by and among Holdings, RCPC, the subsidiaries of RCPC party thereto and Jefferies Finance LLC, as Pari Passu Collateral Agent (as defined in the Prepetition BrandCo Credit Agreement) (in such capacity, the “**BrandCo Pari Passu Collateral Agent**”) (collectively, the “**Prepetition BrandCo Guarantee and Security Agreements**”), the Debtors other than RCPC (the “**Prepetition BrandCo Guarantors**”) guaranteed on a joint and several basis the obligations under the Prepetition BrandCo Loan Documents.

(iii) *Prepetition BrandCo Intercreditor Agreement.* Pursuant to that certain Intercreditor Agreement, dated as of May 7, 2020 (the “**Prepetition BrandCo Intercreditor Agreement**”), by and among the BrandCo First Lien Collateral Agent, the BrandCo Second Lien Collateral Agent, the BrandCo Third Lien Collateral Agent, Holdings, RCPC and the Prepetition BrandCo Guarantors, the BrandCo First Lien Collateral Agent, the BrandCo Second Lien Collateral Agent and the BrandCo Third Lien Collateral Agent agreed, among other things: (a) that the Prepetition BrandCo First Liens on the Prepetition BrandCo Collateral are senior to the Prepetition BrandCo Second Liens and the Prepetition BrandCo Third Liens on the Prepetition BrandCo Collateral, (b) that the Prepetition BrandCo Second Liens on the Prepetition BrandCo Collateral are senior to the Prepetition BrandCo Third Liens on the Prepetition BrandCo Collateral, (c) to be bound by the waterfall and turnover provisions contained therein and (d) to (I) consent to, or not oppose, certain actions taken, or rights asserted, by the holders of First Lien Obligations (as defined therein) or the BrandCo First Lien Collateral Agent and/or the holders of Second Lien Obligations (as defined therein) or the BrandCo Second Lien Collateral Agent, as applicable, and (II) refrain from taking certain actions with respect to the Prepetition BrandCo Collateral, including in connection with a bankruptcy proceeding.

(iv) *Prepetition Pari Passu Term Loan Intercreditor Agreement*. Pursuant to and to the extent set forth in that certain First Lien Pari Passu Intercreditor Agreement, dated as of May 7, 2020 (the “**Prepetition Pari Passu Term Loan Intercreditor Agreement**”), by and among the Prepetition 2016 Term Loan Agent, the Prepetition BrandCo Agent, the BrandCo Pari Passu Collateral Agent, the Debtors other than the BrandCo Entities, the Prepetition 2016 Term Loan Agent, the Prepetition BrandCo Agent and the BrandCo Pari Passu Collateral Agent agreed, among other things (a) that the Prepetition BrandCo Pari Passu Liens on the Prepetition Shared Collateral are pari passu with the Prepetition 2016 Term Loan Liens on the Prepetition Shared Collateral, (b) to be bound by the waterfall and turnover provisions contained therein with respect to the Prepetition Shared Collateral, and (c) to (I) consent to, or not oppose, certain actions taken, or rights asserted, by the Applicable Collateral Agent (as defined therein) and (II) refrain from taking certain actions with respect to the Prepetition Shared Collateral, including in connection with a bankruptcy proceeding. The Prepetition Pari Passu Term Loan Intercreditor Agreement is binding and enforceable in accordance with its terms and the parties thereto are not entitled to take action that would be contrary to the provisions thereof.

(v) *Prepetition BrandCo Credit Facility Debt*. As of the Petition Date, the Prepetition BrandCo Borrower was justly and lawfully indebted and liable to the Prepetition BrandCo Secured Parties, without defense, counterclaim or offset of any kind, in the aggregate principal amount of not less than \$1,878,019,219 including (a) \$938,986,931 in outstanding principal amount of Term B-1 Loans (as defined in the Prepetition BrandCo Credit Agreement), (b) \$936,052,001 in outstanding principal amount of Term B-2 Loans (as defined in the Prepetition BrandCo Credit Agreement), (c) \$2,980,287 in outstanding principal amount of the Initial Term B-3 Loans (as defined in the Prepetition BrandCo Credit Agreement) and (d) the

Applicable Premium (as defined in the Prepetition BrandCo Credit Agreement) that became due and payable on the Petition Date as a result of commencement of the Chapter 11 Cases (all of the foregoing collectively, together with accrued and unpaid interest, any fees, expenses and disbursements (including attorneys' fees, accountants' fees, auditor fees, appraisers' fees and financial advisors' fees, and related expenses and disbursements), treasury, cash management, bank product and derivative obligations, indemnification obligations, guarantee obligations, and other charges, amounts and costs of whatever nature owing, whether or not contingent, whenever arising, accrued, accruing, due, owing, or chargeable in respect of any of the Prepetition BrandCo Borrower's or the Prepetition BrandCo Guarantors' obligations pursuant to, or secured by, the Prepetition BrandCo Credit Agreement, including all Obligations (as defined in the Prepetition BrandCo Credit Agreement), and all interest, fees, prepayment premiums, early termination fees, costs and other charges, the "**Prepetition BrandCo Credit Facility Debt**"), which Prepetition BrandCo Credit Facility Debt has been guaranteed on a joint and several basis by each of the Prepetition BrandCo Guarantors, each of which Prepetition BrandCo Guarantors, as of the Petition Date, was justly and lawfully indebted and liable to the Prepetition BrandCo Secured Parties, without defense, counterclaim or offset of any kind, for all Prepetition BrandCo Credit Facility Debt.

(vi) *Prepetition BrandCo Liens*. As more fully set forth in the Prepetition BrandCo Loan Documents, (a) prior to the Petition Date, the Prepetition BrandCo Borrower and each Prepetition BrandCo Guarantor granted to the Prepetition BrandCo Agent, for the benefit of itself and the other Prepetition BrandCo Secured Parties, a security interest in and continuing lien (the "**Prepetition BrandCo Liens**") on (1) the "Shared Collateral" (as defined in the Prepetition Pari Passu Term Loan Intercreditor Agreement (as defined below)) (the "**Prepetition Shared**

Collateral”) (such Prepetition BrandCo Liens, the “**Prepetition BrandCo Pari Passu Liens**”) and (2) substantially all of the assets and property of the BrandCo Entities and the other “BrandCo Collateral” (as defined in the Prepetition BrandCo Credit Agreement) (the “**Prepetition BrandCo Collateral**” and, together with the Prepetition Shared Collateral, the “**Prepetition Collateral**”) (such Prepetition BrandCo Liens in respect of the Term B-1 Loans, the “**Prepetition BrandCo First Liens**”; such Prepetition BrandCo Liens in respect of the Term B-2 Loans, the “**Prepetition BrandCo Second Liens**”; such Prepetition BrandCo Liens in respect of the Term B-3 Loans, the “**Prepetition BrandCo Third Liens**”) and (b) all Royalty Payments, all distributions in respect of “Pledged Securities” under the BrandCo Stock Pledge Agreements (as defined in the Prepetition BrandCo Credit Agreement) and all identifiable proceeds of any of the foregoing are proceeds of Prepetition BrandCo Collateral.

(vii) *Prepetition 2016 Term Loan Liens.* As more fully set forth in the Prepetition 2016 Term Loan Documents,⁹ prior to the Petition Date, the Debtors, other than the BrandCo Entities, each granted to the Prepetition 2016 Term Loan Agent, for the benefit of itself and the other Prepetition 2016 Term Loan Secured Parties, a security interest in and continuing lien on the Prepetition Shared Collateral (the “**Prepetition 2016 Term Loan Liens**”).

(viii) *Prepetition ABL Credit Facility.* Pursuant to that certain Asset-Based Revolving Credit Agreement, dated as of September 7, 2016, as amended and restated by that

⁹ The “**Prepetition 2016 Term Loan Documents**” mean collectively (i) that certain credit agreement, dated as of September 7, 2016, as modified by that certain Incremental Joinder Agreement, dated as of April 30, 2020, and as further amended and restated by that certain Amendment No. 1, dated as of May 7, 2020 (the “**Prepetition 2016 Term Loan Credit Agreement**”), by and among Holdings, RCPC (in such capacity, the “**Prepetition 2016 Term Loan Borrower**”), (b) Citibank, N.A., as administrative agent and collateral agent (in such capacities, the “**Prepetition 2016 Term Loan Agent**”) and (d) the Lenders (as defined in the Prepetition 2016 Term Loan Credit Agreement) party thereto (collectively, the “**Prepetition 2016 Term Loan Lenders**”) (the Prepetition 2016 Term Loan Lenders, collectively with the Prepetition 2016 Term Loan Agent, the “**Prepetition 2016 Term Loan Secured Parties**”) and (ii) the other “Loan Documents” (as defined in the Prepetition 2016 Term Loan Credit Agreement) and any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time.

certain Amendment No. 1, dated as of April 17, 2018, as further amended and restated by that certain Amendment No. 2, dated as of March 6, 2019, and as further amended and restated by that certain Amendment No. 3, dated as of April 17, 2020, and as further amended and restated by that certain Amendment No. 4, dated as of May 7, 2020, as further amended and restated by that certain Amendment No. 5, dated as of October 23, 2020, as further amended by that certain Limited Waiver to Credit Agreement, dated as of November 27, 2020, as further amended by that certain Second Limited Waiver to Credit Agreement, dated as of December 11, 2020, as further amended and restated by that certain Amendment No. 6, dated as of December 21, 2020, as further amended and restated by that certain Amendment No. 7, dated as of March 8, 2021, as further amended and restated by that certain Amendment No. 8, dated as of May 7, 2021, and as further amended by that certain Amendment No. 9, dated as of March 31, 2022 (the “**Prepetition ABL Credit Agreement**”), and collectively with any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time, the “**Prepetition ABL Loan Documents**” and, together with the Prepetition BrandCo Loan Documents and the Prepetition 2016 Term Loan Documents, the “**Prepetition Loan Documents**”), by and among (a) Holdings, (b) RCPC and the subsidiaries of RCPC party from time to time thereto as borrowers (in such capacities, the “**Prepetition ABL Borrowers**”), (c) MidCap Funding IV Trust, as administrative agent and collateral agent (in such capacities, the “**Prepetition LIFO ABL Agent**”), issuing lender and swingline lender, (d) Crystal Financial LLC d/b/a SLR Credit Solutions, as SISO Term Loan Agent (as defined therein) (in such capacity, the “**Prepetition SISO ABL Agent**”), (e) Alter Domus (US) LLC, as Tranche B Administrative Agent (as defined therein) (the “**Prepetition FILO ABL Agent**” and, together with the Prepetition LIFO ABL Agent, the

Prepetition SISO ABL Agent and the Prepetition ABL Collateral Agent (as defined herein), the “**Prepetition ABL Agents**” and, together with the Prepetition BrandCo Agent, the Prepetition 2016 Term Loan Agent, the Prepetition LIFO ABL Agent and the Prepetition SISO ABL Agent, the “**Prepetition Agents**”) and (f) the several banks and other financial institutions or entities party from time to time thereto consisting of the Tranche A Revolving Lenders (as defined in the Prepetition ABL Credit Agreement) (the “**Prepetition LIFO ABL Lenders**” and, together with the Prepetition LIFO ABL Agent, the “**Prepetition LIFO ABL Secured Parties**”), the SISO Term Lenders (as defined in the Prepetition ABL Credit Agreement) (the “**Prepetition SISO ABL Lenders**” and, together with the Prepetition SISO ABL Agent, the “**Prepetition SISO ABL Secured Parties**”), and the Tranche B Term Lenders (as defined in the Prepetition ABL Credit Agreement) (the “**Prepetition FILO ABL Lenders**” and, together with the Prepetition LIFO ABL Lenders and the Prepetition SISO ABL Lenders, the “**Prepetition ABL Lenders**,” and the Prepetition FILO ABL Lenders together with the Prepetition FILO ABL Agent, the “**Prepetition FILO ABL Secured Parties**”) (the Prepetition ABL Lenders, collectively with the Prepetition ABL Agents and all other holders of Prepetition ABL Credit Facility Debt (as defined herein), the “**Prepetition ABL Secured Parties**” and together with the Prepetition BrandCo Secured Parties and the Prepetition 2016 Term Loan Secured Parties, the “**Prepetition Secured Parties**”), the Prepetition ABL Lenders provided revolving credit loans to the Prepetition ABL Borrowers from time to time pursuant to the Prepetition ABL Loan Documents (the “**Prepetition ABL Credit Facility**”).

(ix) *Prepetition ABL Guarantee and Collateral Agreement.* Pursuant to that certain ABL Guarantee and Collateral Agreement, dated as of September 7, 2016 (as amended, restated, amended and restated, supplemented, waived, or otherwise modified from time to time)

by and among RCPC and the subsidiaries of RCPC party from time to time thereto and MidCap Funding IV Trust, as collateral agent (in such capacity, the “**Prepetition ABL Collateral Agent**”) (the “**Prepetition ABL Guarantee and Collateral Agreement**”), the Debtors other than the BrandCo Entities (the “**Prepetition ABL Guarantors**”) guaranteed on a joint and several basis the Prepetition ABL Credit Facility Debt.

(x) *Prepetition ABL Intercreditor Agreement.* Pursuant to and to the extent set forth in that certain Intercreditor Agreement, dated as of September 7, 2016, as supplemented by that certain Intercreditor Joinder Agreement, dated as of May 7, 2020 (the “**Prepetition ABL Intercreditor Agreement**” and, together with the Prepetition BrandCo Intercreditor Agreement and the Prepetition Pari Passu Term Loan Intercreditor Agreement, the “**Prepetition Intercreditor Agreements**”), by and among the Prepetition 2016 Term Loan Agent, the Prepetition ABL Agent, the BrandCo Pari Passu Collateral Agent and the Debtors other than the BrandCo Entities, the Prepetition ABL Agent, the Prepetition 2016 Term Loan Agent and the BrandCo Pari Passu Collateral Agent agreed, among other things, that: (a) the Prepetition ABL Liens on the Prepetition Shared Collateral constituting ABL Facility First Priority Collateral (as defined therein) (the “**Prepetition ABL Priority Collateral**”) are senior to the Prepetition BrandCo Pari Passu Liens and the Prepetition 2016 Term Loan Liens on the Prepetition ABL Priority Collateral, (b) that the Prepetition BrandCo Pari Passu Liens and the Prepetition 2016 Term Loan Liens on the Prepetition Shared Collateral constituting Term Facility First Priority Collateral (as defined therein) (the “**Prepetition Shared Term Priority Collateral**”) are senior to the Prepetition ABL Liens on the Prepetition Shared Term Priority Collateral, (c) to be bound by the other waterfall and turnover provisions contained therein and (d) to refrain from taking

certain actions with respect to the Prepetition Shared Collateral, including in connection with a bankruptcy proceeding.

(xi) *Prepetition ABL Credit Facility Debt.* As of the Petition Date, the Prepetition ABL Borrowers were justly and lawfully indebted and liable to the Prepetition ABL Secured Parties, without defense, counterclaim or offset of any kind, in the aggregate principal amount of not less than \$ \$289,000,000 including (a) \$109,000,000 in outstanding principal amount of “Tranche A Revolving Loans,” (b) \$130,000,000 in outstanding principal amount of “SISO Term Loans,” and (c) \$50,000,000 in outstanding principal amount of “Tranche B Term Loans” (in each case, as defined in the Prepetition ABL Credit Agreement) (the Tranche A Revolving Loans, SISO Term Loans and Tranche B Term Loans, together with accrued and unpaid interest, any fees, expenses and disbursements (including attorneys’ fees, accountants’ fees, auditor fees, appraisers’ fees and financial advisors’ fees, and related expenses and disbursements), treasury, cash management, bank product and derivative obligations, indemnification obligations, guarantee obligations, and other charges, amounts and costs of whatever nature owing, whether or not contingent, whenever arising, accrued, accruing, due, owing, or chargeable in respect of any of the Prepetition ABL Borrowers’ or the Prepetition ABL Guarantors’ obligations pursuant to, or secured by, the Prepetition ABL Credit Agreement, including all Obligations (as defined in the Prepetition ABL Credit Agreement, the “**Prepetition ABL Obligations**”; the Prepetition ABL Obligations owed to the Prepetition LIFO ABL Secured Parties, the “**Prepetition LIFO ABL Obligations**”; the Prepetition ABL Obligations owed to the Prepetition SISO ABL Secured Parties, the “**Prepetition SISO ABL Obligations**”; the Prepetition ABL Obligations to the Prepetition FILO ABL Secured Parties, the “**Prepetition FILO ABL Obligations**”), and all interest, fees, prepayment premiums, early termination fees,

costs and other charges, (collectively, with the Prepetition ABL Obligations, the “**Prepetition ABL Credit Facility Debt**”), which Prepetition ABL Credit Facility Debt has been guaranteed on a joint and several basis by each of the Prepetition ABL Guarantors.

(xii) *Prepetition ABL Liens.* As more fully set forth in the Prepetition ABL Loan Documents, prior to the Petition Date, the Prepetition ABL Borrowers and the Prepetition ABL Guarantors each granted to the Prepetition ABL Collateral Agent, for the benefit of itself and the other Prepetition ABL Secured Parties, a security interest in and continuing lien on (the “**Prepetition ABL Liens**” and, together with the Prepetition BrandCo Liens and the Prepetition 2016 Term Loan Liens, the “**Prepetition Liens**”) the Prepetition Shared Collateral, including both Prepetition ABL Priority Collateral and Prepetition Shared Term Priority Collateral

(xiii) *Validity, Perfection and Priority of Prepetition BrandCo Liens and Prepetition BrandCo Credit Facility Debt.* The Debtors acknowledge and agree that as of the Petition Date (a) the Prepetition BrandCo Liens on the Prepetition Collateral were valid, binding, enforceable, non-avoidable and properly perfected and were granted to, or for the benefit of, the Prepetition BrandCo Secured Parties for fair consideration and reasonably equivalent value; (b) the Prepetition BrandCo Liens were senior in priority over any and all other liens on the Prepetition Collateral, and as to other collateral, subject only to (1) the Prepetition 2016 Term Loan Liens on the Prepetition Shared Collateral, which rank equally in priority with the Prepetition BrandCo Pari Passu Liens with respect to the Prepetition Shared Collateral, (2) the Prepetition ABL Liens on the Prepetition Shared Term Priority Collateral, which rank junior in priority to the Prepetition BrandCo Pari Passu Liens with respect to the Prepetition Shared Term Priority Collateral, (3) the Prepetition ABL Liens on the Prepetition ABL Priority Collateral,

which rank senior in priority to the Prepetition BrandCo Pari Passu Liens with respect to the Prepetition ABL Priority Collateral and (4) certain liens senior by operation of law or otherwise permitted by the Prepetition BrandCo Loan Documents (solely to the extent any such permitted liens were valid, properly perfected, non-avoidable and senior in priority to the Prepetition Liens as of the Petition Date, the “**Prepetition BrandCo Permitted Prior Liens**”); (c) the Prepetition BrandCo Credit Facility Debt constitutes legal, valid, binding, and non-avoidable obligations of the Prepetition BrandCo Borrower and Prepetition BrandCo Guarantors enforceable in accordance with the terms of the applicable Prepetition BrandCo Loan Documents; (d) no offsets, recoupments, challenges, objections, defenses, claims or counterclaims of any kind or nature to any of the Prepetition BrandCo Liens or Prepetition BrandCo Credit Facility Debt exist, and no portion of the Prepetition BrandCo Liens or Prepetition BrandCo Credit Facility Debt is subject to any challenge or defense, including avoidance, disallowance, disgorgement, recharacterization, or subordination (equitable or otherwise) pursuant to the Bankruptcy Code or applicable non-bankruptcy law (including, without limitation based on any theory under the Prepetition 2016 Term Loan Documents); (e) the Debtors and their estates have no claims, objections, challenges, causes of action, and/or choses in action, including avoidance claims under Chapter 5 of the Bankruptcy Code or applicable state law equivalents or actions for recovery or disgorgement, against any of the Prepetition BrandCo Secured Parties or any of their respective affiliates, agents, attorneys, advisors, professionals, officers, directors and employees arising out of, based upon or related to the Prepetition BrandCo Credit Facilities; and (f) the Debtors waive, discharge, and release any right to challenge any of the Prepetition BrandCo Credit Facility Debt, the priority of the Debtors’ obligations thereunder, and the validity, extent, and priority of the Prepetition BrandCo Liens securing the Prepetition BrandCo Credit Facility Debt.

(xiv) *Validity, Perfection and Priority of Prepetition ABL Liens and Prepetition*

ABL Credit Facility Debt. The Debtors acknowledge and agree that as of the Petition Date (a) the Prepetition ABL Liens on the Prepetition Shared Collateral were valid, binding, enforceable, non-avoidable and properly perfected and were granted to, or for the benefit of, the Prepetition ABL Secured Parties for fair consideration and reasonably equivalent value; (b) the Prepetition ABL Liens were senior in priority over any and all other liens on the Prepetition Shared Collateral, subject only to (1) the Prepetition BrandCo Pari Passu Liens on the Prepetition Shared Collateral, which rank senior in priority to the Prepetition ABL Liens only with respect to the Prepetition Shared Term Priority Collateral and which rank junior in priority to the Prepetition ABL Liens only with respect to the Prepetition ABL Priority Collateral, (2) the Prepetition 2016 Term Loan Liens on the Prepetition Shared Collateral, which rank senior in priority to the Prepetition ABL Liens only with respect to the Prepetition Shared Term Priority Collateral and which rank junior in priority to the Prepetition ABL Liens only with respect to the Prepetition ABL Priority Collateral and (3) certain liens senior by operation of law or otherwise permitted by the Prepetition ABL Loan Documents (solely to the extent any such permitted liens were valid, properly perfected, non-avoidable and senior in priority to the Prepetition Liens as of the Petition Date, the “**Prepetition ABL Permitted Prior Liens**” and, together with the Prepetition BrandCo Permitted Prior Liens, the “**Permitted Prior Liens**”); (c) the Prepetition ABL Credit Facility Debt constitutes legal, valid, binding, and non-avoidable obligations of the Prepetition ABL Borrower and Prepetition ABL Guarantors enforceable in accordance with the terms of the applicable Prepetition ABL Loan Documents; (d) no offsets, recoupments, challenges, objections, defenses, claims or counterclaims of any kind or nature to any of the Prepetition ABL Liens or Prepetition ABL Credit Facility Debt exist, and no portion of the

Prepetition ABL Liens or Prepetition ABL Credit Facility Debt is subject to any challenge or defense, including avoidance, disallowance, disgorgement, recharacterization, or subordination (equitable or otherwise) pursuant to the Bankruptcy Code or applicable non-bankruptcy law; (e) the Debtors and their estates have no claims, objections, challenges, causes of action, and/or choses in action, including avoidance claims under Chapter 5 of the Bankruptcy Code or applicable state law equivalents or actions for recovery or disgorgement, against any of the Prepetition ABL Secured Parties or any of their respective affiliates, agents, attorneys, advisors, professionals, officers, directors and employees arising out of, based upon or related to the Prepetition ABL Credit Facilities; and (f) the Debtors waive, discharge, and release any right to challenge any of the Prepetition ABL Credit Facility Debt, the priority of the Debtors' obligations thereunder, and the validity, extent, and priority of the Prepetition ABL Liens securing the Prepetition ABL Credit Facility Debt.

(xv) *Validity, Perfection and Priority of Prepetition 2016 Term Loan Liens.* The Debtors acknowledge and agree that as of the Petition Date (a) the Prepetition 2016 Term Loan Liens on the Prepetition Shared Collateral were valid, binding, enforceable, non-avoidable and properly perfected and were granted to, or for the benefit of, the Prepetition 2016 Term Loan Secured Parties for fair consideration and reasonably equivalent value and (b) the Prepetition 2016 Term Loan Liens were senior in priority over any and all other liens on the Prepetition Shared Collateral, subject only to (1) the Prepetition BrandCo Pari Passu Liens on the Prepetition Shared Collateral, which rank equally in priority with the Prepetition 2016 Term Loan Liens with respect to the Prepetition Shared Collateral, (2) the Prepetition ABL Liens on the Prepetition Shared Collateral, which rank junior in priority to the Prepetition 2016 Term Loan Liens with respect to the Prepetition Shared Term Priority Collateral and which rank senior

in priority to the Prepetition 2016 Term Loan Liens with respect to the Prepetition ABL Priority Collateral and (3) certain liens senior by operation of law or otherwise permitted by the 2016 Term Loan Documents (solely to the extent any such permitted liens were valid, properly perfected, non-avoidable and senior in priority to the Prepetition Liens as of the Petition Date, the “**Prepetition 2016 Term Loan Permitted Prior Liens**”).

(xvi) *No Control*. None of the Prepetition BrandCo Secured Parties or the Prepetition ABL Secured Parties control (or have in the past controlled) the Debtors or their properties or operations, have authority to determine the manner in which any Debtors’ operations are conducted or are control persons or insiders of the Debtors by virtue of any of the actions taken with respect to, in connection with, related to or arising from the Prepetition BrandCo Loan Documents, the Prepetition 2016 Term Loan Documents or the Prepetition ABL Loan Documents.

(xvii) *No Claims or Causes of Action*. No claims or causes of action held by the Debtors or their estates exist against, or with respect to, the Prepetition BrandCo Secured Parties, the Prepetition ABL Secured Parties, the DIP Secured Parties and each of their respective Representatives (as defined herein) (in each case in their capacity as such) under or relating to any agreements by and among the Debtors and any Prepetition Secured Party that is in existence as of the Petition Date.

(xviii) *Release*. Effective as of the date of entry of this Interim Order, each of the Debtors and the Debtors’ estates, on its own behalf, and on behalf of its and their respective past, present and future predecessors, successors, subsidiaries, and assigns, hereby absolutely, unconditionally and irrevocably releases and forever discharges and acquits the Prepetition BrandCo Secured Parties, the Prepetition ABL Secured Parties, the DIP Secured Parties and each

of their respective Representatives (as defined herein) (collectively, the “**Released Parties**”), from any and all obligations and liabilities to the Debtors (and their successors and assigns) and from any and all claims, counterclaims, demands, defenses, offsets, debts, accounts, contracts, liabilities, actions and causes of action arising prior to the Petition Date of any kind, nature or description, whether matured or unmatured, known or unknown, asserted or unasserted, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, liquidated or unliquidated, pending or threatened, arising in law or equity, upon contract or tort or under any state or federal law or otherwise, (collectively, the “**Released Claims**”) in each case arising out of or related to (as applicable) any prepetition financing agreements with the Debtors or their subsidiaries or the DIP Documents, the obligations owing and the financial obligations made thereunder, the negotiation thereof and of the transactions and agreements reflected thereby, in each case that the Debtors at any time had, now have or may have, or that their predecessors, successors or assigns at any time had or hereafter can or may have against any of the Released Parties for or by reason of any act, omission, matter, cause or thing whatsoever arising at any time on or prior to the date of this Interim Order. For the avoidance of doubt, nothing in this release shall relieve the DIP Secured Parties or the Debtors of their Obligations under the DIP Documents from and after the date of this Interim Order.

H. *Findings Regarding the DIP Financing and Use of Cash Collateral.*

(i) Good and sufficient cause has been shown for the entry of this Interim Order and for authorization of the Debtor DIP Loan Parties to obtain financing pursuant to the DIP Documents.

(ii) The Debtor DIP Loan Parties have an immediate and critical need to obtain the DIP Financing and to use the Prepetition Collateral (including Cash Collateral) in

order to permit, among other things, the orderly continuation of the operation of their businesses, to maintain business relationships with vendors, suppliers and customers, to make payroll, to make capital expenditures, to satisfy other working capital and operational needs and to fund expenses of these Chapter 11 Cases. The access of the Debtor DIP Loan Parties to sufficient working capital and liquidity through the use of Cash Collateral and other Prepetition Collateral, the incurrence of new indebtedness under the DIP Documents and other financial accommodations provided under the DIP Documents are necessary and vital to the preservation and maintenance of the going concern values of the Debtor DIP Loan Parties and to a successful reorganization of the Debtor DIP Loan Parties.

(iii) The Debtor DIP Loan Parties are unable to obtain financing on more favorable terms from sources other than the DIP Lenders under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtor DIP Loan Parties are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without granting to the DIP Secured Parties, the DIP Liens and the DIP Superpriority Claims (as defined herein) and incurring the Adequate Protection Obligations (as defined herein), in each case subject to the Carve-Out, under the terms and conditions set forth in this Interim Order and in the DIP Documents.

(iv) The Debtor DIP Loan Parties continue to collect cash, rents, income, offspring, products, proceeds, and profits generated from the Prepetition Collateral and acquire equipment, inventory and other personal property, all of which constitute Prepetition Collateral under the Prepetition Loan Documents that are subject to the Prepetition Secured Parties' security interests as set forth in the Prepetition Loan Documents.

(v) The Debtor DIP Loan Parties desire to use a portion of the cash, rents, income, offspring, products, proceeds and profits described in the preceding paragraph in their business operations that constitute Cash Collateral of the Prepetition Secured Parties under section 363(a) of the Bankruptcy Code. Certain prepetition rents, income, offspring, products, proceeds, and profits, in existence as of the Petition Date, including balances of funds in the Debtor DIP Loan Parties' prepetition and postpetition operating bank accounts, also constitute Cash Collateral.

(vi) Upon entry of the Interim Order, the outstanding Prepetition LIFO ABL Obligations shall be converted into ABL DIP Loans in accordance with the ABL DIP Term Sheet. The Prepetition LIFO ABL Lenders would not otherwise consent to the use of their Cash Collateral, the release of reserves or the subordination of their liens to the DIP Liens without the inclusion of the ABL DIP Loans in the DIP Obligations pursuant to the Prepetition LIFO ABL Roll-Up. The conversion (or "roll-up") of the Prepetition LIFO ABL Obligations shall be authorized as compensation for, in consideration for, and solely on account of, the agreement of the Prepetition LIFO ABL Lenders to provide new-money liquidity and permit access to Cash Collateral, and not as payments under, adequate protection for, or otherwise on account of, any Prepetition Secured Obligations. Because the Prepetition LIFO ABL Roll-Up is subject to the reservation of rights in paragraph 29, such roll-up will not prejudice any party in interest.

(vii) Upon entry of the Interim Order, the outstanding amount of Prepetition SISO ABL Obligations, shall be converted into ABL DIP Loans in accordance with the ABL DIP Credit Agreement. The conversion (or "roll-up") of the Prepetition SISO ABL Obligations shall be authorized as compensation for, in consideration for, and on account of (a) the agreement of the Prepetition SISO ABL Lenders to permit access to Cash Collateral and (b) the

waiver of the SISO Buy-Out Option (as defined herein), and not as payments under, adequate protection for, or otherwise on account of, any Prepetition Secured Obligations. Because the Prepetition SISO ABL Roll-Up is subject to the reservation of rights in paragraph 29, it will not prejudice any party in interest.

(viii) Based on the DIP Motion, the Zelin Declaration, the Caruso Declaration and the record presented to the Court at the Interim Hearings, the terms of the DIP Financing, the terms of the adequate protection granted to the Prepetition Secured Parties as provided in paragraphs 14 – 20 of this Interim Order (the “**Adequate Protection**”), and the terms on which the Debtor DIP Loan Parties may continue to use the Prepetition Collateral (including Cash Collateral) pursuant to this Interim Order and the DIP Documents are fair and reasonable, reflect the Debtor DIP Loan Parties’ exercise of prudent business judgment consistent with their fiduciary duties and constitute reasonably equivalent value and fair consideration.

(ix) The DIP Financing, the Adequate Protection and the use of the Prepetition Collateral (including Cash Collateral) have been negotiated in good faith and at arm’s length among the Debtor DIP Loan Parties, the DIP Secured Parties, and the Prepetition Secured Parties, and all of the Debtor DIP Loan Parties’ obligations and indebtedness arising under, in respect of, or in connection with, the DIP Financing and the DIP Documents, including, without limitation: all loans made to and guarantees issued by the Debtor DIP Loan Parties pursuant to the DIP Documents and any DIP Obligations shall be deemed to have been extended by the DIP Agents and the DIP Secured Parties and their respective affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Agents and the DIP Secured Parties (and the successors and assigns thereof) shall be entitled to the full protection of section 364(e) of the

Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise. Notwithstanding the foregoing, all parties reserve the right to object to the Final Order on the basis that the DIP Secured Parties and the Prepetition Secured Parties have not acted in good faith and should not be entitled to the protections of section 363(m) of the Bankruptcy Code with respect to any amounts in excess of the Initial Draw and nothing in this Interim Order shall prejudice, limit or otherwise impair any such objection.

(x) The Prepetition BrandCo Agent and the Prepetition BrandCo Secured Parties have acted in good faith regarding the DIP Financing and the Debtor DIP Loan Parties' continued use of the Prepetition BrandCo Collateral (including Cash Collateral) to fund the administration of the Debtor DIP Loan Parties' estates and continued operation of their businesses (including the incurrence and payment of the Adequate Protection Obligations and the granting of the Adequate Protection Liens (as defined herein)), in accordance with the terms hereof, and the Prepetition BrandCo Agent and Prepetition BrandCo Secured Parties (and the successors and assigns thereof) shall be entitled to the full protection of sections 363(m) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise. Notwithstanding the foregoing, all parties reserve the right to object to the Final Order on the basis that the Prepetition BrandCo Agent and the Prepetition BrandCo Secured Parties have not acted in good faith and should not be entitled to the protections of section 363(m) of the Bankruptcy Code with respect to any amounts in excess of the Initial Draw and nothing in this Interim Order shall prejudice, limit or otherwise impair any such objection.

(xi) The Prepetition LIFO ABL Agent, Prepetition ABL Collateral Agent, Prepetition SISO ABL Agent and the Prepetition ABL Secured Parties have acted in good faith

regarding the DIP Financing and the Debtor DIP Loan Parties' continued use of the Prepetition Shared Collateral (including Cash Collateral) to fund the administration of the Debtor DIP Loan Parties' estates and continued operation of their businesses (including the incurrence and payment of the Adequate Protection Obligations and the granting of the Adequate Protection Liens (as defined herein)), in accordance with the terms hereof, and the Prepetition LIFO ABL Agent, Prepetition ABL Collateral Agent, Prepetition SISO ABL Agent and Prepetition ABL Secured Parties (and the successors and assigns thereof) shall be entitled to the full protection of sections 363(m) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(xii) The Intercompany DIP Lenders have acted in good faith regarding the Intercompany DIP Financing, and the Intercompany DIP Lenders (and the successors and assigns thereof) shall be entitled to the full protection of sections 363(m) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise. Notwithstanding the foregoing, all parties reserve the right to object to the Final Order on the basis that the Intercompany DIP Lenders have not acted in good faith and should not be entitled to the protections of section 363(m) of the Bankruptcy Code with respect to any amounts in excess of those funded under the Intercompany DIP Financing prior to entry of such Final Order and nothing in this Interim Order shall prejudice, limit or otherwise impair any such objection.

(xiii) The Prepetition Secured Parties are entitled to the Adequate Protection provided in this Interim Order as and to the extent set forth herein pursuant to sections 361, 362, 363 and 364 of the Bankruptcy Code, and shall be entitled to the full protection of sections 363(m) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is

vacated, reversed or modified, on appeal or otherwise. Based on the DIP Motion and on the record presented to the Court, and for purposes of the Interim Order only, the terms of the proposed adequate protection arrangements and of the use of the Prepetition Collateral (including Cash Collateral) are fair and reasonable, reflect the Debtor DIP Loan Parties' prudent exercise of business judgment and constitute reasonably equivalent value and fair consideration for the use of the Prepetition Collateral, including the Cash Collateral, and, to the extent their consent is required, the Prepetition Secured Parties have consented or are deemed hereby to have consented to the use of the Prepetition Collateral, including the Cash Collateral, on the terms set forth in this Interim Order, and the priming of the Prepetition Liens by the DIP Liens pursuant to the DIP Documents solely in connection with the Interim Order; *provided* that nothing in this Interim Order or the DIP Documents shall (a) be construed as the affirmative consent by any of the Prepetition Secured Parties for the use of Cash Collateral other than on the terms set forth in this Interim Order and in the context of the DIP Financing authorized by this Interim Order to the extent such consent has been or will be given, (b) be construed as a consent by any party to the terms of the Final Order, any other financing or any other lien encumbering the Prepetition Collateral (whether senior or junior), (c) prejudice, limit or otherwise impair the rights of any of the Prepetition Secured Parties to seek new, different or additional adequate protection or assert the interests of any of the Prepetition Secured Parties, and the rights of any other party in interest, including the Debtor DIP Loan Parties, to object to such relief are hereby preserved, or (d) prejudice, limit or otherwise impair the ability of any Prepetition Secured Party to (i) not consent to the use of the Prepetition Collateral in connection with the Final Order or (ii) assert that any proposed adequate protection in the Final Order is insufficient.

(xiv) The Debtors have prepared and delivered to the advisors to the DIP Secured Parties an initial budget (the “**Initial DIP Budget**”), attached hereto as Schedule 1. The Initial DIP Budget reflects, among other things, the Debtors’ anticipated cash receipts and anticipated disbursements for each calendar week, and is in form and substance satisfactory to the Required DIP Lenders. The Initial DIP Budget may be modified, amended and updated from time to time in accordance with the DIP Credit Agreements, and once approved by the Required DIP Lenders, shall supplement and replace the Initial DIP Budget (the Initial DIP Budget and each subsequent approved budget, shall constitute without duplication, an “**Approved Budget**”). The Debtors believe that the Initial DIP Budget is reasonable under the facts and circumstances. The DIP Secured Parties are relying, in part, upon the DIP Loan Parties’ agreement to comply with the Approved Budget (subject only to permitted variances), the other DIP Documents and this Interim Order in determining to enter into the postpetition financing arrangements provided for in this Interim Order.

(xv) Each of the Prepetition BrandCo Secured Parties shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and, subject to and effective upon entry of the Final Order, the “equities of the case” exception under section 552(b) of the Bankruptcy Code shall not apply to the Prepetition BrandCo Secured Parties with respect to proceeds, product, offspring, or profits with respect to any of the Prepetition Collateral.

(xvi) Each of the Prepetition LIFO ABL Secured Parties and Prepetition SISO ABL Secured Parties shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and, subject to and effective upon entry of the Final Order, the “equities of the case” exception under section 552(b) of the Bankruptcy Code shall not apply to the Prepetition

LIFO ABL Secured Parties and Prepetition SISO ABL Secured Parties with respect to proceeds, product, offspring, or profits with respect to any of the Prepetition Shared Collateral.

I. *Immediate Entry.* Sufficient cause exists for immediate entry of this Interim Order pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2). Absent granting the relief set forth in this Interim Order, the Debtor DIP Loan Parties' estates will be immediately and irreparably harmed. Consummation of the DIP Financing and the use of Prepetition Collateral (including Cash Collateral), in accordance with this Interim Order and the DIP Documents are therefore in the best interests of the Debtor DIP Loan Parties' estates and consistent with the Debtor DIP Loan Parties' exercise of their fiduciary duties.

J. *Permitted Prior Liens; Continuation of Prepetition Liens.* Nothing herein shall constitute a finding or ruling by this Court that any alleged Permitted Prior Lien is valid, senior, enforceable, prior, perfected, or non-avoidable. Nothing herein shall prejudice the rights of any party-in-interest, including, but not limited to, the Debtor DIP Loan Parties, the DIP Agents, the DIP Secured Parties, the Prepetition BrandCo Agent, the Prepetition LIFO ABL Agent, the Prepetition SISO ABL Agent, Prepetition BrandCo Secured Parties, Prepetition LIFO ABL Secured Parties, the Prepetition SISO ABL Secured Parties, the other Prepetition Secured Parties and any statutory committee pursuant to section 328 or 1103 of the Bankruptcy Code (the "**Committee**") or any other non-Debtor party in interest to challenge the validity, priority, enforceability, seniority, avoidability, perfection, or extent of any alleged Permitted Prior Lien and/or security interests. The right of a seller of goods to reclaim such goods under section 546(c) of the Bankruptcy Code is not a Permitted Prior Lien and is expressly subject to the DIP Liens (as defined herein). The Prepetition Liens, and the DIP Liens that prime the Prepetition Liens, are continuing liens and the DIP Collateral is and will continue to be encumbered by such

liens in light of the integrated nature of the DIP Facility, the DIP Documents and the Prepetition Loan Documents.

Based upon the foregoing findings and conclusions, the DIP Motion and the record before the Court with respect to the DIP Motion, and after due consideration and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. *Motion Granted.* The interim relief sought in the DIP Motion is granted, the interim financing described herein is authorized and approved, and the use of Cash Collateral on an interim basis is authorized, in each case subject to the terms and conditions set forth in the DIP Documents and this Interim Order. All objections to this Interim Order, to the extent not withdrawn, waived, settled, or resolved, are hereby denied and overruled on the merits.

2. *Authorization of the DIP Financing and the DIP Documents.*

(a) The Debtor DIP Loan Parties are hereby authorized to execute, deliver, enter into and, as applicable, perform all of their obligations under the DIP Documents and such other and further acts as may be necessary, appropriate or desirable in connection therewith. The Borrower is hereby authorized to borrow money pursuant to the DIP Credit Agreements or ABL DIP Term Sheet, as applicable, including in an amount pursuant to the ABL DIP Credit Agreement or DIP ABL Term Sheet, as applicable, equal to the aggregate amount of the Prepetition LIFO ABL Roll-Up and the Prepetition SISO ABL Roll-Up. Each Debtor DIP Guarantor is hereby authorized to, and the Debtors are hereby authorized to provide a guaranty of payment in respect of the Borrower's obligations with respect to such borrowings, subject to any limitations on borrowing under the DIP Documents, which shall be used for all purposes permitted under the DIP Documents (and subject to and in accordance with the Approved Budget)

(subject to any permitted variances) up to the aggregate amount of the Initial Draw, the Prepetition LIFO ABL Roll-Up and the Prepetition SISO ABL Roll-Up.

(b) In furtherance of the foregoing and without further approval of this Court, each Debtor DIP Loan Party is authorized to perform all acts, to make, execute and deliver all instruments, certificates, agreements, charges, deeds and documents (including, without limitation, the execution or recordation of pledge and security agreements, mortgages, financing statements and other similar documents), and to pay all fees, expenses and indemnities in connection with or that may be reasonably required, necessary, or desirable for the DIP Loan Parties' performance of their obligations under or related to the DIP Financing, including, without limitation:

(i) the execution and delivery of, and performance under, each of the DIP Documents;

(ii) the execution and delivery of, and performance under, one or more amendments, waivers, consents or other modifications to and under the DIP Documents, in each case, in such form as the DIP Loan Parties, the applicable DIP Agent and the applicable required parties under the DIP Documents may agree, it being understood that no further approval of this Court shall be required for any authorizations, amendments, waivers, consents or other modifications to and under the DIP Documents (and any fees and other expenses (including attorneys', accountants', appraisers' and financial advisors' fees), amounts, charges, costs, indemnities and other obligations paid in connection therewith) that do not shorten the maturity of the extensions of credit thereunder or increase the aggregate commitments or the rate of interest payable thereunder. Updates and supplements to the Approved Budget required to be delivered by the DIP Loan Parties under the DIP Documents shall not be considered amendments

or modifications to the Approved Budget or the DIP Documents and no further approval of this Court shall be required therefor;

(iii) the non-refundable payment to the DIP Agents and the DIP Secured Parties, as the case may be, of all fees, including unused facility fees, amendment fees, prepayment premiums, early termination fees, servicing fees, audit fees, liquidator fees, structuring fees, administrative agent's, collateral agent's or security trustee's fees (including fees payable under the Administrative Agent Fee Letters), upfront fees, closing fees, commitment fees, exit fees, closing date fees, backstop fees, original issue discount fees, prepayment fees or agency fees, indemnities and professional fees (the payment of which fees shall be irrevocable, and shall be, and shall be deemed to have been, approved upon entry of this Interim Order, whether any such fees arose before or after the Petition Date, and whether or not the transactions contemplated hereby are consummated, and upon payment thereof, shall not be subject to any contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance or other claim, cause of action or other challenge of any nature under the Bankruptcy Code, applicable non-bankruptcy law or otherwise) and any amounts due (or that may become due) in respect of the indemnification and expense reimbursement obligations, in each case referred to in the DIP Credit Agreements or DIP Documents (or in any separate letter agreements, including, without limitation, any fee letters between any or all DIP Loan Parties, on the one hand, and any of the DIP Agents and/or DIP Secured Parties, on the other, in connection with the DIP Financing) and the costs and expenses as may be due from time to time, including, without limitation, fees and expenses of the professionals retained by, or on behalf of, any of the Term DIP Agent (including, without limitation, those of Paul Hastings LLP and any local counsel retained thereby), that certain ad

hoc group of Prepetition BrandCo Lenders that are Term DIP Lenders (the “**Ad Hoc Group of BrandCo Lenders**”) (including, without limitation, those of Davis Polk & Wardwell LLP, Kobre & Kim LLP, each local or special counsel retained thereby, and Centerview Partners LLC), or the ABL DIP Secured Parties (including, without limitation, those of Proskauer Rose LLP, Morgan Lewis & Bockius LLP and Berkeley Research Group LLC), any local counsel retained by the DIP Agents and/or the DIP Lenders and any other advisors as are permitted under the DIP Documents), in each case, as provided for in the DIP Documents (collectively, the “**DIP Fees and Expenses**”), without the need to file retention motions or fee applications, but subject to the review procedures set forth in paragraph 28; and

(iv) the performance of all other acts required under or in connection with the DIP Documents, including the granting of the DIP Liens and the DIP Superpriority Claims and perfection of the DIP Liens and DIP Superpriority Claims as permitted herein and therein, and incurring up to \$375 million of Term DIP obligations and using the proceeds thereof to refinance all or a portion of the Foreign ABTL Facility and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith, in each case in accordance with the terms of the Term DIP Documents.

3. *DIP Obligations.* Upon execution and delivery of the DIP Documents, the DIP Documents shall constitute legal, valid, binding and non-avoidable obligations of the DIP Loan Parties, enforceable against each Debtor DIP Loan Party and their estates in accordance with the terms of the DIP Documents and this Interim Order, and any successors thereto, including any trustee appointed in the Chapter 11 Cases, or in any case under Chapter 7 of the Bankruptcy Code upon the conversion of any of the Chapter 11 Cases, or in any other proceedings superseding or related to any of the foregoing (collectively, the “**Successor Cases**”). Upon

execution and delivery of the DIP Documents, the DIP Obligations will include all loans and any other indebtedness or obligations, contingent or absolute, which may now or from time to time be owing by any of the DIP Loan Parties to any of the DIP Agents or DIP Secured Parties, in each case, under, or secured by, the DIP Documents or this Interim Order, including all principal, interest, costs, fees, expenses, indemnities and other amounts under the DIP Documents (including this Interim Order). The DIP Loan Parties shall be jointly and severally liable for the applicable DIP Obligations. Except as permitted hereby, no obligation, payment, transfer, or grant of security hereunder or under the DIP Documents to the DIP Agents and/or the DIP Secured Parties (including their Representatives) shall be stayed, restrained, voidable, avoidable, or recoverable, under the Bankruptcy Code or under any applicable law (including, without limitation, under sections 502(d), 544, and 547 to 550 of the Bankruptcy Code or under any applicable state Uniform Voidable Transactions Act, Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, or similar statute or common law), or subject to any defense, avoidance, reduction, setoff, recoupment, offset, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, impairment, claim, counterclaim, cross-claim, or any other challenge under the Bankruptcy Code or any applicable law or regulation by any person or entity.

4. *Carve-Out.*

(a) As used in this Interim Order, the term “**Carve-Out**” means the sum of:

(i) all fees required to be paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee (the “**U.S. Trustee**”) under section 1930(a) of title 28 of the United States Code plus interest at the statutory rate, if any, pursuant to 31 U.S.C. § 3717 (without regard to the notice set forth in (iii) below); (ii) all reasonable fees and expenses up to \$100,000 incurred

by a trustee under section 726(b) of the Bankruptcy Code (without regard to the notice set forth in (iii) below); (iii) subject, in each case, to application of any retainers that may be held and to the extent allowed at any time, whether by interim order, procedural order, final order or otherwise, all unpaid fees and expenses (the “**Allowed Professional Fees**”) incurred by persons or firms retained by the Debtors pursuant to section 327, 328 or 363 of the Bankruptcy Code and the Committee (collectively, the “**Estate Professionals**”) (in each case, other than any restructuring, sale, success or other transaction fee of any investment bankers or financial advisors) at any time before or on the first business day following delivery by any DIP Agent of a Carve-Out Trigger Notice (as defined below), and without regard to whether such fees and expenses are provided for in any Approved Budget, whether allowed by the Bankruptcy Court prior to or after delivery of a Carve-Out Trigger Notice (the amounts set forth in this clause (iii) being the “**Pre-Carve-Out Trigger Notice Cap**”); and (iv) Allowed Professional Fees of Estate Professionals in an aggregate amount not to exceed \$20,000,000 incurred after the first business day following delivery by any DIP Agent of the Carve-Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, final order or otherwise (the amounts set forth in this clause (iv) being the “**Post-Carve-Out Trigger Notice Cap**” and, together with the Pre-Carve-Out Trigger Notice Cap and the amounts set forth in clauses (i) through (ii), the “**Carve-Out Cap**”). The Carve-Out shall be subject to the restrictions on the use of proceeds of the DIP Loans and Cash Collateral.

(b) The ABL DIP Agent shall be entitled to maintain a Carve-Out reserve, and the Debtors shall reflect in each borrowing base report delivered to the DIP Agents by the Debtors, a reserve in an amount not less than the sum of (i) the amounts set forth in paragraph 4(a)(i) above, (ii) the Post-Carve-Out Trigger Notice Cap, (iii) the fees and expenses for Estate

Professionals (“**Professional Fees**”) set forth in the Approved Budget from the Petition Date through the end of the then-current week (to the extent then unpaid), and (iv) a reasonable estimate of the amount by which Professional Fees may exceed amounts set forth in the Approved Budget for the succeeding two-week period (the “**Carve-Out Reserve**”). The Carve-Out Reserve shall be established by the ABL DIP Agent in its sole discretion in consultation with the Debtors’ professionals.

(c) Immediately upon the delivery of a Carve-Out Trigger Notice (as defined below), and prior to the payment of any DIP obligations or any Adequate Protection Payments, the Loan Parties shall be required to deposit into a separate account not subject to the control of the DIP Agents, the Prepetition BrandCo Agents, the Prepetition 2016 Term Loan Agent or the Prepetition ABL Agents (the “**Carve-Out Account**”) an amount equal to the Carve-Out Cap. Notwithstanding anything to the contrary herein or in the DIP Documents, following delivery of a Carve-Out Trigger Notice, the DIP Agents shall not sweep or foreclose on cash (including cash received as a result of the sale or other disposition of any assets) of the Debtors until the Carve-Out Account has been fully funded in an amount equal to all obligations benefitting from the Carve-Out. The amounts in the Carve-Out Account shall be available only to satisfy Allowed Professional Fees and other amounts included in the Carve-Out Cap until such amounts are paid in full. The amount in the Carve-Out Account shall be reduced on a dollar-for-dollar basis for Allowed Professional Fees that are paid after the delivery of the Carve-Out Trigger Notice, and the Carve-Out Account shall not be replenished for such amounts so paid. The failure of the Carve-Out Account to satisfy in full the amount set forth in the Carve-Out shall not affect the priority of the Carve-Out. For the avoidance of doubt, (i) to the extent the Carve-Out is funded from borrowings under the DIP Facilities, such borrowed amounts shall constitute DIP

Obligations, and (ii) the incurrence or payment of any Carve-Out Account or amounts included in the Carve-Out shall not be restricted by the Approved Budget. In no way shall the Carve-Out, the Carve-Out Account, or any Approved Budget be construed as a cap or limitation on the amount of the Allowed Professional Fees due and payable by the Debtors or that may be allowed by the Bankruptcy Court at any time (whether by interim order, final order, or otherwise).

(d) For purposes of the foregoing, “**Carve-Out Trigger Notice**” shall mean a written notice delivered by email by a DIP Agent (or, after the applicable DIP Obligations have been indefeasibly paid in full and the DIP Commitments terminated, the applicable Prepetition Agent) to the Debtors, their lead restructuring counsel (Paul, Weiss, Rifkind, Wharton & Garrison LLP), the U.S. Trustee, lead counsel to the Committee (if any) and lead counsel to any other DIP Agent, which notice may be delivered following the occurrence and during the continuation of an Event of Default (as defined herein) and acceleration of the obligations under a DIP Facility other than the Intercompany DIP Facility (or, after the DIP Obligations have been indefeasibly paid in full and the DIP Commitments terminated, any occurrence that would constitute an Event of Default hereunder, other than with respect to the Intercompany DIP Facility) or the occurrence of a Maturity Date (as defined in each DIP Credit Agreement), stating that the Post-Carve-Out Trigger Notice Cap has been invoked.

(e) On the day on which a Carve-Out Trigger Notice is received by the Debtors (the “**Carve-Out Trigger Notice Date**”), the Carve-Out Trigger Notice shall constitute a demand to the Debtors to utilize cash on hand to transfer to the Carve-Out Account cash in an amount equal to all obligations benefitting from the Carve-Out.

(f) For the avoidance of doubt, to the extent that professional fees and expenses of the Estate Professionals have been incurred by the Debtors at any time before or on

the first business day after delivery by a DIP Agent or Prepetition Agent, as applicable, of a Carve-Out Trigger Notice but have not yet been allowed by the Bankruptcy Court, such professional fees and expenses of the Estate Professionals shall constitute Allowed Professional Fees benefiting from the Carve-Out pursuant to clause (iii) of the definition thereof upon their allowance by the Bankruptcy Court, whether by interim or final compensation order and whether before or after delivery of the Carve-Out Trigger Notice, and the Debtors shall fund the Carve-Out Account in the amount of such professional fees and expenses.

(g) The DIP Agents, the DIP Lenders and the Prepetition Secured Parties shall not be responsible for the direct payment or reimbursement of any fees or expenses of any Estate Professionals incurred in connection with the Cases or any Successor Case under any chapter of the Bankruptcy Code. Nothing in this Interim Order or otherwise shall be construed to obligate any of the DIP Agents, the DIP Lenders or the Prepetition Secured Parties, in any way to pay compensation to or reimburse expenses of any Estate Professional, or to guarantee that the Debtors have sufficient funds to pay such compensation or expense reimbursement.

(h) All funds in the Carve-Out Account shall be used first to pay all obligations benefitting from the Pre-Carve-Out Trigger Notice Cap, until paid in full, and then the obligations benefitting from the Post-Carve-Out Trigger Notice Cap. If, after paying all amounts set forth in the definition of Carve-Out, the Carve-Out Account has not been reduced to zero, all remaining funds in the Carve-Out Account that are funded pursuant to paragraph 29(b) out of DIP Collateral that constitutes (i) Prepetition Shared Term Priority Collateral or proceeds thereof shall be distributed to the Term DIP Agent on account of the DIP Term Loans, and (ii) Prepetition ABL Priority Collateral or proceeds thereof shall be distributed to the ABL DIP Agent on account of the ABL DIP Loans.

5. *DIP Superpriority Claims.*

(a) *Term DIP Superpriority Claims.* Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the Term DIP Obligations shall constitute allowed superpriority administrative expense claims against the Debtor Term DIP Loan Parties on a joint and several basis (without the need to file any proof of claim) with priority over any and all claims against the Debtor Term DIP Loan Parties, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code and any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114 of the Bankruptcy Code (including the Adequate Protection Obligations), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims (the “**Term DIP Superpriority Claims**”) shall for purposes of section 1129(a)(9)(A) of the Bankruptcy Code be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code, and which Term DIP Superpriority Claims shall be payable from and have recourse to all prepetition and postpetition property of the Debtor Term DIP Loan Parties and all proceeds thereof (excluding claims and causes of action under sections 502(d), 544, 545, 547, 548 and 550 of the Bankruptcy Code, or any other avoidance actions under the Bankruptcy Code (collectively, “**Avoidance Actions**”) but, subject to the entry of the Final Order, including any proceeds or property recovered, unencumbered or otherwise, from Avoidance Actions, whether by judgment, settlement or otherwise (“**Avoidance Proceeds**”) in accordance with the Term DIP Documents and this Interim Order, subject only to the liens on such property and the Carve-Out as set forth in this Interim Order and the Term DIP Documents. The Term DIP Superpriority Claims shall be

entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(b) *ABL DIP Superpriority Claims.* Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the ABL DIP Obligations shall constitute allowed superpriority administrative expense claims against the Debtor ABL DIP Loan Parties on a joint and several basis (without the need to file any proof of claim) with priority over any and all claims against the Debtor ABL DIP Loan Parties, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code and any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114 of the Bankruptcy Code (including the Adequate Protection Obligations), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims (the “**ABL DIP Superpriority Claims**”) shall for purposes of section 1129(a)(9)(A) of the Bankruptcy Code be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code, and which ABL DIP Superpriority Claims shall be payable from and have recourse to all prepetition and postpetition property of the Debtor ABL DIP Loan Parties and all proceeds thereof (excluding Avoidance Actions) but, subject to the entry of the Final Order, including any Avoidance Proceeds in accordance with the ABL DIP Documents and this Interim Order, subject only to the liens on such property and the Carve-Out as set forth in this Interim Order and the ABL DIP Documents. The ABL DIP Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(c) *Intercompany DIP Superpriority Claims.* Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the Intercompany DIP Obligations shall constitute allowed superpriority administrative expense claims against the Debtor Intercompany DIP Loan Parties on a joint and several basis (without the need to file any proof of claim) with priority over any and all claims against the Debtor Intercompany DIP Loan Parties, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code and any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114 of the Bankruptcy Code (including the Adequate Protection Obligations), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims (the “**Intercompany DIP Superpriority Claims**” and, together with the Term DIP Superpriority Claims and the ABL DIP Superpriority Claims, the “**DIP Superpriority Claims**”) shall for purposes of section 1129(a)(9)(A) of the Bankruptcy Code be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code, and which Intercompany DIP Superpriority Claims shall be payable from and have recourse to all prepetition and postpetition property of the Debtor Intercompany DIP Loan Parties and all proceeds thereof (excluding Avoidance Actions) but, subject to the entry of the Final Order, including any Avoidance Proceeds in accordance with this Interim Order, subject only to the liens on such property and the Carve-Out as set forth in this Interim Order. The Intercompany DIP Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

(d) *Priority of DIP Superpriority Claims.* The Term DIP Superpriority Claims and the ABL DIP Superpriority Claims shall be *pari passu* in right of payment with one another and senior to the Intercompany DIP Superpriority Claims. All DIP Superpriority Claims shall be senior in right of payment to the 507(b) Claims (as defined herein), and subordinated to the Carve-Out.

6. *DIP Liens.*

(a) *Term DIP Liens.* As security for the Term DIP Obligations, effective and automatically and properly perfected upon the date of this Interim Order without the necessity of the execution, recordation or filing by the DIP Loan Parties or any of the Term DIP Secured Parties of mortgages, security agreements, control agreements, pledge agreements, financing statements, notation of certificates of title for titled goods or other similar documents, instruments, deeds, charges or certificates, or the possession or control by the Term DIP Agent of, or over, any Collateral, the following valid, binding, continuing, enforceable and non-avoidable security interests and liens (all security interests and liens granted to the Term DIP Agent, for its benefit and for the benefit of the Term DIP Secured Parties, pursuant to this Interim Order and the Term DIP Documents, the “**Term DIP Liens**”) are hereby granted to the Term DIP Agent for its own benefit and the benefit of the Term DIP Secured Parties (all property identified in clauses (i) through (viii) below being collectively referred to as the “**Term DIP Collateral**”); *provided* that notwithstanding anything herein to the contrary, the Term DIP Liens shall be (a) subject and junior to the Carve-Out in all respects and (b) in each case in accordance with the priorities set forth in the Prepetition Intercreditor Agreements and **Exhibit 3**:

- (i) *First Lien on OpCo Unencumbered Term Priority Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected first (subject only to the Carve-Out) priority senior security interest in and

lien upon all prepetition and postpetition property of the Debtor Term DIP Loan Parties other than the BrandCo Entities, whether existing on the Petition Date or thereafter acquired, that, (X) on or as of the Petition Date, is not subject to (i) a valid, perfected and non-avoidable lien or (ii) a valid and non-avoidable lien in existence as of the Petition Date that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, including, without limitation, any and all unencumbered cash of the Debtor Term DIP Loan Parties other than the BrandCo Entities (whether maintained with any of the DIP Secured Parties or otherwise) and any investment of cash, inventory, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, fixtures, machinery, equipment, general intangibles, documents, instruments, securities, goodwill, causes of action, insurance policies and rights, claims and proceeds from insurance, commercial tort claims and claims that may constitute commercial tort claims (known and unknown), chattel paper, interests in leaseholds, real properties, deposit accounts, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, capital stock of subsidiaries, wherever located, and the proceeds, products, rents and profits of the foregoing, whether arising under section 552(b) of the Bankruptcy Code or otherwise, of all the foregoing (the “**OpCo Unencumbered Property**”) and (Y) that is not of the same nature, scope, and type as Prepetition ABL Priority Collateral (the “**OpCo Unencumbered Term Priority Property**”), other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, including Avoidance Proceeds);

- (ii) *Third Lien on OpCo Unencumbered ABL Priority Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected third (subject to the Carve-Out and junior and subject only to (I) following entry of the Interim Order, the ABL DIP Liens and (II) the FILO ABL AP Liens, in each case on the OpCo Unencumbered ABL Priority Property) priority security interest in and lien upon all OpCo Unencumbered Property that is of the same nature, scope, and type as the Prepetition ABL Priority Collateral (the “**OpCo Unencumbered ABL Priority Property**”), other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, including Avoidance Proceeds);

- (iii) *First Lien on BrandCo Unencumbered Property.* For the benefit of the Term DIP Obligations only, pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected first (subject only to the Carve-Out) priority senior security interest in and lien upon all prepetition and postpetition property of the BrandCo Entities, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date, is not subject to (i) a valid, perfected and non-avoidable lien or (ii) a valid and non-avoidable lien in existence as of the Petition Date that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, including, without limitation, any and all unencumbered cash of the BrandCo Entities (whether maintained with any of the DIP Secured Parties or otherwise) and any investment of cash, inventory, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, fixtures, machinery, equipment, general intangibles, documents, instruments, securities, goodwill, causes of action, insurance policies and rights, claims and proceeds from insurance, commercial tort claims and claims that may constitute commercial tort claims (known and unknown), chattel paper, interests in leaseholds, real properties, deposit accounts, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, capital stock of subsidiaries, wherever located, and the proceeds, products, rents and profits of the foregoing, whether arising under section 552(b) of the Bankruptcy Code or otherwise, of all the foregoing (the “**BrandCo Unencumbered Property**” and, together with the OpCo Unencumbered Property, the “**Unencumbered Property**”), in each case other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, “Unencumbered Property” shall include Avoidance Proceeds);
- (iv) *First Liens Priming the Prepetition Secured Parties’ Liens on Prepetition Shared Term Priority Collateral.* Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first (subject only to the Carve-Out) priority senior priming security interest in and lien upon all Prepetition Shared Term Priority Collateral of the Debtor Term DIP Loan Parties other than the BrandCo Entities, regardless of where located, (the “**Term DIP Shared Collateral Priming Liens**”), which Term DIP Shared Collateral Priming Liens shall prime in all respects the interests of the Prepetition Secured Parties arising from the current and future liens of the Prepetition Secured Parties on the

Prepetition Shared Term Priority Collateral (including, without limitation, the Adequate Protection Liens granted to the Prepetition Secured Parties) (the “**Shared Collateral Primed Liens**”);

- (v) *Fourth Liens Priming Certain Prepetition Secured Parties’ Liens on Prepetition ABL Priority Collateral.* Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected fourth (subject to the Carve-Out and junior and subject only to (I) the ABL DIP ABL Priority Collateral Priming Liens, (II) the FILO ABL AP Liens and (III) the liens held by the Prepetition FILO ABL Agent (the “**Prepetition FILO ABL Liens**”), in each case on the Prepetition ABL Priority Collateral) priority priming security interest in and lien upon all Prepetition ABL Priority Collateral of the Debtor Term DIP Loan Parties other than the BrandCo Entities, regardless of where located, (the “**Term DIP ABL Priority Collateral Priming Liens**”), which Term DIP ABL Priority Collateral Priming Liens shall prime in all respects the interests of the Prepetition Secured Parties arising from the current and future liens of the Prepetition Secured Parties on the Prepetition ABL Priority Collateral (including, without limitation, the Adequate Protection Liens granted to the Prepetition Secured Parties) (the “**ABL Priority Collateral Primed Liens**”);
- (vi) *First Liens Priming the Prepetition BrandCo Secured Parties’ Liens on Prepetition BrandCo Collateral.* For the benefit of the Term DIP Obligations only, pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first (subject only to the Carve-Out) priority senior priming security interest in and lien upon all Prepetition BrandCo Collateral, regardless of where located, (the “**Term DIP BrandCo Collateral Priming Liens**”), which Term DIP BrandCo Collateral Priming Liens shall prime in all respects the interests of the Prepetition BrandCo Secured Parties arising from the current and future liens of the Prepetition BrandCo Secured Parties on the Prepetition BrandCo Collateral (including, without limitation, the Adequate Protection Liens granted to the Prepetition Secured Parties) (the “**BrandCo Collateral Primed Liens**” and, together with the Shared Collateral Primed Liens and ABL Priority Collateral Primed Liens, the “**Primed Liens**”);
- (vii) *Liens Junior to Certain Other Liens.* Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected security interest in and lien upon

all tangible and intangible prepetition and postpetition property of each Debtor Term DIP Loan Party that is not described in the foregoing clauses (i) through (vi) and is subject to either (i) valid, perfected and non-avoidable senior liens in existence immediately prior to the Petition Date (other than the Primed Liens) or (ii) any valid and non-avoidable senior liens (other than the Primed Liens) in existence immediately prior to the Petition Date that are perfected subsequent to such commencement as permitted by section 546(b) of the Bankruptcy Code, which shall be (x) junior and subordinate to any valid, perfected and non-avoidable liens (other than the Primed Liens) in existence immediately prior to the Petition Date, and (y) any such valid and non-avoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code; *provided* that nothing in the foregoing clauses (i) and (ii) shall limit the rights of the Term DIP Secured Parties under the Term DIP Documents to the extent such liens are not permitted thereunder; and

- (viii) *Term DIP Liens Senior to Certain Other Liens.* The Term DIP Liens shall not be (i) subject or subordinate to or made *pari passu* with (A) any lien or security interest that is avoided and preserved for the benefit of the Debtors or their estates under section 551 of the Bankruptcy Code, (B) unless otherwise provided for in the Term DIP Documents or in this Interim Order, any liens or security interests arising after the Petition Date, including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit (including any regulatory body), commission, board or court for any liability of the Debtor Term DIP Loan Parties, or (C) any intercompany or affiliate liens of the Debtor Term DIP Loan Parties or security interests of the Debtor Term DIP Loan Parties; or (ii) subordinated to or made *pari passu* with any other lien or security interest under section 363 or 364 of the Bankruptcy Code granted after the date hereof.

(b) *Intercompany DIP Liens.* As security for the Intercompany DIP Obligations, effective and automatically and properly perfected upon the date of this Interim Order without the necessity of the execution, recordation or filing by the Debtor Intercreditor DIP Loan Parties or any of the Intercompany DIP Secured Parties of mortgages, security agreements, control agreements, pledge agreements, financing statements, notation of certificates

of title for titled goods or other similar documents, instruments, deeds, charges or certificates, or the possession or control by the Intercompany DIP Lenders of, or over, any Collateral, valid, binding, continuing, enforceable and non-avoidable security interests and liens (all security interests and liens granted to the Intercompany DIP Secured Parties pursuant to this Interim Order, the “**Intercompany DIP Liens**”) on all Term DIP Collateral held by the Debtor Intercreditor DIP Loan Parties (the “**Intercompany DIP Collateral**”) immediately junior and subject to the Term DIP Liens on each category of Term DIP Collateral, as set forth in **Exhibit 3**.

(c) *ABL DIP Liens*. As security for the ABL DIP Obligations, effective and automatically and properly perfected upon the date of this Interim Order, and without the necessity of the execution, recordation or filing by the Debtor ABL DIP Loan Parties or any of the ABL DIP Secured Parties of mortgages, security agreements, control agreements, pledge agreements, financing statements, notation of certificates of title for titled goods or other similar documents, instruments, deeds, charges or certificates, or the possession or control by the ABL DIP Agent of, or over, any Collateral, the following valid, binding, continuing, enforceable and non-avoidable security interests and liens (all security interests and liens granted to the ABL DIP Agent, pursuant to this Interim Order and the ABL DIP Documents, for its benefit and for the benefit of the LIFO ABL DIP Secured Parties, the “**LIFO ABL DIP Liens**,” and for the benefit of the SISO ABL DIP Secured Parties, the “**SISO ABL DIP Liens**,” together with the LIFO ABL DIP Liens, the “**ABL DIP Liens**” and, together with the Term DIP Liens and the Intercompany DIP Liens, the “**DIP Liens**”) are hereby granted to the ABL DIP Agent for its own benefit and the benefit of the ABL DIP Secured Parties (all property identified in clauses (i) through (vi) below being collectively referred to as the “**ABL DIP Collateral**” and, together with the Term DIP Collateral and the Intercompany DIP Collateral, the “**DIP Collateral**”);

provided that notwithstanding anything herein to the contrary, (1) the LIFO ABL DIP Liens shall be senior in all respects to the SISO ABL DIP Liens and (2) the ABL DIP Liens shall be (a) subject to the Carve-Out in all respects and (b) in each case in accordance with the priorities set for in the Prepetition Intercreditor Agreements and **Exhibit 3**:

- (i) *Fourth Lien on OpCo Unencumbered Term Priority Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected fourth (subject to the Carve-Out and junior and subject only to (I) following entry of the Interim Order, the Term DIP Liens, (II) following entry of the Interim Order, the Intercompany DIP Liens and (III) the Shared Term Collateral AP Liens and the BrandCo Collateral AP Liens, in each case on the OpCo Unencumbered Term Priority Property) priority security interest in and lien upon all OpCo Unencumbered Term Priority Property, other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, including Avoidance Proceeds);
- (ii) *First Lien on OpCo Unencumbered ABL Priority Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected first (subject only to the Carve-Out) priority senior security interest in and lien upon all OpCo Unencumbered ABL Priority Property, other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, including Avoidance Proceeds);
- (iii) *Fifth Liens Priming Certain Prepetition Secured Parties' Liens on Prepetition Shared Term Priority Collateral.* Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected fifth (subject to the Carve-Out and junior and subject only to (I) the Term DIP Shared Collateral Priming Liens, (II) the Intercompany DIP Shared Collateral Priming Liens, (III) the Shared Term Collateral AP Liens and the BrandCo Collateral AP Liens and (IV) the Prepetition BrandCo Liens and the Prepetition 2016 Term Loan Liens, in each case on the Prepetition Shared Term Priority Collateral) priority priming security interest in and lien upon all Prepetition Shared Term Priority Collateral of the Debtor ABL DIP Loan Parties, regardless of where located, (the "**ABL DIP Shared Collateral Priming Liens**"), which ABL DIP Shared Collateral Priming Liens shall prime in all

respects the interests of the Prepetition Secured Parties arising from the Shared Collateral Primed Liens;

- (iv) *First Liens Priming Certain Prepetition Secured Parties' Liens on Prepetition ABL Priority Collateral*. Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first (subject only to the Carve-Out) priority senior priming security interest in and lien upon all Prepetition ABL Priority Collateral of the Debtor ABL DIP Loan Parties, regardless of where located, (the “**ABL DIP ABL Priority Collateral Priming Liens**”), which ABL DIP ABL Priority Collateral Priming Liens shall prime in all respects the interests of the Prepetition Secured Parties arising from the ABL Priority Collateral Primed Liens;
- (v) *Liens Junior to Certain Other Liens*. Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected security interest in and lien upon all tangible and intangible prepetition and postpetition property of each Debtor ABL DIP Loan Party that is not described in the foregoing clauses (i) through (iv) and is subject to either (i) valid, perfected and non-avoidable senior liens in existence immediately prior to the Petition Date (other than the Primed Liens) or (ii) any valid and non-avoidable senior liens (other than the Primed Liens) in existence immediately prior to the Petition Date that are perfected subsequent to such commencement as permitted by section 546(b) of the Bankruptcy Code, which shall be (x) junior and subordinate to any valid, perfected and non-avoidable liens (other than the Primed Liens) in existence immediately prior to the Petition Date, and (y) any such valid and non-avoidable liens in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code; *provided* that nothing in the foregoing clauses (i) and (ii) shall limit the rights of the ABL DIP Secured Parties under the ABL DIP Documents to the extent such liens are not permitted thereunder; and
- (vi) *ABL DIP Liens Senior to Certain Other Liens*. The ABL DIP Liens shall not be (i) subject or subordinate to or made *pari passu* with (A) any lien or security interest that is avoided and preserved for the benefit of the Debtors or their estates under section 551 of the Bankruptcy Code, (B) unless otherwise provided for in the ABL DIP Documents or in this Interim Order, any liens or security interests arising after the Petition Date, including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or

other governmental unit (including any regulatory body), commission, board or court for any liability of the Debtor ABL DIP Loan Parties, or (C) any intercompany or affiliate liens of the Debtor ABL DIP Loan Parties or security interests of the Debtor ABL DIP Loan Parties; or (ii) subordinated to or made *pari passu* with any other lien or security interest under section 363 or 364 of the Bankruptcy Code granted after the date hereof.

(d) *Relative Priority of Liens.* Notwithstanding anything to the contrary in this Interim DIP Order or in the DIP Documents, the relative priority of each DIP Lien granted in this paragraph 6, the Prepetition BrandCo Liens, the Prepetition 2016 Term Loan Liens, the Prepetition FILO ABL Liens, the Shared Term Collateral AP Liens, the BrandCo Collateral AP Liens and the FILO ABL AP Liens shall be as set forth in **Exhibit 3** attached hereto; provided that, for the avoidance of doubt, each such lien shall be subject to the Carve-Out in all respects.

7. *Protection of DIP Lenders' Rights.*

(a) So long as (i) there are any Term DIP Obligations outstanding or the Term DIP Lenders have any outstanding Term DIP Commitments under the Term DIP Documents or (ii) there are any ABL DIP Obligations outstanding or the ABL DIP Lenders have any outstanding ABL DIP Commitments under the ABL DIP Documents, the Prepetition BrandCo Secured Parties or Prepetition ABL Secured Parties, as applicable, shall: (I) have no right to and shall take no action to foreclose upon, or recover in connection with, the liens granted thereto pursuant to the Prepetition Loan Documents or this Interim Order, or otherwise seek to exercise or enforce any rights or remedies against the DIP Collateral, including in connection with the Adequate Protection Liens; (II) be deemed to have consented to any transfer, disposition or sale of, or release of liens on, the DIP Collateral (but not any proceeds of such transfer, disposition or sale to the extent remaining after payment in cash in full of the DIP Obligations and termination of the DIP Commitments), to the extent the transfer, disposition, sale or release is authorized

under the DIP Documents; (III) not file any further financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or otherwise take any action to perfect their security interests in the DIP Collateral other than as necessary to give effect to this Interim Order other than, (x) solely as to this clause (iii), the DIP Agents filing financing statements or other documents to perfect the liens granted pursuant to this Interim Order, or (y) as may be required by applicable state law or foreign law to complete a previously commenced process of perfection or to continue the perfection of valid and non-avoidable liens or security interests existing as of the Petition Date; and (IV) deliver or cause to be delivered, at the DIP Loan Parties' cost and expense, any termination statements, releases and/or assignments in favor of the DIP Agents or the DIP Secured Parties or other documents necessary to effectuate and/or evidence the release, termination and/or assignment of liens on any portion of the DIP Collateral subject to any ordinary course sale or court-approved disposition.

(b) To the extent any Prepetition Secured Party has possession of any Prepetition Collateral or DIP Collateral or has control with respect to any Prepetition Collateral or DIP Collateral, or has been noted as secured party on any certificate of title for a titled good constituting Prepetition Collateral or DIP Collateral, then such Prepetition Secured Party shall be deemed to maintain such possession or notation or exercise such control as a gratuitous bailee and/or gratuitous agent for perfection for the benefit of the DIP Agents and the DIP Secured Parties.

(c) Any proceeds of Prepetition Collateral subject to the Primed Liens received by any Prepetition Secured Party, whether in connection with the exercise of any right or remedy (including setoff) relating to the Prepetition Collateral or otherwise received by the Prepetition Agents, shall be segregated and held in trust for the benefit of and forthwith paid over

to the DIP Agents for the benefit of the DIP Secured Parties in the same form as received, with any necessary endorsements. The DIP Agents are hereby authorized to make any such endorsements as agent for the Prepetition Agents or any such Prepetition Secured Parties. This authorization is coupled with an interest and is irrevocable.

(d) The Automatic Stay is hereby modified to the extent necessary to permit each DIP Agent (acting at the direction of the applicable required parties under the DIP Documents) to take any or all of the following actions, at the same or different time, in each case without further order or application of the Court: (i) immediately upon the occurrence of an Event of Default, declare (A) the termination, reduction or restriction of any applicable further DIP Commitment to the extent any such DIP Commitment remains, (B) all applicable DIP Obligations to be immediately due, owing and payable, without presentment, demand, protest, or other notice of any kind, all of which are expressly waived by the DIP Lenders, notwithstanding anything herein or in any DIP Document to the contrary, and (C) the termination of the applicable DIP Documents as to any future liability or obligation of the DIP Agents and the applicable DIP Lenders with respect to the DIP Commitments (but, for the avoidance of doubt, without affecting any of the DIP Liens or the DIP Obligations), and (ii) upon the occurrence and continuance of an Event of Default and the giving of seven (7) days' prior written notice (which shall run concurrently with any notice required to be provided under the DIP Documents) (the "**Remedies Notice Period**") via email to counsel to the Debtors, Creditors' Committee (if any), the U.S. Trustee, counsel to the Prepetition 2016 Term Loan Agent, counsel to the Ad Hoc Group of Prepetition 2016 Term Loan Lenders and lead counsel to any other DIP Agent, which notice shall also be filed on the docket of the Court, unless this Court orders otherwise during the Remedies Notice Period after a hearing, (A) exercise all rights and remedies available under the

applicable DIP Documents and otherwise available under applicable law whether or not the maturity of any of the DIP Obligations shall have been accelerated and (B) withdraw consent to the Debtors' continued use of applicable Cash Collateral.

(e) During the Remedies Notice Period, the Debtors shall be permitted to cure any Event of Default and to use Cash Collateral solely to (A) pay payroll and other critical administrative expenses to keep the business of the Debtors operating, strictly in accordance with the Approved Budget (without variance) or as necessary to maintain and maximize the value of the DIP Collateral, or as otherwise agreed by the applicable DIP Agent acting at the direction of the applicable Required DIP Lenders, (B) fund the Carve-Out Account and (C) seek a hearing before the Court. During the Remedies Notice Period, the Debtors, the Creditors' Committee (if appointed) and/or any party in interest shall be entitled to seek an emergency hearing with the Court within the Remedies Notice Period solely for the purpose of contesting whether, in fact, an Event of Default has occurred and is continuing. Except as set forth in this Interim Order, the Debtors shall waive their right to seek relief under the Bankruptcy Code, including, without limitation, under section 105 of the Bankruptcy Code, to the extent that such relief would in any way impair or restrict the rights or remedies of the DIP Secured Parties set forth in this Interim Order or the DIP Documents.

(f) No rights, protections or remedies of the DIP Agents or the DIP Secured Parties granted by the provisions of this Interim Order or the DIP Documents shall be limited, modified or impaired in any way by: (i) any actual or purported withdrawal of the consent of any party to the Debtors' authority to continue to use Cash Collateral; (ii) any actual or purported termination of the Debtors' authority to continue to use Cash Collateral; or (iii) the terms of any

other order or stipulation related to the Debtors' continued use of Cash Collateral or the provision of adequate protection to any party.

8. *Limitation on Charging Expenses Against Collateral.* Subject to and effective upon entry of the Final Order, no costs or expenses of administration of the Chapter 11 Cases or any Successor Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the DIP Collateral (including Cash Collateral) or Prepetition Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the applicable DIP Agent or Prepetition Agent, as applicable, and no consent shall be implied from any other action, inaction or acquiescence by the DIP Agents, the DIP Secured Parties, the Prepetition Agents or the Prepetition Secured Parties, and nothing contained in this Interim Order shall be deemed to be a consent by the DIP Agents, the DIP Secured Parties, the Prepetition Agents or the Prepetition Secured Parties to any charge, lien, assessment or claims against the DIP Collateral (including Cash Collateral) under section 506(c) of the Bankruptcy Code or otherwise.

9. *"Equities of the case" exception.* Subject to and effective upon entry of the Final Order, in no event shall the "equities of the case" exception in section 552(b) of the Bankruptcy Code apply to (a) the Prepetition BrandCo Agent or the Prepetition BrandCo Secured Parties with respect to proceeds, products, offspring or profits of any Prepetition Collateral or (b) the Prepetition LIFO ABL Agent, the Prepetition SISO ABL Agent, the Prepetition LIFO ABL Secured Parties or the Prepetition SISO ABL Secured Parties with respect to proceeds, products, offspring or profits of any Prepetition Shared Collateral.

10. *No Marshaling.* In no event shall (a) the DIP Agents or the DIP Secured Parties or (b) subject to and effective upon entry of the Final Order, the Prepetition BrandCo Agent, the Prepetition BrandCo Secured Parties, the Prepetition LIFO ABL Agent, the Prepetition LIFO ABL Secured Parties, the Prepetition SISO ABL Agent or the Prepetition SISO ABL Secured Parties, be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the DIP Collateral, the DIP Obligations, the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility Debt or the Prepetition Collateral; *provided* that (x) all parties reserve the right to object to the Final Order on the basis that the foregoing provisions should not be applied to the DIP Agents or the DIP Secured Parties and (y) prior to entry of the Final Order, the foregoing provision shall apply to the DIP Agents and the DIP Secured Parties in the event of any actual exercise of remedies on account of the DIP Obligations, but there shall be no prejudice, limit or impairment of any party’s claims, assertions or defenses regarding the appropriate allocation of the economic burden of the DIP Obligations among the Debtors after such DIP Obligations are indefeasibly been paid in cash in full and all DIP Commitments have been terminated

11. *Payments Free and Clear.* Any and all payments or proceeds remitted to (i) the DIP Agents by, through or on behalf of the DIP Secured Parties or (ii) Intercompany Secured Lenders pursuant to the provisions of this Interim Order, the DIP Documents or any subsequent order of the Court shall be irrevocable, received free and clear of any claim, charge, assessment or other liability, including without limitation, any claim or charge arising out of or based on, directly or indirectly, sections 506(c) or 552(b) of the Bankruptcy Code, whether asserted or assessed by through or on behalf of the Debtors.

12. *Use of Cash Collateral.* The Debtors are hereby authorized, subject to the terms and conditions of this Interim Order, to use all Cash Collateral in accordance with the DIP Documents and Approved Budget (subject to permitted variances); *provided* that (a) the Prepetition Secured Parties are granted the Adequate Protection as hereinafter set forth and (b) except on the terms and conditions of this Interim Order, the Debtors shall be enjoined and prohibited from at any times using the Cash Collateral absent further order of the Court.

13. *Disposition of DIP Collateral.* The Debtor DIP Loan Parties shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, except as otherwise permitted by the DIP Documents or an order of the Court.

14. *Adequate Protection on Account of Prepetition Shared Term Priority Collateral.* The Prepetition BrandCo Secured Parties and the Prepetition 2016 Term Loan Secured Parties are entitled, pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of their interests in all Prepetition Shared Term Priority Collateral in an amount equal to the aggregate diminution in the value of such parties' interests in the Prepetition Shared Term Priority Collateral from and after the Petition Date, if any, for any reason provided for under the Bankruptcy Code, including, without limitation, any diminution resulting from the sale, lease or use by the Debtors of the Prepetition Term Loan Priority Collateral, the priming of the Prepetition Liens on the Prepetition Shared Term Priority Collateral by the DIP Liens pursuant to the DIP Documents and this Interim Order, the payment of any amounts under the Carve-Out or pursuant to this Interim Order, the Final Order or any other order of the Court or provision of the Bankruptcy Code or otherwise, or the imposition of the Automatic Stay in respect of the Prepetition Shared Term Priority Collateral (the “**Term Collateral Diminution Claims**”). In consideration of the foregoing, the Prepetition BrandCo Agent, for the benefit of

the Prepetition BrandCo Secured Parties, and the Prepetition 2016 Term Loan Agent, for the benefit of the Prepetition 2016 Term Loan Secured Parties, are hereby granted the following as Adequate Protection for, and to secure repayment of an amount equal to such Term Collateral Diminution Claims, (collectively, the “**Term Collateral Adequate Protection Obligations**”):

(a) *Prepetition Shared Term Priority Collateral Adequate Protection Liens.*

The Prepetition BrandCo Agent, for itself and for the benefit of the other Prepetition BrandCo Secured Parties, and the Prepetition 2016 Term Loan Agent, for itself and for the benefit of the Prepetition 2016 Term Loan Secured Parties, are hereby granted (effective and perfected upon the date of this Interim Order and without the necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements) in the amount of their respective Term Collateral Diminution Claims, a valid, perfected replacement security interest in and lien upon all prepetition and postpetition property of the Debtors, excluding the BrandCo Entities, that is of the same nature, scope, and type as the Prepetition Shared Collateral (the “**Shared Term Collateral AP Liens**”), in accordance with the priorities shown in **Exhibit 3** and in each case subject to the Carve-Out; *provided* that the Shared Term Collateral AP Liens of the Prepetition BrandCo Secured Parties and the Prepetition 2016 Term Loan Secured Parties shall be subject to the Prepetition Pari Passu Term Loan Intercreditor Agreement and the Prepetition ABL Intercreditor Agreement.

(b) *Prepetition Shared Term Priority Collateral Section 507(b) Claims.* The Prepetition BrandCo Agent, for itself and for the benefit of the other Prepetition BrandCo Secured Parties, and the Prepetition 2016 Term Loan Agent, for itself and for the benefit of the Prepetition 2016 Term Loan Secured Parties, are hereby granted, subject to the Carve-Out, an allowed superpriority administrative expense claim as provided for in section 507(b) of the

Bankruptcy Code in the amount of any portion of such parties' Term Collateral Diminution Claims not satisfied by the Shared Term Collateral AP Liens, with priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code and subject to, as applicable, the Prepetition Intercreditor Agreements (the "**Term Collateral 507(b) Claims**") which Term Collateral 507(b) Claims shall have recourse to and be payable from all prepetition and postpetition property of the Debtors, excluding the BrandCo Entities, and all proceeds thereof (excluding Avoidance Actions, but including, subject to entry of Final Order, Avoidance Proceeds). The Term Collateral 507(b) Claims shall be subject to the Carve-Out and the DIP Superpriority Claims. Except to the extent expressly set forth in this Interim Order, the Final Order or the DIP Documents, neither the Prepetition BrandCo Secured Parties nor the Prepetition 2016 Term Loan Secured Parties shall receive or retain any payments, property or other amounts in respect of the Term Collateral 507(b) Claims unless and until the DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) have indefeasibly been paid in cash in full and all DIP Commitments have been terminated.

(c) *Prepetition 2016 Term Loan Secured Parties Fees and Expenses.* As Adequate Protection for any diminution in value of their interests in the Prepetition Shared Collateral, Citibank solely in its capacity as Prepetition 2016 Term Loan Agent shall be entitled to payment of all reasonable and documented prepetition and postpetition fees and expenses of Latham & Watkins LLP as lead counsel to the Prepetition 2016 Term Loan Agent, and one financial advisor (such fees and expenses, the "**2016 Term Loan Agent Fees and Expenses**"), subject to (i) the review procedures set forth in paragraph 28 of this Interim Order, including the notice provisions thereof and (ii) the limitations on the use of funds set forth in paragraph 30.

15. *Adequate Protection on Account of Prepetition BrandCo Collateral.* The Prepetition BrandCo Secured Parties are entitled, pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of their interests in all Prepetition BrandCo Collateral in an amount equal to the aggregate diminution in the value of the Prepetition BrandCo Secured Parties' interests in the Prepetition BrandCo Collateral from and after the Petition Date, if any, for any reason provided for under the Bankruptcy Code, including, without limitation, any diminution resulting from the sale, lease or use by the Debtors of the Prepetition BrandCo Collateral, the priming of the Prepetition Liens on the Prepetition BrandCo Collateral by the DIP Liens pursuant to the DIP Documents and this Interim Order, the payment of any amounts under the Carve-Out or pursuant to this Interim Order, the Final Order or any other order of the Court or provision of the Bankruptcy Code or otherwise, or the imposition of the Automatic Stay in respect of the Prepetition BrandCo Collateral (the "**BrandCo Collateral Diminution Claims**"). In consideration of the foregoing, the Prepetition BrandCo Agent, for the benefit of the Prepetition BrandCo Secured Parties (or, with respect to paragraph 17, the holders of the Term B-1 Loans only (as defined in the Prepetition BrandCo Credit Agreement)), is hereby granted the following as Adequate Protection for, and to secure repayment of an amount equal to such BrandCo Collateral Diminution Claims (collectively, the "**BrandCo Collateral Adequate Protection Obligations**"):

(a) *Prepetition BrandCo Collateral Adequate Protection Liens.* The Prepetition BrandCo Agent, for itself and for the benefit of the other Prepetition BrandCo Secured Parties, is hereby granted (effective and perfected upon the date of this Interim Order and without the necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements), in the amount of the Prepetition BrandCo

Secured Parties' BrandCo Collateral Diminution Claims, a valid, perfected replacement security interest in and lien upon all prepetition and postpetition property of the BrandCo Entities (the "**BrandCo Collateral AP Liens**"), in accordance with the priorities shown in **Exhibit 3** and in each case subject to the Carve-Out; *provided* that the BrandCo Collateral AP Liens of the Prepetition BrandCo Secured Parties shall be subject to the Prepetition BrandCo Intercreditor Agreement.

(b) *Prepetition BrandCo Collateral Section 507(b) Claims.* The Prepetition BrandCo Agent, for itself and for the benefit of the other Prepetition BrandCo Secured Parties, is hereby granted, subject to the Carve-Out, an allowed superpriority administrative expense claim as provided for in section 507(b) of the Bankruptcy Code in the amount of the Prepetition BrandCo Secured Parties' BrandCo Collateral Diminution Claims, with priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code and subject to, as applicable, the Prepetition Intercreditor Agreements (the "**BrandCo Collateral 507(b) Claims**") which BrandCo Collateral 507(b) Claims shall have recourse to and be payable from all prepetition and postpetition property of the BrandCo Entities and all proceeds thereof (excluding Avoidance Actions, but including, subject to entry of Final Order, Avoidance Proceeds). The BrandCo Collateral 507(b) Claims shall be subject to the Carve-Out and the DIP Superpriority Claims. Except to the extent expressly set forth in this Interim Order, the Final Order or the DIP Documents, the Prepetition BrandCo Secured Parties shall not receive or retain any payments, property or other amounts in respect of the BrandCo Collateral 507(b) Claims unless and until the DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) have indefeasibly been paid in cash in full and all DIP Commitments have been terminated.

16. *Adequate Protection of Prepetition FILO ABL Secured Parties.* The Prepetition FILO ABL Secured Parties are entitled, pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of their interests in all Prepetition ABL Priority Collateral in an amount equal to the aggregate diminution in the value of the Prepetition FILO ABL Secured Parties' interests in the Prepetition ABL Priority Collateral from and after the Petition Date, if any, for any reason provided for under the Bankruptcy Code, including, without limitation, any diminution resulting from the sale, lease or use by the Debtors of the Prepetition ABL Priority Collateral, the priming of the Prepetition Liens on the Prepetition ABL Priority Collateral by the DIP Liens pursuant to the DIP Documents and this Interim Order, the payment of any amounts under the Carve-Out or pursuant to this Interim Order, the Final Order or any other order of the Court or provision of the Bankruptcy Code or otherwise, or the imposition of the Automatic Stay in respect of the Prepetition ABL Priority Collateral (the "**FILO ABL Diminution Claims**") and, together with the Term Collateral Diminution Claims, the BrandCo Collateral Diminution Claims and the FILO ABL Diminution Claims the "**Diminution Claims**"). In consideration of the foregoing, the Prepetition FILO ABL Agent, for the benefit of the Prepetition FILO ABL Secured Parties, is hereby granted the following as Adequate Protection for, and to secure repayment of an amount equal to such FILO ABL Diminution Claims (collectively, the "**FILO ABL Adequate Protection Obligations**") and, together with the Term Collateral Adequate Protection Obligations, the BrandCo Collateral Adequate Protection Obligations and the FILO Adequate Protection Obligations the "**Adequate Protection Obligations**"):

(a) *Prepetition FILO ABL Adequate Protection Liens.* The Prepetition FILO ABL Agent, for itself and for the benefit of the other Prepetition FILO ABL Secured Parties, is

hereby granted (effective and perfected upon the date of this Interim Order and without the necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements) in the amount of the Prepetition FILO ABL Secured Parties' FILO ABL Diminution Claims, a valid, perfected replacement security interest in and lien upon all prepetition and postpetition property of the Debtors, excluding the BrandCo Entities, that is of the same nature, scope, and type as the Prepetition Shared Collateral (the "**FILO ABL AP Liens**" and, together with the Shared Term Collateral AP Liens, the BrandCo Collateral AP Liens and the FILO AP Liens, the "**Adequate Protection Liens**"), in accordance with the priorities shown in **Exhibit 3** and in each case subject to the Carve-Out; *provided* that the FILO ABL AP Liens of the Prepetition FILO ABL Secured Parties shall be subject to the Prepetition ABL Credit Agreement.

(b) *FILO ABL Section 507(b) Claims*. The Prepetition FILO ABL Agent, for itself and for the benefit of the other Prepetition FILO ABL Secured Parties, is hereby granted, subject to the Carve-Out, an allowed superpriority administrative expense claim as provided for in section 507(b) of the Bankruptcy Code in the amount of the Prepetition FILO ABL Secured Parties' FILO ABL Diminution Claims, with priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code and subject to, as applicable, the Prepetition Intercreditor Agreements (the "**FILO ABL 507(b) Claims**" and, together with the Term Collateral 507(b) Claims, the BrandCo Collateral 507(b) Claims and the FILO ABL 507(b) Claims the "**507(b) Claims**") which FILO ABL 507(b) Claims shall have recourse to and be payable from all prepetition and postpetition property of the Debtors, excluding the BrandCo Entities, and all proceeds thereof (excluding Avoidance Actions, but including, subject to entry of Final Order, Avoidance Proceeds). The FILO ABL 507(b)

Claims shall be subject to the Carve-Out and the DIP Superpriority Claims. Except to the extent expressly set forth in this Interim Order, the Final Order or the DIP Documents, the Prepetition FILO ABL Secured Parties shall not receive or retain any payments, property or other amounts in respect of the FILO ABL 507(b) Claims unless and until the DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) have indefeasibly been paid in cash in full and all DIP Commitments have been terminated.

17. *Prepetition BrandCo Term B-1 Loans Interest Payment.* As (a) Adequate Protection for any diminution in value of their interests in the Prepetition BrandCo Collateral and (b) consideration for their agreement to extension of the Intercompany DIP Facility, the Prepetition BrandCo Agent, on behalf of the holders of the Term B-1 Loans (as defined in the Prepetition BrandCo Credit Agreement), shall receive quarterly payments (the “**BrandCo B-1 Payments**”) equal to (i) the interest payable in cash accrued since the last interest payment in respect of the Term B-1 Loans (including, as to the first such BrandCo B-1 Payment, amounts accrued prior to the Petition Date) at the non-default interest rate applicable to the Term B-1 Loans under the Prepetition BrandCo Credit Agreement during such quarterly period. During the Chapter 11 Cases, (ii) interest paid in kind under the terms of the Prepetition BrandCo Credit Agreement shall continue to accrue in respect of the Term B-1 Loans at the non-default rate that would otherwise be owed to the Prepetition BrandCo Lenders holding the Term B-1 Loans and (iii) default interest due under the terms of the Prepetition BrandCo Credit Agreement shall accrue in kind in respect of the Term B-1 Loans. The Prepetition BrandCo Agent and the Prepetition BrandCo Lenders reserve all rights to assert claims for payment of additional interest, whether adequate protection or otherwise.

18. *Prepetition BrandCo Secured Parties Fees and Expenses.* As (a) Adequate Protection for any diminution in value of their interests in the Prepetition BrandCo Collateral, (b) consideration for their agreement to extension of the Intercompany DIP Facility and (c) consideration for their commitment to extend the Term DIP Facility, the Prepetition BrandCo Agent and the Ad Hoc Group of BrandCo Lenders shall be entitled to current cash payment of all reasonable and documented prepetition and postpetition fees and expenses, including, but not limited to, the reasonable and documented fees and out-of-pocket expenses of primary, special, conflicts and local counsel (in each applicable jurisdiction) and financial advisors, including without limitation, Davis Polk & Wardwell LLP, Centerview Partners, Kobre & Kim LLP, Paul Hastings LLP and any other advisors retained by or on behalf of the BrandCo Agent or the Ad Hoc Group of BrandCo Lenders (such fees and expenses, the “**BrandCo Fees and Expenses**” and, such counsel and advisors, the “**Prepetition BrandCo Secured Parties Advisors**”), subject to the review procedures set forth in paragraph 28 of this Interim Order, including the notice provisions thereof.

19. *JP Morgan Letters of Credit.* Pursuant to the Continuing Agreement for Standby Letters of Credit, dated May 6, 2021, the Assignment of Deposits, dated October 20, 2020 and the Amended and Restated Assignment of Deposits, dated June 7, 2021, in each case between Revlon Consumer Products Corporation and JPMorgan Chase Bank, N.A. (together the “**JPMC LC Agreements**”), JPMorgan Chase Bank, N.A. (“**JPMC**”) has issued letters of credit in the aggregate face amount of approximately \$2,345,857.71 (the “**JPMC LCs**”) for the account of one or more Debtors and the Debtors have provided cash collateral in the amount of approximately \$2,580,443.48 to JPMC (the “**JPMC Cash Collateral**”). The Debtors agree that JPMC is entitled to Adequate Protection of its interest in the JPMC Cash Collateral and the

Debtors are authorized to provide such Adequate Protection in accordance with this paragraph of this Order. The JPMC Cash Collateral will (i) continue to be held by JPMC during the pendency of the Debtors Chapter 11 Cases in accordance with the terms of the JPMC LC Agreements, and (ii) continue to secure all reimbursement obligations and the payment of fees, costs and expenses now or hereafter owing to JPMC in respect of the JPMC LCs, all of which shall continue to accrue and be payable to JPMC in accordance with the JPMC LC Agreements (collectively, the “**JPMC LC Obligations**”). JPMC is hereby authorized to apply all or any portion of the JPMC Cash Collateral to the payment of the JPMC LC Obligations from time to time without further notice to or consent by the Debtors or any other party in interest and without further order of the Court. Notwithstanding anything to the contrary in this or any other Order, (a) JPMC’s lien on the JPMC LC Cash Collateral shall not be subject or subordinate to the Carve Out, the DIP Liens, the Adequate Protection Liens, the Prior Permitted Liens or the Prepetition Liens, and (b) JPMC shall be entitled to an allowed administrative expense claim in an amount equal to the JPMC LC Obligations (but limited to the amount of the JPMC Cash Collateral) in each of the Cases and in any Successor Cases (the “JPMC Adequate Protection Claim”). The JPMC Adequate Protection Claim shall be senior to all other administrative claims (including the Carve Out, the DIP Superpriority Claim and the Prepetition Superpriority Claims). The JPMC Cash Collateral shall be returned to the Debtors upon (x) the expiration of the JPMC LCs, (y) the provision to JPMC of a backup LC satisfactory to JPMC, or (z) the return of the undrawn JPMC LCs.

20. *Prepetition Secured Parties’ Adequate Protection Information Rights.* The Debtor DIP Loan Parties shall promptly provide the Prepetition Agents, for distribution to the Prepetition Secured Parties and, to the extent applicable, counsel to such parties (and subject to applicable confidentiality restrictions in any of the Prepetition Loan Documents, including with

respect to any “private” side lender database), with all required written financial reporting and other periodic reporting that is required to be provided to the DIP Agents or the DIP Secured Parties under the DIP Documents, including without limitation the reporting required under sections 6.1 and 6.2 of the Term DIP Credit Agreement (the “**Adequate Protection Reporting Requirement**”). Upon indefeasible payment in full of all DIP Obligations and termination of all DIP Commitments, the Prepetition Secured Parties shall continue to be entitled hereby to satisfaction of the Adequate Protection Reporting Requirement.

21. *Maintenance of Collateral.* The DIP Loan Parties shall continue to maintain and insure the Prepetition Collateral and DIP Collateral in amounts and for the risks, and by the entities, as required under the Prepetition Loan Documents and the DIP Documents.

22. *Ad Hoc Group of Prepetition 2016 Term Loan Lenders Fees and Expenses.* Akin Gump Strauss Hauer & Feld LLP, as lead counsel, and other professionals retained by the Ad Hoc Group of Prepetition 2016 Term Loan Lenders, shall be entitled to payment of all reasonable and documented prepetition fees and expenses (a) solely on account of such fees and expenses accrued through the Petition Date and (b) capped in an amount not to exceed \$1 million in the aggregate (such fees and expenses, the “**2016 Ad Hoc Group Fees and Expenses**” and together with the 2016 Term Loan Agent Fees and Expenses, the “**2016 Term Loan Fees and Expenses**”), subject to the review procedures set forth in paragraph 28 of this Interim Order, including the notice provisions thereof.

23. *Intercompany DIP Facility Terms.* Amounts deemed borrowed under the Intercompany DIP Facility shall accrue interest, paid in kind on the last Business Day of each calendar quarter, from the date of each deemed borrowing at the rate applicable to “ABR Loans” and following the methods of computation set forth in section 2.15 of the Term DIP Credit

Agreement. The Maturity Date for the Intercompany DIP Facility shall be the same as the “Maturity Date” provided in the DIP Credit Agreement. Upon the Maturity Date, the Borrower promises to pay the Intercompany DIP Lenders the unpaid principal amount of borrowings under the Intercompany DIP Facility and accrued interest on the unpaid principal amount of such borrowings made to the Borrower from time to time outstanding from the date made until payment in full thereof at the rates per annum, and on the dates, set forth in section 2.15 of the Term DIP Credit Agreement. For the avoidance of doubt, no further discounts, fees, or premiums shall be due in connection with the Intercompany DIP Facility.

24. *Reservation of Rights.*

(a) *Reservation of Rights of Prepetition Secured Parties.* Under the circumstances and given that the above-described adequate protection is consistent with the Bankruptcy Code, including section 506(b) thereof, the Court finds that the adequate protection provided herein is reasonable and sufficient to protect the interests of the Prepetition Secured Parties and any other parties’ holding interests that are secured by Primed Liens; *provided that* the Prepetition Agents acting on their own behalf or at the direction of the requisite Prepetition Secured Parties, as well as any Prepetition Secured Party in its individual capacity (subject to any applicable contractual limitations on such rights), may request further or different adequate protection and the Debtor DIP Loan Parties or any other party in interest may contest any such request.

(b) *Reservation of Rights of all Parties.* Other than as provided in paragraph 29, nothing in this Interim Order shall prejudice, limit or otherwise impair any legal or equitable claim or cause of action with respect to any prepetition transaction, asset transfer, debt, claim, lien or agreement, including, but not limited to, the Prepetition BrandCo Credit Facilities, the

Prepetition BrandCo Guarantee and Security Agreements, the Prepetition BrandCo Intercreditor Agreement, the Prepetition Pari Passu Term Loan Intercreditor Agreement, the Prepetition BrandCo Credit Facility Debt, the Prepetition BrandCo Liens, the transfer of any assets to the BrandCo Entities and the BrandCo License Agreements, the Prepetition ABL Credit Facility, the Prepetition ABL Guarantee and Collateral Agreement, the Prepetition ABL Intercreditor Agreement, the Prepetition ABL Credit Facility Debt, the Prepetition ABL Liens, the Prepetition 2016 Term Loan Credit Facility and the Prepetition 2016 Term Loan Credit Facility Debt, whether existing prior to the Petition Date or arising in connection with these proceedings or otherwise (collectively, the “**Existing and Bankruptcy Claims**”). All parties rights and claims, including available remedies, as well as defenses, are reserved with respect to the Existing Claims and the Bankruptcy Claims.

25. *Perfection of DIP Liens and Adequate Protection Liens.*

(a) Without in any way limiting the automatically valid and effective perfection of the DIP Liens granted pursuant to paragraph 6 hereof and the Adequate Protection Liens granted pursuant to paragraphs 14 – 16 hereof, the DIP Agents, the DIP Secured Parties, the Prepetition Agents and the Prepetition Secured Parties are hereby authorized, but not required, to file or record (and to execute in the name of the DIP Loan Parties and the Prepetition Secured Parties (as applicable), as their true and lawful attorneys, with full power of substitution, to the maximum extent permitted by law) financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, including as may be reasonably required or deemed appropriate by the applicable DIP Agent, acting at the direction of the applicable required parties under the DIP Documents, and the Prepetition Agents, acting at the direction of the “Required Lenders” (as such term is defined the applicable Prepetition Loan

Documents), under applicable local laws, or take possession of or control over cash or securities, or to amend or modify security documents, or enter into, amend or modify intercreditor agreements, or to subordinate existing liens and any other similar action or action in connection therewith or take any other action in order to document, validate and perfect the liens and security interests granted to them hereunder (the “**Perfection Actions**”). Whether or not the applicable DIP Agent, on behalf of the applicable DIP Secured Parties and acting at the direction of the applicable required parties under the DIP Documents or the applicable Prepetition Agent, on behalf of the applicable Prepetition Secured Parties and acting at the direction of the “Required Lenders” (as such term is defined the applicable Prepetition Loan Documents) shall take such Perfection Actions, the liens and security interests granted pursuant to this Interim Order shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, at the time and on the date of entry of this Interim Order. Upon the request of a DIP Agent, acting at the direction of the applicable required parties under the DIP Documents, or a Prepetition Agent, acting at the direction of the applicable Required Lenders, each of the Prepetition Secured Parties and the Debtor DIP Loan Parties, without any further consent of any party, and at the sole cost of the Debtors as set forth herein, is authorized (in the case of the Debtor DIP Loan Parties), and directed (in the case of the Prepetition Secured Parties), and such direction is hereby deemed to constitute required direction under the applicable DIP Documents or Prepetition Loan Documents, to take, execute, deliver and file such actions, instruments and agreements (in each case, without representation or warranty of any kind) to enable the DIP Agents to further validate, perfect, preserve and enforce the DIP Liens in all jurisdictions required under the DIP Credit Agreements, including all local law documentation therefor determined to be reasonably necessary by such DIP Agent, acting at the

direction of the applicable required parties under the DIP Documents; provided, however, that no action need be taken in a foreign jurisdiction that would jeopardize the validity and enforceability of the Prepetition Liens. All such documents will be deemed to have been recorded and filed as of the Petition Date. To the extent necessary to effectuate the terms of this Interim Order and the DIP Documents, each of the DIP Agents and the Prepetition Agents hereby are deemed to appoint the other (and deemed to have accepted such appointment) to act as its agent with respect to the Shared Collateral (as defined in the DIP Documents) and under the Common Security Documents (as defined in the DIP Documents) to which they are a party in such capacity, with such powers as are expressly delegated thereto under the DIP Documents and Prepetition Loan Documents (and even if it involves self-contracting and multiple representation to the extent legally possible), together with such other powers as are reasonably incidental thereto.

(b) A certified copy of this Interim Order may, in the discretion of each DIP Agent, acting at the direction of the applicable required parties under the DIP Documents, and the Prepetition Agents, acting at the direction of the applicable required parties under the Prepetition Loan Documents, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized and directed to accept a certified copy of this Interim Order for filing and/or recording, as applicable. The Automatic Stay shall be modified to the extent necessary to permit the DIP Agents and the Prepetition Agents to take all actions, as applicable, referenced in this subparagraph (b) and the immediately preceding subparagraph (a).

26. *Preservation of Rights Granted Under this Interim Order.*

(a) Other than the Carve-Out and other claims and liens expressly granted by this Interim Order, no claim or lien having a priority superior to or *pari passu* with those granted by this Interim Order to the DIP Agents and the DIP Secured Parties or the Prepetition Agents and the Prepetition Secured Parties shall be permitted while any of the DIP Obligations or the Adequate Protection Obligations remain outstanding, and, except as otherwise expressly provided in this Interim Order, the DIP Liens and the Adequate Protection Liens shall not be:

(i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code; (ii) subordinated to or made *pari passu* with any other lien or security interest, whether under section 364(d) of the Bankruptcy Code or otherwise; (iii) subordinated to or made *pari passu* with any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other domestic or foreign governmental unit (including any regulatory body), commission, board or court for any liability of the DIP Loan Parties; or (iv) subject or junior to any intercompany or affiliate liens or security interests of the DIP Loan Parties.

(b) The occurrence and continuance of any Event of Default (as defined in the DIP Credit Agreements) in violation of any of the terms of this Interim Order, shall, after notice by the applicable DIP Agent (acting in accordance with the terms of this Interim DIP Order) in writing to the Borrower, its lead restructuring counsel (Paul, Weiss, Rifkind, Wharton & Garrison LLP), the U.S. Trustee, and lead counsel to the Committee (if any) and lead counsel to any other DIP Agent (and, in the case of violation of any terms of this Interim Order, and after indefeasible payment in full of the DIP Obligations and termination of the DIP Commitments, notice to such parties by the applicable Prepetition Agent acting at the direction of the required

parties under the applicable Loan Documents), constitute an event of default under this Interim Order (an “**Event of Default**”) and, upon such notice of any such Event of Default, interest, including, where applicable, default interest, shall accrue and be paid as set forth in the DIP Credit Agreements. Notwithstanding any order that may be entered dismissing any of the Chapter 11 Cases under section 1112 of the Bankruptcy Code: (A) the DIP Superpriority Claims, the 507(b) Claims, the DIP Liens, and the Adequate Protection Liens, and any claims related to the foregoing, shall continue in full force and effect and shall maintain their priorities as provided in this Interim Order until all DIP Obligations and Adequate Protection Obligations shall have been paid in full (and that such DIP Superpriority Claims, 507(b) Claims, DIP Liens and Adequate Protection Liens shall, notwithstanding such dismissal, remain binding on all parties in interest); (B) the other rights granted by this Interim Order, including with respect to the Carve-Out, shall not be affected; and (C) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in this paragraph and otherwise in this Interim Order.

(c) If any or all of the provisions of this Interim Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacatur or stay shall not affect: (i) the validity, priority or enforceability of any DIP Obligations or Adequate Protection Obligations incurred prior to the actual receipt of written notice by either DIP Agent or the applicable Prepetition Agent, as applicable, of the effective date of such reversal, modification, vacatur or stay; or (ii) the validity, priority or enforceability of the DIP Liens or the Adequate Protection Liens or the Carve-Out. Notwithstanding any reversal, modification, vacatur or stay of any use of Cash Collateral, any DIP Obligations, DIP Liens, Adequate Protection Obligations or Adequate Protection Liens incurred by the Debtor DIP Loan Parties and granted to the DIP

Agents, the DIP Secured Parties, the Prepetition Agents or the other Prepetition Secured Parties, as the case may be, prior to the actual receipt of written notice by either DIP Agent or any Prepetition Agent, as applicable, of the effective date of such reversal, modification, vacatur or stay shall be governed in all respects by the original provisions of this Interim Order, and the DIP Agents, the DIP Secured Parties, the Prepetition Agents and the other Prepetition Secured Parties shall be entitled to, and are hereby granted, all the rights, remedies, privileges and benefits arising under sections 364(e) and 363(m) of the Bankruptcy Code, this Interim Order and the DIP Documents with respect to all uses of Cash Collateral, DIP Obligations and Adequate Protection Obligations.

(d) Except as expressly provided in this Interim Order or in the DIP Documents, the DIP Liens, the DIP Superpriority Claims, the Adequate Protection Liens, the Adequate Protection Obligations, the 507(b) Claims and all other rights and remedies of the DIP Agents, the DIP Secured Parties, the Prepetition Agents and the Prepetition Secured Parties granted by the provisions of this Interim Order and the DIP Documents and the Carve-Out shall survive, and shall not be modified, impaired or discharged by: (i) the entry of an order converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code, dismissing any of the Chapter 11 Cases or terminating the joint administration of these Chapter 11 Cases or by any other act or omission; (ii) the entry of an order approving the sale of any DIP Collateral pursuant to section 363(b) of the Bankruptcy Code (except to the extent permitted by the DIP Documents); or (iii) the entry of an order confirming a chapter 11 plan in any of the Chapter 11 Cases and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the DIP Loan Parties have waived any discharge as to any remaining DIP Obligations or Adequate Protection Obligations. The terms and provisions of this Interim Order and the DIP Documents shall continue in these Chapter 11

Cases, in any Successor Cases if these Chapter 11 Cases cease to be jointly administered and in any superseding chapter 7 cases under the Bankruptcy Code, and the DIP Liens, the DIP Superpriority Claims, the Adequate Protection Liens and the Adequate Protection Obligations and all other rights and remedies of the DIP Agents, the DIP Secured Parties, the Agents and the Prepetition Secured Parties granted by the provisions of this Interim Order and the DIP Documents shall continue in full force and effect until the DIP Obligations are indefeasibly paid in full in cash, as set forth herein and in the DIP Documents, and the DIP Commitments have been terminated (and in the case of rights and remedies of the Prepetition BrandCo Agent, the Prepetition 2016 Term Loan Agent and Prepetition Secured Parties, shall remain in full force and effect thereafter, subject to the terms of this Interim Order, until the Adequate Protection Obligations are indefeasibly paid in full in cash), and the Carve-Out shall continue in full force and effect.

27. *SISO Buy-Out Option.* The Prepetition SISO ABL Agent is deemed to waive its right to exercise the Buy-Out Option pursuant to, and as defined in, Section 10 of the Amended and Restated Agreement among Lenders, dated as of March 31, 2022, among each lender executing such agreement and MidCap funding IV Trust, as administrative agent under the Prepetition ABL Credit Agreement, which shall remain in full force and effect and continue to govern the relative priorities, rights and remedies of the ABL DIP Lenders under the ABL DIP Facility and the Prepetition ABL Secured Parties under the Prepetition ABL Credit Agreement; *provided that*, in the event that the Final Order providing for the Prepetition SISO ABL Roll-Up is not entered by the date set forth in the ABL DIP Term Sheet and ABL DIP Credit Agreement (as may be extended by agreement of the applicable required parties under the ABL DIP Documents), such waiver will be null and void and the Prepetition SISO ABL Agent's Buy-Out

Option will be reinstated and the ten (10) day time period referenced in clause (a)(i) with respect to sub-clause (3) therein shall be deemed to commence as of the date of any such Final Order as in effect as of the Petition Date.

28. *Payment of Fees and Expenses.* The Jefferies Engagement Letter and the Administrative Agent Fee Letters are hereby approved, and the Debtor DIP Loan Parties are authorized to and shall pay the DIP Fees and Expenses, the BrandCo Fees and Expenses and the 2016 Term Loan Fees and Expenses, in each case to the extent reasonable and as provided for in this Interim Order. Subject to the review procedures set forth in this paragraph 28, payment of all DIP Fees and Expenses, BrandCo Fees and Expenses and 2016 Term Loan Fees and Expenses shall not be subject to allowance or review by the Court. Professionals for the DIP Secured Parties, the Prepetition BrandCo Secured Parties and the Prepetition ABL Secured Parties shall not be required to comply with the U.S. Trustee fee guidelines, however any time that such professionals seek payment of fees and expenses from the Debtor DIP Loan Parties after the Initial Draw and prior to confirmation of a chapter 11 plan, each professional shall provide summary copies of its invoices including aggregate amounts of fees and expenses and total amount of time (which shall not be required to contain individual time entries and which may be redacted, summarized or modified to the extent necessary to delete any information subject to the attorney-client privilege, any information constituting attorney work product, or any other confidential information, and the provision of their invoices shall not constitute any waiver of the attorney client privilege or of any benefits of the attorney work product doctrine) to the Debtor DIP Loan Parties, the U.S. Trustee (provided that such invoices submitted to the U.S. Trustee shall be unredacted), and counsel to any statutory committee appointed in these Chapter 11 Cases (together, the “**Review Parties**”). In no event shall any invoice or other statement

submitted by any DIP Secured Party to any Debtor, the Creditors' Committee, the U.S. Trustee or any other interested person (or any of their respective Professionals) with respect to fees or expenses incurred by any professional retained by such DIP Secured Party, Prepetition BrandCo Secured Party or Prepetition ABL Secured Party operate to waive the attorney/client privilege, the work-product doctrine or any other evidentiary privilege or protection recognized under applicable law. Any objections raised by any Review Party with respect to such invoices must be in writing and state with particularity the grounds therefor and must be submitted to the applicable professional within ten (10) calendar days after the receipt by the Review Parties (the **"Review Period"**). If no written objection is received by 12:00 p.m., prevailing Eastern Time, on the end date of the Review Period, the Debtor DIP Loan Parties shall pay such invoices within five (5) calendar days thereafter. If an objection to a professional's invoice is received within the Review Period, the Debtor DIP Loan Parties shall promptly pay the undisputed amount of the invoice, without the necessity of filing formal fee applications, regardless of whether such amounts arose or were incurred before or after the Petition Date, and this Court shall have jurisdiction to determine the disputed portion of such invoice if the parties are unable to resolve the dispute consensually. Notwithstanding the foregoing, the Debtor DIP Loan Parties are authorized and directed to pay on the Closing Date the DIP Fees and Expenses, the BrandCo Fees and Expenses and the 2016 Term Loan Fees and Expenses incurred on or prior to such date without the need for any professional engaged by, or on behalf of, the DIP Secured Parties or the Prepetition BrandCo Secured Parties or the Prepetition ABL Secured Parties to first deliver a copy of its invoice or other supporting documentation to the Review Parties (other than the Debtor DIP Loan Parties). No attorney or advisor to the DIP Secured Parties or any Prepetition BrandCo Secured Party or Prepetition ABL Secured Party shall be required to file an application

seeking compensation for services or reimbursement of expenses with the Court. Any and all fees, costs, and expenses paid prior to the Petition Date by any of the Debtors to the (i) DIP Secured Parties in connection with or with respect to the DIP Facility and (ii) Prepetition BrandCo Secured Parties or the Prepetition ABL Secured Parties in connection with or with respect to these matters, are hereby approved in full and shall not be subject to recharacterization, avoidance, subordination, disgorgement or any similar form of recovery by the Debtor DIP Loan Parties or any other person.

29. *Effect of Stipulations on Third Parties.* The Debtors' stipulations, admissions, agreements and releases contained in this Interim Order, including as set forth in paragraph G, shall be binding upon the Debtors and any successor thereto (including, without limitation, any chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors) in all circumstances and for all purposes, including with respect to any Prepetition LIFO ABL Obligations or Prepetition SISO ABL Obligations to the extent such obligations are recharacterized or not rolled-up into DIP Obligations. The Debtors' stipulations, admissions, agreements and releases contained in this Interim Order shall be binding upon all other parties in interest, including, without limitation, any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases and any other person or entity acting or seeking to act on behalf of the Debtors' estates, including any chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors, in all circumstances and for all purposes unless: (a) (i) with respect to any party in interest with requisite standing other than any Committee (subject in all respects to any agreement or applicable law that may limit or affect such entity's right or ability to do so), such party has timely filed an adversary proceeding or contested matter (subject to the limitations contained herein, including, *inter alia*, in this paragraph) by no later than 75 calendar

days after entry of the Final Order, (ii) with respect to any Committee with requisite standing (subject in all respects to any agreement or applicable law that may limit or affect such entity's right or ability to do so), such Committee has timely filed an adversary proceeding or contested matter (subject to the limitations contained herein, including, *inter alia*, in this paragraph) by no later than 60 calendar days after the entry of the Final Order, and (iii) in each case with respect to (i) and (ii), any such later date as has been agreed to in writing by (x) the ABL DIP Agent with respect to the ABL DIP Collateral (acting with the direction of the Required ABL DIP Lenders), (y) the Term DIP Agent with respect to the Term DIP Collateral (acting with the direction of the Required Term DIP Lenders) and (z) the applicable Prepetition Agent with respect to the applicable Prepetition Collateral (acting with the direction of the required parties pursuant to the applicable Loan Documents) or ordered by the Court for cause upon a motion filed and served within any applicable period (the time period established by the foregoing clauses (i)-(iii), the "**Challenge Period**"), (A) objecting to or challenging the amount, validity, perfection, enforceability, priority or extent of the Prepetition ABL Credit Facility Debt, Prepetition BrandCo Credit Facility Debt, Prepetition ABL Liens or the Prepetition BrandCo Liens or (B) otherwise asserting or prosecuting any action for preferences, fraudulent transfers or conveyances, other avoidance power claims or any other claims, counterclaims or causes of action, objections, contests or defenses (collectively, the "**Challenges**") against the Prepetition ABL Secured Parties or the Prepetition BrandCo Secured Parties or their respective subsidiaries, affiliates, officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other professionals and the respective successors and assigns thereof, in each case in their respective capacity as such (each, a "**Representative**" and, collectively, the "**Representatives**") in connection with

matters related to the Prepetition BrandCo Loan Documents, the Prepetition ABL Loan Documents, the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility, the Prepetition BrandCo Liens, the Prepetition ABL Liens, the Prepetition BrandCo Collateral and the Prepetition Shared Collateral; and (b) there is a final non-appealable order in favor of the plaintiff sustaining any such Challenge in any such timely filed adversary proceeding or contested matter; *provided, however*, that any pleadings filed in connection with any Challenge shall set forth with specificity the basis for such challenge or claim and any challenges or claims not so specified prior to the expiration of the Challenge Period shall be deemed forever, waived, released and barred. If no such Challenge is timely and properly filed during the Challenge Period or the Court does not rule in favor of the plaintiff in any such proceeding then: (1) the Debtors' stipulations, admissions, agreements and releases contained in this Interim Order shall be binding on all parties in interest; (2) the obligations of the Debtor DIP Loan Parties under the Prepetition ABL Loan Documents and Prepetition BrandCo Loan Documents, including the Prepetition ABL Credit Facility Debt and the Prepetition BrandCo Credit Facility Debt, shall constitute allowed claims not subject to defense, claim, counterclaim, recharacterization, subordination, recoupment, offset or avoidance, for all purposes in the Chapter 11 Cases, and any subsequent chapter 7 case(s); (3) the Prepetition BrandCo Liens on the Prepetition BrandCo Collateral and the Prepetition ABL Liens on the Prepetition Shared Collateral shall be deemed to have been, as of the Petition Date, legal, valid, binding, perfected, security interests and liens, not subject to recharacterization, subordination, avoidance or other defense; and (4) the Prepetition BrandCo Credit Facility Debt and the Prepetition BrandCo Liens on the Prepetition BrandCo Collateral and the Prepetition ABL Credit Facility Debt and the Prepetition ABL Liens on the Prepetition Shared Collateral shall not be subject to any other or further claim or challenge by

any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases or any other party in interest acting or seeking to act on behalf of the Debtor DIP Loan Parties' estates, including, without limitation, any successor thereto (including, without limitation, any chapter 7 trustee or chapter 11 trustee or examiner appointed or elected for any of the Debtors) and any defenses, claims, causes of action, counterclaims and offsets by any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases or any other party acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any successor thereto (including, without limitation, any chapter 7 trustee or chapter 11 trustee or examiner appointed or elected for any of the Debtors), whether arising under the Bankruptcy Code or otherwise, against any of the Prepetition ABL Secured Parties or Prepetition BrandCo Secured Parties or their respective Representatives arising out of or relating to any of the Prepetition ABL Loan Documents, the Prepetition BrandCo Loan Documents, the Prepetition ABL Credit Facility Debt, the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Liens, the Prepetition BrandCo Liens, the Prepetition Shared Collateral and the Prepetition BrandCo Collateral, as applicable, shall be deemed forever waived, released and barred. If any such Challenge is timely filed during the Challenge Period by any statutory or nonstatutory committee appointed or formed in the Chapter 11 Cases or any other person or entity with requisite standing, the stipulations, admissions, agreements and releases contained in this Interim Order shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) on each other statutory or nonstatutory committee appointed or formed in the Chapter 11 Cases and on any other person or entity, except to the extent that such stipulations, admissions, agreements and releases were expressly and successfully challenged in such Challenge as set forth in a final, non-appealable order of a court of competent jurisdiction. Nothing in this

Interim Order vests or confers on any Person (as defined in the Bankruptcy Code), including any statutory or non-statutory committees appointed or formed in these Chapter 11 Cases, standing or authority to pursue any claim or cause of action belonging to the Debtors or their estates, including, without limitation, Challenges with respect to the Prepetition BrandCo Loan Documents, the Prepetition ABL Loan Documents, the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility Debt, the Prepetition BrandCo Liens, or the Prepetition ABL Liens, the Prepetition BrandCo Collateral or the Prepetition ABL Collateral, and any ruling on standing, if appealed, shall not stay or otherwise delay the Chapter 11 Cases or confirmation of any plan of reorganization. Nothing in this Interim Order shall prohibit any of the Debtors from commencing, initiating, participating in or being a party to any in litigation, adversary proceeding or other contested matter, including pursuant to section 506 of the Bankruptcy Code that is consistent with the Debtors' stipulations, admissions, agreements and releases contained in this Interim Order. In the event of a timely and successful Challenge, the Court may, among other remedies, unwind the paydown of any Prepetition ABL Credit Facility Debt made pursuant to this Interim Order.

30. *Limitation on Use of DIP Financing Proceeds and Collateral.* Notwithstanding any other provision of this Interim Order or any other order entered by the Court, no DIP Loans, DIP Collateral, Prepetition Collateral (including Cash Collateral) or any portion of the Carve-Out, may be used directly or indirectly, including without limitation through reimbursement of professional fees of any non-Debtor party, (a) in connection with the investigation, threatened initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation (i) against any of the DIP Secured Parties, the Prepetition BrandCo Secured Parties, the Prepetition ABL Secured Parties, any member of the Ad Hoc Group of BrandCo Lenders or,

with respect to each of the foregoing, their respective predecessors-in-interest, agents, affiliates, representatives, attorneys, or advisors, in each case in their respective capacity as such, or any action purporting to do the foregoing in respect of the DIP Obligations, DIP Liens, DIP Superpriority Claims, Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility Debt and/or the Adequate Protection Obligations and Adequate Protection Liens granted to the Prepetition BrandCo Secured Parties and Prepetition ABL Secured Parties, as applicable, or (ii) challenging the amount, validity, perfection, priority or enforceability of or asserting any defense, counterclaim or offset with respect to the DIP Obligations, the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility Debt and/or the liens, claims, rights, or security interests securing or supporting the DIP Obligations granted under this Interim Order, the Final Order, the DIP Documents, the Prepetition BrandCo Loan Documents or the Prepetition ABL Loan Documents in respect of the Prepetition BrandCo Credit Facility Debt and the Prepetition ABL Credit Facility Debt, including, without limitation, any obligations arising from or related to the Applicable Premium (as defined in the Prepetition BrandCo Credit Agreement), and including, in the case of each (i) and (ii), without limitation, for lender liability or pursuant to section 105, 510, 544, 547, 548, 549, 550 or 552 of the Bankruptcy Code, applicable non-bankruptcy law or otherwise (provided that, notwithstanding anything to the contrary herein, the proceeds of the DIP Loans and/or DIP Collateral (including Cash Collateral) may be used by any Committee to investigate (but not to prosecute or initiate the prosecution of, including the preparation of any complaint or motion on account of) (A) the claims and liens of the Prepetition BrandCo Secured Parties or the Prepetition ABL Secured Parties and (B) potential claims, counterclaims, causes of action or defenses against the Prepetition BrandCo Secured Parties or the Prepetition ABL Secured Parties (together, the “**Investigation**”), up to an

aggregate cap of no more than \$50,000 (the “**Investigation Budget**”), (b) to prevent, hinder, or otherwise delay or interfere with the Prepetition BrandCo Agent’s, the Prepetition LIFO ABL Agent’s, the Prepetition BrandCo Secured Parties’, the Prepetition ABL Secured Parties’, the DIP Agents’, or the DIP Secured Parties’, as applicable, enforcement or realization on the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility Debt, the Prepetition BrandCo Collateral, the Prepetition Shared Collateral, the DIP Obligations, DIP Collateral, and the liens, claims and rights granted to such parties under the Interim Order or Final Order, as applicable, each in accordance with the DIP Documents, the Prepetition BrandCo Loan Documents, the Prepetition ABL Loan Documents or this Interim Order; (c) to seek to modify without the requisite consents any of the rights and remedies granted to the Prepetition BrandCo Agent, the Prepetition LIFO ABL Agent, the Prepetition BrandCo Secured Parties, the Prepetition ABL Secured Parties, the DIP Agents, or the DIP Secured Parties under this Interim Order, the Prepetition BrandCo Loan Documents, the Prepetition ABL Loan Documents or the DIP Documents, as applicable; (d) to apply to the Court for authority to approve superpriority claims or grant liens (other than the liens permitted pursuant to the DIP Documents) or security interests in the DIP Collateral or any portion thereof that are senior to, or on parity with, the DIP Liens, DIP Superpriority Claims, Adequate Protection Liens and 507(b) Claims granted to the Prepetition ABL Secured Parties (except as permitted by the DIP Documents) or the Prepetition BrandCo Secured Parties; or (e) to pay or to seek to pay any amount on account of any claims arising prior to the Petition Date unless such payments are agreed to in writing by the Required DIP Lenders, expressly permitted under this Interim Order or permitted under the DIP Documents (including the Approved Budget, subject to permitted variances), in each case unless all DIP Obligations, Prepetition BrandCo Credit Facility Debt, Prepetition ABL Credit Facility

Debt, Adequate Protection Obligations and claims granted to the DIP Agents, DIP Secured Parties, Prepetition Agents and Prepetition Secured Parties under this Interim Order have been refinanced or paid in full in cash (including the cash collateralization of any letters of credit) or otherwise agreed to in writing by the Required DIP Lenders. For the avoidance of doubt, this paragraph 30 shall not limit the Debtors' right to use DIP Collateral, including Cash Collateral, to contest whether an Event of Default has occurred hereunder or to take any other action permitted pursuant to paragraph 7(d) of this Interim Order consistent with the terms thereof.

31. *Interim Order Governs.* In the event of any inconsistency between the provisions of this Interim Order and the DIP Documents (including, but not limited to, with respect to the Adequate Protection Obligations) or any other order entered by this Court, the provisions of this Interim Order shall govern. Notwithstanding anything to the contrary in any other order entered by this Court, any payment made pursuant to any authorization contained in any other order entered by this Court shall be consistent with and subject to the requirements set forth in this Interim Order and the DIP Documents, including, without limitation, the Approved Budget (subject to permitted variances).

32. *Binding Effect; Successors and Assigns.* The DIP Documents and the provisions of this Interim Order, including all findings herein, shall be binding upon all parties in interest in these Chapter 11 Cases, including, without limitation, the DIP Agents, the DIP Secured Parties, the Prepetition BrandCo Agent, the Prepetition 2016 Term Loan Agent, the Prepetition Secured Parties, any statutory or non-statutory committees appointed or formed in these Chapter 11 Cases, the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Debtors, an examiner appointed pursuant to section 1104 of the Bankruptcy Code, or any other fiduciary appointed as a

legal representative of any of the Debtors or with respect to the property of the estate of any of the Debtors) and shall inure to the benefit of the DIP Agents, the DIP Secured Parties, the Prepetition BrandCo Agent, the Prepetition 2016 Term Loan Agent, the Prepetition Secured Parties and the Debtors and their respective successors and assigns; *provided* that the DIP Agents, the DIP Secured Parties, the Prepetition BrandCo Agent, the Prepetition 2016 Term Loan Agent and the Prepetition Secured Parties shall have no obligation to permit the use of the Prepetition Collateral (including Cash Collateral) by, or to extend any financing to, any chapter 7 trustee, chapter 11 trustee or similar responsible person appointed for the estates of the Debtors.

33. *Exculpation.* Nothing in this Interim Order, the DIP Documents, the Prepetition Loan Documents or any other documents related to the transactions contemplated hereby shall in any way be construed or interpreted to impose or allow the imposition upon any DIP Secured Party or Prepetition Secured Party any liability for any claims arising from the prepetition (subject to paragraph 29) or postpetition activities of the Debtors in the operation of their businesses, or in connection with their restructuring efforts. The DIP Secured Parties and Prepetition Secured Parties shall not, in any way or manner, be liable or responsible for (i) the safekeeping of the DIP Collateral or Prepetition Collateral, (ii) any loss or damage thereto occurring or arising in any manner or fashion from any cause, (iii) any diminution in the value thereof or (iv) any act or default of any carrier, servicer, bailee, custodian, forwarding agency or other person and (b) all risk of loss, damage or destruction of the DIP Collateral or Prepetition Collateral shall be borne by the Debtors.

34. *Limitation of Liability.* In determining to make any loan or other extension of credit under the DIP Documents, to permit the use of the DIP Collateral or Prepetition Collateral (including Cash Collateral) or in exercising any rights or remedies as and when permitted

pursuant to this Interim Order or the DIP Documents or Prepetition Loan Documents, none of the DIP Secured Parties or Prepetition Secured Parties shall (a) have any liability to any third party or be deemed to be in “control” of the operations of the Debtors; (b) owe any fiduciary duty to the Debtors, their respective creditors, shareholders or estates; or (c) be deemed to be acting as a “Responsible Person” or “Owner” or “Operator” or “managing agent” with respect to the operation or management of any of the Debtors (as such terms or similar terms are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, as amended, or any other federal or state statute, including the Internal Revenue Code). Furthermore, nothing in this Interim Order shall in any way be construed or interpreted to impose or allow the imposition upon any of the DIP Agents, DIP Secured Parties, the Prepetition BrandCo Agent, the Prepetition 2016 Term Loan Agent or Prepetition Secured Parties of any liability for any claims arising from the prepetition or postpetition activities of any of the Debtors and their respective affiliates (as defined in section 101(2) of the Bankruptcy Code).

35. *Master Proofs of Claim.* The Prepetition Agents and/or any other Prepetition Secured Parties shall not be required to file proofs of claim in the Chapter 11 Cases or any Successor Case in order to assert claims on behalf of themselves or the Prepetition Secured Parties for payment of the Prepetition BrandCo Credit Facility Debt, the Prepetition ABL Credit Facility Debt arising under the Prepetition Loan Documents, as applicable, or obligations arising under the Prepetition 2016 Term Loan Documents, including, without limitation, any principal, unpaid interest, fees, expenses and other amounts under the Prepetition Loan Documents. The statements of claim in respect of such indebtedness set forth in this Interim Order, together with any evidence accompanying the DIP Motion and presented at the Interim Hearings, are deemed

sufficient to and do constitute proofs of claim in respect of such debt and such secured status. However, in order to facilitate the processing of claims, to ease the burden upon the Court and to reduce an unnecessary expense to the Debtors' estates, the Prepetition Agents are authorized, but not directed or required, to file in the Debtors' lead chapter 11 case *In re Revlon, Inc.*, Case No. 22-10760 (DSJ), a master proof of claim on behalf of their respective Prepetition Secured Parties on account of any and all of their respective claims arising under the applicable Prepetition Loan Documents and hereunder (each, a "**Master Proof of Claim**") against each of the Debtors. Upon the filing of a Master Proof of Claim by a Prepetition Agent, it shall be deemed to have filed a proof of claim in the amount set forth opposite its name therein in respect of its claims against each of the Debtors of any type or nature whatsoever with respect to the applicable Prepetition Loan Documents, and the claim of each applicable Prepetition Secured Party (and each of its respective successors and assigns), named in a Master Proof of Claim shall be treated as if it had filed a separate proof of claim in each of these Chapter 11 Cases. The Master Proofs of Claim shall not be required to identify whether any Prepetition Secured Party acquired its claim from another party and the identity of any such party or to be amended to reflect a change in the holders of the claims set forth therein or a reallocation among the holders of the claims asserted therein resulting from the transfer of all or any portion of such claims. The provisions of this paragraph 35 and each Master Proof of Claim are intended solely for the purpose of administrative convenience and shall not affect the right of each Prepetition Secured Party (or its successors in interest) to vote separately on any plan proposed in these Chapter 11 Cases. The Master Proofs of Claim shall not be required to attach any instruments, agreements or other documents evidencing the obligations owing by each of the Debtors to the applicable Prepetition Secured Parties, which instruments, agreements or other documents will be provided upon

written request to counsel to the applicable Prepetition Agent. The DIP Agents and the DIP Secured Parties shall similarly not be required to file proofs of claim with respect to their DIP Obligations under the DIP Documents, and the evidence presented with the DIP Motion and the record established at the Interim Hearings are deemed sufficient to, and do, constitute proofs of claim with respect to their obligations, secured status, and priority.

36. *Forbearance of the Prepetition Secured Parties.* Prior to the occurrence of an Event of Default, except as expressly permitted pursuant to the terms of this Interim Order or the DIP Documents, the Prepetition Secured Parties shall not (i) exercise any rights or remedies with respect to any Prepetition Liens or Prepetition Collateral, (ii) enforce or pursue an event of default or other breach under any Prepetition Loan Document, or (iii) assert any demand for payment of any kind whatsoever, in each case with respect to any Debtor on account of any Prepetition Obligations; *provided* that, following (x) payment in full of the DIP Obligations and termination of the DIP Commitments and (y) the occurrence of any Event of Default or other violation of the terms of this Interim Order, subject to seven (7) days' notice (i) the forbearance set forth in this paragraph 36 shall be of no further force or effect, and (ii) the Prepetition Secured Parties shall be permitted to file a Stay Relief Motion (consistent with the procedures set forth in paragraph 7(c) of this Interim Order and the Prepetition Intercreditor Agreements) seeking authority to rescind any consent given under this Interim Order regarding the use of Prepetition Collateral (including Cash Collateral) and proceed to protect, enforce and exercise all other rights and remedies provided under the Prepetition Loan Documents or applicable law.

37. *Insurance.* To the extent that the Prepetition BrandCo Agent, the Prepetition LIFO ABL Agent or the Prepetition SISO ABL Agent is listed as loss payee under the Borrower's or any DIP Guarantors' insurance policies, the applicable DIP Agent (on behalf of

the applicable Required DIP Lenders) are also deemed to be the loss payee under the insurance policies and shall act in that capacity and distribute any proceeds recovered or received in respect of the insurance policies, to the indefeasible payment in full of the applicable DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) and termination of the DIP Commitments, and to the payment of the applicable Prepetition BrandCo Credit Facility Debt and the Prepetition ABL Credit Facility Debt, as applicable, in each case subject to the Prepetition ABL Intercreditor Agreement.

38. *Credit Bidding.* (a) The respective DIP Agents shall have the right to credit bid, in accordance with the DIP Documents, up to the full amount of the applicable DIP Obligations in any sale of the DIP Collateral outside the ordinary course of business and (b) the Prepetition BrandCo Agent and the Prepetition LIFO ABL Agent shall have the right, consistent with the provisions of the Prepetition BrandCo Loan Documents and the Prepetition ABL Loan Documents, including, as applicable, the Prepetition Intercreditor Agreements (and providing for the DIP Obligations to be indefeasibly repaid in full in cash and the termination of the DIP Commitments), to credit bid up to the full amount of the Prepetition BrandCo Credit Facility Debt or the Prepetition ABL Credit Facility Debt in any sale of the Prepetition BrandCo Collateral or the Prepetition Shared Collateral, as applicable, in each case outside the ordinary course of business, without the need for further Court order authorizing the same and whether any such sale is effectuated through section 363(k) 1123 or 1129(b) of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise; *provided* that (a) no Prepetition BrandCo Credit Facility Debt or Term DIP Obligations may be credit bid in any disposition of any Prepetition ABL Priority Collateral unless such sale provides for indefeasible payment in full in cash to the ABL DIP Agent and the ABL DIP Lenders of all ABL DIP

Obligations and (b) no Prepetition ABL Credit Facility Debt or ABL DIP Obligations may be credit bid in any disposition of any Prepetition Term Priority Collateral unless such sale provides for indefeasible payment in full in cash to the Term DIP Agent and the Term DIP Lenders of all Term DIP Obligations and, for the avoidance of doubt, no Prepetition ABL Credit Facility Debt or ABL DIP Obligations may be credit bid in any disposition of any Prepetition BrandCo Collateral.

39. *BrandCo License Agreements.* The Debtors have stipulated that the BrandCo License Agreements are in full force and effect and have not been amended, modified, revoked, or repealed since the Petition Date. The rejection or termination of, or default under, the BrandCo License Agreements shall constitute an Event of Default. Nothing in this Interim Order shall modify the status of the BrandCo License Agreements.

40. *Effectiveness.* This Interim Order shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry hereof. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, or 9014 of the Bankruptcy Rules or any Local Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Interim Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Interim Order.

41. *Governing Order.* Notwithstanding the relief granted in any other order by this Court, (i) all payments and actions by any of the Debtors pursuant to the authority granted therein shall be subject to this Interim Order, including compliance with the Approved Budget and all other terms and conditions hereof, and (ii) to the extent there is any inconsistency

between the terms of such other order and this Interim Order, this Interim Order shall control, in each case, except to the extent expressly provided otherwise in such other order.

42. *Modification of DIP Documents and Approved Budget.* The Debtors are hereby authorized, without further order of this Court, to enter into agreements with the DIP Secured Parties (or the Prepetition BrandCo Secured Parties after the indefeasible payment in full of the DIP Obligations and termination of the DIP Commitments) providing for any consensual non-material amendments, modifications, waivers or supplements to the Approved Budget or the DIP Documents, or of any other amendments, modifications, waivers or supplements to the DIP Documents necessary to conform the terms of the DIP Documents to this Interim Order, in each case consistent with the amendment provisions of the DIP Documents; *provided, however*, that notice of any material amendment, modification, waivers or supplement to the DIP Documents shall be provided to the U.S. Trustee, any statutory committee, the Prepetition 2016 Term Loan Agent, the Ad Hoc Group of Prepetition 2016 Term Loan Lenders and any other DIP Agent which shall have five (5) days from the date of such notice within which to object, in writing, to the amendment, modification, waivers or supplement. If the U.S. Trustee, any statutory committee, the Prepetition 2016 Term Loan Agent, the Ad Hoc Group of Prepetition 2016 Term Loan Lender or any other DIP Agent timely objects to any such material amendment, modification, waivers or supplement to the DIP Documents, the material amendment, modification, waivers or supplement shall only be permitted pursuant to an order of the Court. The foregoing shall be without prejudice to the Debtors' right to seek approval from the Court of a material amendment, modification, waivers or supplement on an expedited basis.

43. *Headings.* Section headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Interim Order.

44. *Payments Held in Trust.* Except as expressly permitted in this Interim Order or the DIP Documents, and subject to the Carve-Out and except with respect to the DIP Loan Parties, in the event that any person or entity receives any payment on account of a security interest in DIP Collateral, receives any DIP Collateral or any proceeds of DIP Collateral or receives any other payment with respect thereto from any other source prior to indefeasible payment in full in cash of all DIP Obligations and termination of all DIP Commitments, such person or entity shall be deemed to have received, and shall hold, any such payment or proceeds of DIP Collateral in trust for the benefit of the DIP Agents and the DIP Secured Parties and shall immediately turn over the proceeds to the DIP Agents, or as otherwise instructed by this Court, for application in accordance with the DIP Documents and this Interim Order.

45. *Bankruptcy Rules.* The requirements of Bankruptcy Rules 4001, 6003 and 6004, in each case to the extent applicable, are satisfied by the contents of the DIP Motion.

46. *No Third Party Rights.* Except as explicitly provided for herein, this Interim Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect or incidental beneficiary.

47. *Necessary Action.* The Debtors, the DIP Secured Parties and the Prepetition Secured Parties are authorized to take all actions as are necessary or appropriate to implement the terms of this Interim Order. In addition, the Automatic Stay is modified to permit affiliates of the Debtors who are not debtors in these Chapter 11 cases to take all actions as are necessary or appropriate to implement the terms of this Interim Order.

48. *Retention of Jurisdiction.* The Court shall retain jurisdiction to enforce the provisions of this Interim Order, and this retention of jurisdiction shall survive the confirmation and consummation of any chapter 11 plan for any one or more of the Debtors notwithstanding

the terms or provisions of any such chapter 11 plan or any order confirming any such chapter 11 plan.

49. *Final Hearing.* A final hearing to consider the relief requested in the Motion shall be held on July 22, 2022 at 10:00 a.m. (Prevailing Eastern Time) and any objections or responses to the Motion shall be filed on or prior to July 15, 2022 at 4:00 p.m. (Prevailing Eastern Time). At that time, the Court shall consider any and all objections to the entry of a Final Order and shall consider any proposed changes to the relief granted in this Interim Order; *provided, however,* any such changes shall not affect the validity, priority or enforceability of any advances previously made by any DIP Secured Party, or any liens, claims, or rights authorized, granted, or conferred upon the DIP Secured Parties to the extent of any advances made during the interim period covered by this Interim Order.

50. *Objections.* Any party in interest objecting to the relief sought at the Final Hearing shall file and serve (via mail and e-mail) written objections, which objections shall be served upon (a) the U.S. Trustee; (b) entities listed as holding the 50 largest unsecured claims against the Debtors (on a consolidated basis); (c) the Debtors, RCPC (Attn.: Andrew Kidd and Seth Fier (Andrew.Kidd@revlon.com and Seth.Fier@revlon.com)); (d) counsel to the Debtors, Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019 (Attn.: Paul Basta (pbasta@paulweiss.com), Alice Eaton (aeaton@paulweiss.com) and Brian Bolin (bbolin@paulweiss.com)); (e) counsel to the Term DIP Agent and Prepetition BrandCo Agent, (Attn: Paul Hastings LLP, 200 Park Avenue, New York, NY 10136 (Attn: Andrew V. Tenzer (andrewtenzer@paulhastings.com), Scott C. Shelley (scottshelley@paulhastings.com), and Will C. Farmer (willfarmer@paulhastings.com)); (f) counsel to the ABL DIP Agent, Proskauer Rose LLP, Eleven Times Square, New York, NY

10036 (Attn: Charles A. Dale (cdale@proskauer.com), Vincent Indelicato (vindelicato@proskauer.com), and Megan R. Volin (mvolin@proskauer.com)); (g) counsel to the SISO ABL DIP Lenders, Morgan, Lewis & Bockius LLP, 101 Park Avenue, New York, NY 10178, (Attn: Julia Frost-Davies (Julia.frost-davies@morganlewis.com), Sandra J. Vrejan (sandra.vrejan@morganlewis.com), Christopher L. Carter (christopher.carter@morganlewis.com) and T. Charlie Liu (charlie.liu@morganlewis.com)); (h) counsel to the Ad Hoc Group of BrandCo Lenders, Davis Polk & Wardwell LLP, 450 Lexington Avenue, New York, New York 10017 (Attn.: Eli J. Vonnegut (eli.vonnegut@davispolk.com), Joshua Sturm (joshua.sturm@davispolk.com) and Stephanie Massman (stephanie.massman@davispolk.com)); (i) counsel to the Prepetition 2016 Term Loan Agent, Latham & Watkins LLP, 1271 Avenue of the Americas, New York, NY 10020 (Attn: Keith A. Simon (keith.simon@lw.com) and Andrew C. Ambruso (Andrew.Ambruso@lw.com)); (j) the counsel to the Ad Hoc Group of Prepetition 2016 Term Loan Lenders, Akin Gump Strauss Hauer & Feld LLP, Robert S. Strauss Tower, 2001 K Street, N.W., Washington, DC 20006-1037 (Attn: James Savin (jsavin@akingump.com) and One Bryant Park, Bank of America Tower, New York, NY 10036-6745 (Attn: Michael S. Stamer (mstamer@akingump.com) and Kevin Zuzolo (kzuzolo@akingump.com)); (k) the Office of the United States Attorney for the Southern District of New York; (l) the state attorneys general for states in which the Debtor DIP Loan Parties conduct business; (m) the Internal Revenue Service; (n) the Securities and Exchange Commission; (o) the Environmental Protection Agency and similar state environmental agencies for states in which the Debtor DIP Loan Parties conduct business; and (p) any other party that has filed a request for notices with this Court pursuant to Bankruptcy Rule 2002, with a copy to the Court's chamber, in each case to allow actual receipt by the foregoing no later than July 15, 2022 at 4:00 p.m., prevailing Eastern

Time and otherwise in conformity with the Court's order establishing notice and case management procedures.

51. The Debtors shall promptly serve copies of this Interim Order (which shall constitute adequate notice of the Final Hearing) to the parties having been given notice of the Interim Hearings and to any party that has filed a request for notices with this Court.

Dated: New York, New York
June 17, 2022

s/ David S. Jones
HONORABLE DAVID S. JONES
UNITED STATES BANKRUPTCY JUDGE

Tab 31

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE)
JUSTICE CAVANAGH)

FRIDAY, THE 12th
DAY OF MARCH, 2021



IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF KNOTEL, INC. and KNOTEL CANADA,
INC.

APPLICATION OF KNOTEL CANADA, INC. UNDER SECTION 46 OF
THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985,
c. C-36, AS AMENDED

**SUPPLEMENTAL ORDER
(FOREIGN MAIN PROCEEDING)**

THIS APPLICATION, made by Knotel Canada, Inc. in its capacity as the foreign representative (the "**Foreign Representative**") of Knotel, Inc. and Knotel Canada, Inc. (the "**Canadian Filing Entities**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form enclosed in the Application Record, was heard by judicial videoconference via Zoom at Toronto, Ontario due to the COVID-19 crisis.

ON READING the Notice of Application, the affidavit of John M. Jureller sworn March 8, 2021, filed, the affidavit of John M. Jureller sworn March 11, 2021 (the "**Supplemental Affidavit**"), filed, the affidavit of Ashely Jung sworn March 11, 2021, filed, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Foreign Representative, counsel for Alvarez & Marsal Canada Inc. in its capacity as the proposed information officer; counsel for the other parties as appearing on the counsel slip; no one appearing for any other parties although duly served as appears from the affidavits of service of Kieran May sworn March 9, 10, and 11, 2021, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

INITIAL RECOGNITION ORDER

2. THIS COURT ORDERS that any capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Initial Recognition Order (Foreign Main Proceeding) dated March 12, 2021 (the "**Recognition Order**").

3. THIS COURT ORDERS that the provisions of this Supplemental Order shall be interpreted in a manner complementary and supplementary to the provisions of the Recognition Order, provided that in the event of a conflict between the provisions of this Supplemental Order and the provisions of the Recognition Order, the provisions of the Recognition Order shall govern.

RECOGNITION OF FOREIGN ORDERS

4. THIS COURT ORDERS that the following orders (collectively, the "**Foreign Orders**") of United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") made in the Foreign Proceeding are hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to section 49 of the CCAA:

- (a) *Final Order (i) Authorizing the Debtors to Pay Certain Prepetition Taxes and Fees, (ii) Authorizing Banks and Financial Institutions to Honor and Process Checks and Transfers Related Thereto, and (iii) Granting Related Relief* (Docket I.D.#267), attached as **Schedule "A"** to this Order;
- (b) *Final Order (i) Authorizing Payment of Prepetition Claims of Certain Critical Vendors and (ii) Granting Related Relief* (Docket I.D. #279), attached as **Schedule "B"** to this Order;
- (c) *Final Order (i) Prohibiting Utility Providers From Altering, Refusing or Discontinuing Utility Services, (ii) Approving Proposed Adequate Assurance of Payment to Utility Providers and Authorizing Debtors to Provide Additional Assurance, (iii) Establishing Procedures to Resolve Requests for Additional Assurance and (iv)*

Granting Related Relief (Docket I.D. #280), attached as **Schedule “C”** to this Order;

- (d) *Final Order (i) Authorizing Continued Use of Cash Management System, (ii) Authorizing Use of Prepetition Bank Accounts, Account Control Agreements, and Payment Methods, (iii) Authorizing Use of Existing Business Forms, (iv) Authorizing Continuation of Ordinary Course Intercompany Transactions, (v) Granting Administrative Priority to Postpetition Intercompany Claims, and (vi) Extending Time to Comply With the Requirements of 11 U.S.C. § 345(b)* (Docket I.D. #281), attached as **Schedule “D”** to this Order;
- (e) *Final Order (i) Authorizing the Debtors to Pay Certain Prepetition Wages, Benefits and Other Compensation Obligations, (ii) Authorizing Financial Institutions to Honor All Obligations Related Thereto, and (iii) Granting Related Relief* (Docket I.D. #282), attached as **Schedule “E”** to this Order;
- (f) *Final Order Authorizing Debtors to (A) Continue Insurance Policies and Agreements Relating Thereto, (B) Honor Certain Prepetition Obligations in Respect Thereof, (C) Renew, Revise, Extend, Supplement, Change or Enter Into New Insurance Coverage As Needed In Their Business Judgment and (D) Continue to Honor Insurance Premium Finance Obligations* (Docket I.D. #283), attached as **Schedule “F”** to this Order;
- (g) *Order (I) Authorizing Knotel Canada, Inc. to Act as Foreign Representative and (II) Granting Related Relief* (Docket I.D. #397), attached as **Schedule “G”** to this Order;
- (h) *Interim Order Directing Previously Entered Orders as Supplemented Shall Govern Knotel Canada, Inc. Prospectively* (Docket I.D. #405) (but only with respect to Docket I.D. numbers 253, 267; 279; 280; 281; 282; and 283), attached as **Schedule “H”** to this Order;
- (i) *Order Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 9019 Approving Compromise and Settlement Term Sheet among the Debtors, the Official Committee of Unsecured Creditors, and Digiatech LLC; (ii) Amending Bidding Procedures Order; (iii) Authorizing Amendments to the Stalking Horse*

Agreement; and (iv) Granting Related Relief (Docket I.D. #417), a copy of which is attached hereto as **Schedule “I”**; and

- (j) *Amended Order Approving (i) The Debtors’ Entry Into The Stalking Horse Agreement And Related Expense Reimbursement (ii) The Bidding Procedures In Connection With The Sale Of All Or Substantially All Of The Debtors’ Assets, (iii) The Procedures For The Assumption And Assignment Of Executory Contracts And Unexpired Leases, (iv) The Form And Manner Of Notice Of The Sale Hearing, Assumption Procedures, And Auction Results, (v) Dates For An Auction And Sale Hearing And (vi) Granting Related Relief* (Docket I.D. #418) (the “**Amended Bidding Procedures Order**”), a copy of which is attached hereto as **Schedule “J”**.

provided, however, that in the event of any conflict between the terms of the Foreign Orders and the Orders of this Court made in the within proceedings, the Orders of this Court shall govern with respect to Property (as defined below) in Canada.

4.A THIS COURT ORDERS that the Cure Objection Deadline (as defined in the Supplemental Affidavit) is extended for Canadian creditors of Knotel Inc. and Knotel Canada, Inc. until Wednesday, March 17, 2021 at 5:00 p.m. Any objections must be filed with the U.S. Court in accordance with the procedures described in the Amended Bidding Procedures Order.

APPOINTMENT OF INFORMATION OFFICER

5. THIS COURT ORDERS that Alvarez & Marsal Canada Inc. (the “**Information Officer**”) is hereby appointed as an officer of this Court, with the powers and duties set out herein.

NO PROCEEDINGS AGAINST THE CANADIAN FILING ENTITIES OR THE PROPERTY

6. THIS COURT ORDERS that until such date as this Court may order (the “**Stay Period**”) no proceeding or enforcement process in any court or tribunal in Canada (each, a “**Proceeding**”) shall be commenced or continued against or in respect of the Canadian Filing Entities or affecting their business (the “**Business**”) or their current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the “**Property**”), except with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Canadian Filing Entities or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

7. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Canadian Filing Entities, or affecting the Business or the Property, are hereby stayed and suspended except with leave of this Court, provided that nothing in this Order shall (i) prevent the assertion of or the exercise of rights and remedies outside of Canada, (ii) empower any of the Canadian Filing Entities to carry on any business in Canada which that Canadian Filing Entity is not lawfully entitled to carry on, (iii) affect such investigations or Proceedings by a regulatory body as are permitted by section 11.1 of the CCAA, (iv) prevent the filing of any registration to preserve or perfect a security interest, or (v) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

8. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate, or cease to perform any right, renewal right, contract, agreement, licence, or permit in favour of or held by any of the Canadian Filing Entities and affecting the Business in Canada, except with leave of this Court.

ADDITIONAL PROTECTIONS

9. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Canadian Filing Entities or statutory or regulatory mandates for the supply of goods and/or services in Canada, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, or other services provided in respect of the Property or Business of the Canadian Filing Entities are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, or terminating the supply of such goods or services as may be required by the Canadian Filing Entities, and that the Canadian Filing Entities shall be entitled to the continued use in Canada of their current premises, bank accounts, telephone numbers, facsimile numbers, internet addresses, and domain names.

10. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current, or future directors or officers of the Canadian Filing Entities with respect to any claim against the directors or officers that arose before the date hereof and that relates to any

obligations of the Canadian Filing Entities whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

11. THIS COURT ORDERS that no Proceeding shall be commenced or continued against or in respect of the Information Officer, except with leave of this Court. In addition to the rights and protections afforded the Information Officer herein, or as an officer of this Court, the Information Officer shall have the benefit of all of the rights and protections afforded to a Monitor under the CCAA, and shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

OTHER PROVISIONS RELATING TO INFORMATION OFFICER

12. THIS COURT ORDERS that the Information Officer:

- (a) is hereby authorized to provide such assistance to the Foreign Representative in the performance of its duties as the Foreign Representative may reasonably request;
- (b) shall report to this Court at such times and intervals that the Information Officer considers appropriate with respect to the status of these proceedings and the status of the Foreign Proceedings, which reports may include information relating to the Property, the Business, or such other matters as may be relevant to the proceedings herein;
- (c) shall have full and complete access to the Property, including the premises, books, records, data including data in electronic form, and other financial documents of the Canadian Filing Entities, to the extent that is necessary to perform its duties arising under this Order; and
- (d) shall be at liberty to engage independent legal counsel or such other persons as the Information Officer deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order.

13. THIS COURT ORDERS that the Canadian Filing Entities and the Foreign Representative shall (i) advise the Information Officer of all material steps taken by the Canadian Filing Entities

or the Foreign Representative in these proceedings or in the Foreign Proceedings, (ii) co-operate fully with the Information Officer in the exercise of its powers and discharge of its obligations, and (iii) provide the Information Officer with the assistance that is necessary to enable the Information Officer to adequately carry out its functions.

14. THIS COURT ORDERS that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

15. THIS COURT ORDERS that the Information Officer (i) shall post on its website all Orders of this Court made in these proceedings, all reports of the Information Officer filed herein, and such other materials as this Court may order from time to time, and (ii) may post on its website any other materials that the Information Officer deems appropriate.

16. THIS COURT ORDERS that the Information Officer may provide any creditor of a Canadian Filing Entity with information provided by the Canadian Filing Entities in response to reasonable requests for information made in writing by such creditor addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the Canadian Filing Entities is privileged or confidential, the Information Officer shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Information Officer, the Foreign Representative, and the relevant Canadian Filing Entities may agree.

17. THIS COURT ORDERS that counsel to the Canadian Filing Entities, the Information Officer, and counsel to the Information Officer shall be paid by Knotel Canada, Inc. their reasonable fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. Knotel Canada, Inc. is hereby authorized and directed to pay the accounts of its counsel, the Information Officer, and counsel for the Information Officer on a weekly basis or as otherwise agreed with Knotel Canada Inc.

18. THIS COURT ORDERS that the Information Officer and its legal counsel shall pass their accounts from time to time, and for this purpose, the accounts of counsel to the Canadian Filing Entities, the Information Officer, and its legal counsel are hereby referred to a judge of the

Commercial List of the Ontario Superior Court of Justice, and the accounts of counsel to the Canadian Filing Entities, the Information Officer, and its counsel shall not be subject to approval in the Foreign Proceeding.

19. THIS COURT ORDERS that counsel to the Canadian Filing Entities, the Information Officer and counsel to the Information Officer shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property in Canada, which charge shall not exceed an aggregate amount of CDN\$200,000, as security for their professional fees and disbursements incurred in respect of these proceedings, both before and after the making of this Order. The Administration Charge shall have the priority set out paragraph 21 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

20. THIS COURT ORDERS that the filing, registration, or perfection of the Administration Charge shall not be required, and that the Administration Charge shall be valid and enforceable for all purposes, including as against any right, title, or interest filed, registered, recorded, or perfected subsequent to the Administration Charge coming into existence, notwithstanding any such failure to file, register, record, or perfect the Administration Charge.

21. THIS COURT ORDERS that the Administration Charge shall constitute a charge on the Property in Canada and shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except for any validly perfected purchased money security interest of a secured creditor.

22. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Canadian Filing Entities shall not grant any Encumbrances over any Property in Canada that rank in priority to, or *pari passu* with, the Administration Charge, unless the Canadian Filing Entities also obtain the prior written consent of the Information Officer.

23. THIS COURT ORDERS that the Administration Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Administration Charge (collectively, the "**Chargees**") shall not otherwise be limited or impaired in any way by (i) the pendency of these proceedings and the declarations of insolvency made herein; (ii) any application(s) for bankruptcy order(s) issued pursuant to *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (iii) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (iv) the

provisions of any federal or provincial statutes; or (v) any negative covenants, prohibitions, or other similar provisions with respect to borrowings, incurring debt, or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease, or other agreement (collectively, an "**Agreement**") which binds any Canadian Filing Entity, and notwithstanding any provision to the contrary in any Agreement:

- (a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by a Canadian Filing Entity of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Administration Charge; and
- (c) the payments made by the Canadian Filing Entities to the Chargees pursuant to this Order, and the granting of the Administration Charge, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

24. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the applicable Canadian Filing Entity's interest in such real property leases.

SERVICE AND NOTICE

25. THIS COURT ORDERS that that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial>) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL <www.alvarezandmarsal.com/knotel>.

26. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Canadian Filing Entities, the Foreign Representative, and the Information Officer are at liberty to serve or distribute this Order, any other materials, and orders in these proceedings, any notices, or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, or facsimile transmission to the Canadian Filing Entities' creditors or other interested parties at their respective addresses as last shown on the records of the applicable Canadian Filing Entity and that any such service or distribution by courier, personal delivery, or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

27. THIS COURT ORDERS that the Information Officer may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. THIS COURT ORDERS that nothing in this Order shall prevent the Information Officer from acting as an interim receiver, a receiver, a receiver and manager, a monitor, a proposal trustee, or a trustee in bankruptcy of any Canadian Filing Entity, the Business, or the Property.

29. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Canadian Filing Entities, the Foreign Representative, the Information Officer, and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Canadian Filing Entities, the Foreign Representative, and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Canadian Filing Entities, the Foreign Representative, and the Information Officer and its respective agents in carrying out the terms of this Order.

30. THIS COURT ORDERS that each of the Canadian Filing Entities, the Foreign Representative, and the Information Officer be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

31. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days' notice to the Canadian Filing Entities, the Foreign Representative, the Information Officer and its counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

32. THIS COURT ORDERS that this Order shall be effective as of 12:01 a.m. Eastern Time on the date of this Order.

The Honourable Justice Cavanagh

Schedule "A"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Knotel, Inc., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

(Jointly Administered)

Re: D.I. 7, 53

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN
PREPETITION TAXES AND FEES, (II) AUTHORIZING BANKS AND
FINANCIAL INSTITUTIONS TO HONOR AND PROCESS CHECKS AND
TRANSFERS RELATED THERETO, AND (III) GRANTING RELATED RELIEF**

Upon the motion the (“Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 363(b), 507(a) and 541 of the Bankruptcy Code, Bankruptcy Rules 6003 and 6004 and local rule 9013-1(m): (i) authorizing, but not directing, the Debtors to pay prepetition amounts owing in respect of certain taxes and fees that the Debtors, in their discretion, deem necessary to various federal, state, county and/or city Taxing Authorities; (ii) authorizing all banks and other financial institutions to honor all checks and other fund transfers authorized pursuant to the Motion, whether such checks or other fund transfers are issued or presented prior to or after the Petition Date; and (iii) granting related relief, all as more fully described in the Motion; and the Court having previously entered the Interim

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms not defined herein are used as defined in the Motion.

Order; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by the Motion is in the best interests of the Debtors, their estates, their creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, in the ordinary course of business as such obligations become due, to pay the Taxes and Fees arising prior to the Petition Date, including all of those Taxes and Fees subsequently determined, upon audit or otherwise, to be owed, in an aggregate amount not to exceed \$435,000.00.
3. Banks and other financial institutions are hereby authorized and required to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Final Order whether presented prior to or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Final Order.
4. To the extent the Debtors have not yet sought to remit payment to the Taxing Authorities, the Debtors are authorized to issue checks or provide for other means of payment to the Taxing Authorities, to the extent necessary to pay the Taxes and Fees.
5. Nothing in the Motion or in this Final Order is intended or should be construed as: (i) an admission as to the validity or priority of any claim against the Debtors; (ii) a waiver of the Debtors' rights to dispute any claim, including the validity or priority thereof; or (iii)

an approval or assumption of any agreement, contract or lease whether under section 365(a) of the Bankruptcy Code or otherwise. Likewise, any payment made pursuant to this Final Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

6. Notwithstanding entry of this Final Order, nothing herein shall create, nor is intended to create, any rights in favor of or enhance the status of any claim held by, any party.

7. The Debtors are authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Final Order.

8. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon entry hereof.

9. This Court shall retain jurisdiction to hear and determine all matters related to the interpretation or implementation of this Final Order.

Dated: February 24th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Schedule "B"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Knotel, Inc., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

Re: D.I. 11, 54

**FINAL ORDER (I) AUTHORIZING PAYMENT OF PREPETITION CLAIMS OF
CERTAIN CRITICAL VENDORS AND (II) GRANTING RELATED RELIEF**

Upon the motion the (“Motion”)² of the above-captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 363(b), 507(a), 1107(a) and 1108 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004, and Local Rule 9013-1(m): (i) authorizing, but not directing, the Debtors to make payments toward the prepetition fixed, liquidated and undisputed claims of Critical Vendors; and (ii) granting related relief; all as more fully described in the Motion; and the Court having previously entered the Interim Order; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by this Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms not defined herein are used as defined in the Motion.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, in consultation with Digiatech, LLC, the United States Trustee, and the Official Committee of Unsecured Creditors (the "Committee"), to make payments toward prepetition Critical Vendor Claims as described in the Motion in amounts not to exceed \$1,800,000.00 in the aggregate.
3. The Debtors are further authorized, but not directed, to undertake appropriate efforts to enter into Trade Agreements with the Critical Vendors if the Debtors determine, in their discretion, that such an agreement is necessary to their postpetition operations, including, without limitation on the following terms:
 - (a) The amount of such Critical Vendor's estimated claim, after accounting for any setoffs, other credits and discounts thereto, shall be as mutually determined in good faith by the Critical Vendor and the Debtors (but such amount shall be used only for purposes of the Order and shall not be deemed a claim allowed by the Court, and the rights of all parties in interest to object to such claim shall be fully reserved);
 - (b) The amount of payment toward the Critical Vendor's estimated claim;
 - (c) The Critical Vendor's agreement to be bound by the Customary Trade Terms, or such other trade terms as mutually agreed to by the Debtors and such Critical Vendor;
 - (d) The Critical Vendor's agreement to provide goods and services to the Debtors based upon Customary Trade Terms or such other trade terms mutually agreed to by the Debtors and the Critical Vendor, and the Debtors' agreement to pay the Critical Vendor postpetition in accordance with such terms;
 - (e) The Critical Vendor's agreement not to file or otherwise assert against the Debtors, their estates or their respective assets or property (real or personal) any lien (a "Lien") (regardless of the statute or other legal authority upon which such Lien is asserted) related in any way to any remaining prepetition amounts allegedly owed to the Critical Vendor by the Debtors arising from goods or

services provided to the Debtors prior to the Petition Date, and that, to the extent that the Critical Vendor has previously obtained such a Lien, the Critical Vendor shall immediately take all necessary action to release such Lien;

- (f) The Critical Vendor's acknowledgement that it has reviewed the terms and provisions of the Order and consents to be bound thereby;
- (g) The Critical Vendor's agreement that it will not separately assert or otherwise seek payment of any reclamation or Bankruptcy Code section 503(b)(9) claim; and
- (h) If a Critical Vendor who has received payment toward a Critical Vendor Claim subsequently refuses to supply goods or services to the Debtors on Customary Trade Terms, then subject to further Court order: (i) any payments received by the Critical Vendor on account of its Critical Vendor Claim will be deemed to have been in payment of then outstanding postpetition obligations owed to such Critical Vendor; and (ii) such Critical Vendor shall immediately repay to the Debtors any payments received on account of its Critical Vendor Claim to the extent that the aggregate amount of such payments exceed the postpetition obligations then outstanding, without the right of setoff or reclamation.

4. Notwithstanding the foregoing, the Debtors may, in their sole discretion, reinstate a Trade Agreement if the underlying default under the Trade Agreement is fully cured by the Critical Vendor not later than five (5) business days following the Debtors' notification to the Critical Vendor of such default; or the Debtors, in their discretion, reach a favorable alternative agreement with the Critical Vendor.

5. For the avoidance of doubt and notwithstanding the foregoing, the Debtors may, in their sole discretion, negotiate and agree on Customary Trade Terms with Critical Vendors absent a Trade Agreement. The Debtors shall provide the Committee with notice of any such agreement with a Critical Vendor that involves a payment by the Debtors of an amount more than \$20,000.00 to the Critical Vendor on account of the Critical Vendor's prepetition claim(s), and the Committee shall have three days to object.

6. The Debtors shall provide the Committee with weekly reporting of the actual amounts paid to Critical Vendors and copies of each Trade Agreement entered into by the Debtors.

7. The Debtors are not authorized to pay professional service providers (including attorneys, accountants, crisis managers, financial advisors and investment banks) pursuant to this Final Order. Further, the Debtors are not authorized to pay Digiatech, LLC, Newmark Knight Frank or any of their affiliates pursuant to this Final Order.

8. The Debtors' banks shall be and hereby are authorized and directed to receive, process, honor and pay all prepetition and postpetition checks and fund transfers on account of the Critical Vendor Claims that had not been honored and paid as of the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. The Debtors shall be and hereby are authorized to issue new postpetition checks or effect new postpetition fund transfers on account of the Critical Vendor Claims to replace any prepetition checks or fund transfer requests that may be dishonored or rejected.

9. Nothing herein shall be construed to limit, or in any way affect, the Debtors' ability to dispute any Critical Vendor Claim.

10. The authorization granted hereby to pay Critical Vendor Claims shall not create any obligation on the part of the Debtors or their officers, directors, attorneys or agents to pay the Critical Vendor Claims, none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay a Critical Vendor Claim, and nothing contained in this Final Order shall be deemed to increase, reclassify, elevate to an administrative expense status or otherwise affect the Critical Vendor Claims to the extent they are not paid.

11. Nothing in the Motion, the Interim Order or in this Final Order is intended

or should be construed as (a) an admission as to the validity or priority of any claim against the Debtors, (b) a waiver of the Debtors' rights to dispute any claim, including the validity or priority thereof, or (c) an approval or assumption of any agreement, contract or lease whether under section 365(a) of the Bankruptcy Code or otherwise. Likewise, any payment made pursuant to this Final Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

12. The Debtors are authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Final Order.

13. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon entry hereof.

14. This Court shall retain jurisdiction to hear and determine all matters related to the interpretation or implementation of this Final Order.

Dated: February 25th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Schedule "C"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Knotel, Inc., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

Re: D.I. 8, 55

**FINAL ORDER (I) PROHIBITING UTILITY PROVIDERS FROM ALTERING,
REFUSING OR DISCONTINUING UTILITY SERVICES, (II) APPROVING
PROPOSED ADEQUATE ASSURANCE OF PAYMENT TO UTILITY
PROVIDERS AND AUTHORIZING DEBTORS TO PROVIDE ADDITIONAL
ASSURANCE, (III) ESTABLISHING PROCEDURES TO RESOLVE REQUESTS
FOR ADDITIONAL ASSURANCE AND (IV) GRANTING RELATED RELIEF**

Upon the motion the (“Motion”)² of the above captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 363 and 366 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004, and Local Rule 9013-1(m): (i) prohibiting Utility Providers from altering, refusing, discontinuing services or discriminating against the Debtors solely on the basis of the commencement of these case or that the Debtors did not pay a debt when due prepetition; (ii) determining that adequate assurance of payment for postpetition utility services has been furnished to the Utility Providers providing services to the Debtors and authorizing the Debtors to provide additional adequate assurance of payment to the Utility Providers; (iii)

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

establishing procedures for resolving requests by any Utility Provider for additional adequate assurance of payment; and (iv) granting related relief, including authorizing certain payments to the third-party administrator that assists the Debtors in managing the Debtors' utility accounts, all as more fully described in the Motion; and the Court having previously entered the Interim Order; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by this Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. Absent (i) further order of the Court or (ii) compliance with the Additional Assurance Procedures set forth in the Motion and this Final Order, the Utility Providers are prohibited from altering, refusing, or discontinuing service on account of the commencement of these chapter 11 cases and/or any unpaid prepetition charges and are deemed to have received adequate assurance of payment in accordance with section 366 of the Bankruptcy Code.
3. Any bonds or security deposits that were in place prior to the Petition Date shall remain in place and shall continue to be held by those Utility Providers holding the same, except upon either (a) written agreement(s) between the Debtors and Utility Providers without further order of the Court or (b) further order(s) of the Court. Absent written agreement(s) between the Debtors and a Utility Provider, the Debtors may not consider any prepetition deposit held by a Utility Provider when determining the amount of Adequate Assurance Deposit to be made on behalf of such Utility Provider.

4. To the extent not previously funded, the Debtors shall fund within three business days of the entry of this Final Order the Adequate Assurance Deposit of \$29,271.00 by depositing such amount in the Utility Deposit Account. The foregoing amount may be adjusted by the Debtors as follows: (i) reducing the amount held in the Utility Deposit Account to account for termination of Utility Services by the Debtors for any given location or account after payment of the Utility Provider's final invoice with respect to such location or account; (ii) modifying the amount held in the Utility Deposit Account on the basis of agreements reached with Utility Providers regarding Additional Assurance Requests, including, to the extent any Utility Provider receives any other value from the Debtors as adequate assurance of payment, reducing the Adequate Assurance Deposit maintained in the Utility Deposit Account on account of such Utility Provider by the amount of such other value; and (iii) adding additional amounts in the event that the Debtors amend the Utility Providers List to add one or more additional Utility Providers.

5. The obligation to maintain the Adequate Assurance Deposit shall terminate upon the earlier of: (i) the closing of a sale of all or substantially all of the Debtors' assets; (ii) the effective date of a chapter 11 plan; or (iii) the date these cases are dismissed or converted to chapter 7 of the Bankruptcy Code.

6. The following Additional Assurance Procedures are hereby approved in their entirety on a final basis:

- (a) Absent compliance with the Additional Assurance Procedures, no Utility Provider may alter, refuse or discontinue service to or otherwise discriminate against the Debtors on account of the commencement of these chapter 11 cases or any unpaid prepetition charges, or request payment of a deposit or receipt of other security in connection with any unpaid prepetition charges.
- (b) In the event that any Utility Provider has been omitted from the Utility Providers List, the Debtors will supplement the Utility

Providers List and promptly serve copies of the Motion and this Final Order on such Utility Provider upon learning of such omission.

- (c) The Debtors will deposit the Adequate Assurance Deposit into the Utility Deposit Account within 20 days of the Petition Date. In the event of a postpetition default and payment, each Utility Provider shall be entitled to the funds in the Utility Deposit Account in the amount set forth for such Utility Provider in the column labeled “Adequate Assurance Deposit” on the Utility Providers List; provided that to the extent any Utility Provider receives any other value from the Debtors as adequate assurance of payment, the Debtors may reduce the Adequate Assurance Deposit maintained in the Utility Deposit Account on account of such Utility Provider by the amount of such other value absent agreement with the affected Utility Provider to the contrary.
- (d) Any Utility Provider desiring Additional Assurance must either (i) serve a written request (an “Additional Assurance Request”) on: (i) the Debtors, (ii) proposed counsel to the Debtors, Milbank LLP, 2029 Century Park East, 33rd Floor, Los Angeles, CA 90067, Attn: Mark Shinderman (mshinderman@milbank.com) and Daniel Denny (ddenny@milbank.com) and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, P.O. Box 1347, Wilmington, Delaware, 19899-1347, Attn: Robert J. Dehney (rdehney@mnat.com), Matthew B. Harvey (mharvey@mnat.com) and Matthew O. Talmo (mtalmo@mnat.com), and (iii) proposed counsel to the Official Committee of Unsecured Creditors (the “Committee”), Lowenstein Sandler LLP, One Lowenstein Drive, Roseland, New Jersey 07068, Attn: Michael S. Etkin (metkin@lowenstein.com), Bruce Buechler (bbuechler@lowenstein.com), Wojciech F. Jung (wjung@lowenstein.com), Colleen M. Maker (cmaker@lowenstein.com), and Erica G. Mannix (emannix@lowenstein.com) and Potter Anderson & Corroon LLP, 1313 N. Market Street, 6th Floor, Wilmington, Delaware 19801, Attn: Christopher M. Samis (csamis@potteranderson.com), L. Katherine Good (kgood@potteranderson.com), D. Ryan Slaugh (rslaugh@potteranderson.com), Joseph D. Farris, III (jfarris@potteranderson.com) (the “Notice Parties”); or (ii) move to modify the Adequate Assurance Deposit pursuant to 11 U.S.C. § 366(c)(3).
- (e) Any Additional Assurance Request must: (i) be made in writing; (ii) set forth the type of Utility Service(s) provided as well as the Debtors’ location(s) to which such Utility Service(s) is provided and the applicable account number(s); (iii) include a summary of the

Debtors' payment history relevant to each affected account, including any security deposits; and (iv) include a proposal for what the Utility Provider believes would constitute adequate assurance from the Debtors, along with an explanation as to why the Utility Provider believes the Proposed Adequate Assurance is not sufficient adequate assurance of postpetition payment in light of the circumstances.

- (f) Upon the Debtors' receipt of an Additional Assurance Request at the addresses set forth above, the Debtors shall have until (i) the greater of 14 days from receipt of the request or 30 days from the Petition Date or (ii) such other date as the parties mutually agree (the "Resolution Period") to negotiate with such Utility Provider to resolve such Utility Provider's request for additional assurance of payment.
- (g) The Debtors may, in their discretion, resolve any Additional Assurance Request by mutual agreement with the Utility Provider and without further order of the Court, and may, in connection with any such agreement, in their discretion, provide a Utility Provider with Additional Assurance in the form of, but not limited to, cash deposits, prepayments and/or other forms of security, without further order of this Court if the Debtors believe such Additional Assurance is reasonable, provided, however, that the Debtors shall provide the Committee with notice of the resolution of each Additional Assurance Request and the Committee shall have three days to object. To the extent any Utility Provider receives any other value from the Debtors as adequate assurance of payment, the Debtors may reduce the Adequate Assurance Deposit maintained in the Utility Deposit Account on account of such Utility Provider by the amount of such other value absent agreement with the affected Utility Provider.
- (h) If the Debtors determine that an Additional Assurance Request is not reasonable and/or they are not able to reach an alternative resolution with the Utility Provider during the Resolution Period, the Debtors will schedule a hearing (the "Determination Hearing") before this Court on the next scheduled omnibus hearing date to determine the adequacy of assurances of payment with respect to that Utility Provider pursuant to section 366(c)(3) of the Bankruptcy Code.
- (i) During any Resolution Period, and, if applicable, pending the outcome by final order of any Determination Hearing, the relevant Utility Provider shall be restrained from discontinuing, altering or refusing service to the Debtors on account of: (i) unpaid charges for

prepetition services; (ii) a pending Additional Assurance Request; (iii) any objections filed in response to the Proposed Adequate Assurance or to the Additional Assurance Procedures; or (iv) the commencement of these chapter 11 cases.

- (a) Unless and until an order of the Court is entered requiring further assurance of payment, each Utility Provider shall be deemed to have adequate assurance of payment based on the establishment of the Proposed Adequate Assurance.

7. The Debtors are authorized, in their sole discretion, to amend the Utility Providers List to add or delete any Utility Provider, and this Final Order shall apply to any Utility Provider that is subsequently added to the Utility Service List. Any such amended Utility Service List shall be filed with the Court and served with this Final Order.

8. The inclusion of any entity in, or the omission of any entity from, the Utility Providers List shall not be deemed an admission by the Debtors that such entity is or is not a “utility” within the meaning of section 366 of the Bankruptcy Code, and the Debtors’ rights and defenses with respect thereto are reserved and preserved.

9. Nothing in the Motion, the Interim Order or in this Final Order is intended or should be construed as (a) an admission as to the validity or priority of any claim against the Debtors, (b) a waiver of the Debtors’ rights to dispute any claim, including the validity or priority thereof or (c) an approval or assumption of any agreement, contract or lease whether under section 365(a) of the Bankruptcy Code or otherwise. Likewise, any payment made pursuant to this Final Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors’ rights to subsequently dispute such claim.

10. The Debtors are authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Final Order.

11. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon entry hereof.

12. This Court shall retain jurisdiction to hear and determine all matters related to the interpretation or implementation of this Final Order.

Dated: February 25th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Schedule "D"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

KNOTEL, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

Re: D.I. 10, 63

FINAL ORDER (I) AUTHORIZING CONTINUED USE OF CASH MANAGEMENT SYSTEM, (II) AUTHORIZING USE OF PREPETITION BANK ACCOUNTS, ACCOUNT CONTROL AGREEMENTS, AND PAYMENT METHODS, (III) AUTHORIZING USE OF EXISTING BUSINESS FORMS, (IV) AUTHORIZING CONTINUATION OF ORDINARY COURSE INTERCOMPANY TRANSACTIONS, (V) GRANTING ADMINISTRATIVE PRIORITY TO POSTPETITION INTERCOMPANY CLAIMS, AND (VI) EXTENDING TIME TO COMPLY WITH THE REQUIREMENTS OF 11 U.S.C. § 345(b)

Upon the motion (the “Motion”)² of the above captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 345(b) and 363(c)(1) of the Bankruptcy Code, Bankruptcy Rules 2015, 6003 and 6004(h) and Local Rules 2015-2 and 9013-1(m): (i) authorizing the Debtors to continue to utilize their prepetition cash management system, including by authorizing the Debtors’ bank to honor certain transfers and charge certain fees and other amounts; (ii) authorizing use of prepetition bank accounts, account control agreements, and payment methods; (iii) authorizing the Debtors to maintain and continue to use their existing business forms; (iv) authorizing the Debtors to continue ordinary course intercompany

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms not defined herein are used as defined in the Motion.

transactions; (v) granting administrative priority to postpetition intercompany claims; and (vi) extending the Debtors' time to comply with the requirements of section 345(b) of the Bankruptcy Code, all as more fully described in the Motion; and the Court having previously entered the Interim Order; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by this Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized but not directed to continue to use the Cash Management System, including the Bank Accounts included on Exhibit 1, in the ordinary course of business.
3. The Debtors are further authorized but not directed to: (i) continue to use, with the same account numbers, the Bank Accounts in existence on the Petition Date, and need not comply with certain guidelines relating to bank accounts set forth in the U.S. Trustee Operating Guidelines, including, without limitation, the requirement to establish separate accounts for cash collateral and/or tax payments; (ii) treat the Bank Accounts for all purposes as accounts of the Debtors as debtors in possession; (iii) deposit funds in and withdraw funds from the Bank Accounts by all usual means, including, without limitation, by check, wire transfer and other methods; (iv) pay the Bank Fees, including, without limitation, any undisputed Bank Fees regardless of whether such Bank Fees arose before, on or after the Petition Date; and (v) otherwise perform their obligations under the documents governing the Bank Accounts.

4. The Debtors are authorized, but not directed, to honor and pay all undisputed prepetition Service Charges in the ordinary course of business, and the Banks are hereby authorized to debit, charge or deduct, as applicable, such undisputed amounts in the ordinary course of business.

5. The Debtors are authorized to use, in their present form, all Business Forms and other documents related to the Bank Accounts, without reference to their status as debtors in possession, provided, however, that if the Debtors exhaust their existing check stock during the pendency of these chapter 11 cases, the Debtors will order checks with a notation indicating the designation “debtor in possession” and the lead case number of these cases.

6. The Debtors are authorized to open any new Bank Accounts or close any existing Bank Accounts as they may deem necessary and appropriate in their sole discretion; provided, however, that the Debtors give notice within fifteen (15) days to the Office of the United States Trustee for the District of Delaware and any statutory committees appointed in these chapter 11 cases; provided further, however, that the Debtors shall open any such new Bank Accounts at banks that have executed a Uniform Depository Agreement with the Office of the United States Trustee for the District of Delaware, or at such banks that are willing to immediately execute such an agreement.

7. Except as otherwise expressly provided in this Final Order, the Banks are authorized to: (i) continue to maintain, service and administer the Bank Accounts as accounts of the Debtors as debtors in possession and provide related treasury, account and cash management services, all without interruption and in the ordinary course of business; (ii) receive, process, honor and pay, to the extent of available funds, any and all checks, drafts, EFT (including wires or ACH transfers), credit card payments and other items presented, issued or drawn on the Bank Accounts;

provided, however, that any check, draft or other notification that the Debtors advise a Bank to have been drawn, issued or otherwise presented before the Petition Date may be honored by the Banks only to the extent authorized by order of the Court; (iii) accept and honor all representations from the Debtors as to which checks, drafts, EFT (including wires or ACH transfers), credit card payments and other items presented, issued or drawn should be honored or dishonored consistent with any order of the Court and governing law, whether such checks, drafts, EFT (including wires or ACH transfers), credit card payments and other items are dated before or after the Petition Date; and (iv) debit or charge the Bank Accounts for all undisputed Bank Fees, whether arising before, on or after the Petition Date.

8. Subject to the terms of this Final Order, the Banks may rely upon the representations of the Debtors with respect to whether any disbursement should be honored pursuant to any order of this Court, whether or not such disbursements are dated before, on or after the Petition Date, and no Bank that honors a prepetition disbursement that is the subject of this Order at the direction of the Debtors shall or shall be deemed to have any liability to the Debtors or their estates on account of such disbursement being honored postpetition, or otherwise be deemed to be in violation of this Final Order.

9. The Debtors are authorized but not directed to continue performing Intercompany Transactions in the ordinary course of business on a postpetition basis. All Intercompany Claims arising after the Petition Date shall be identified as such and accorded administrative expense priority in accordance with sections 364(b), 503(b) and 507(a)(2) of the Bankruptcy Code. Nothing in this Order shall waive or impair the right of the Official Committee of Unsecured Creditors (the "Committee") to seek to challenge the characterization of any Intercompany Transactions as equity.

10. The Debtors shall provide the Committee with the same reporting they are required to provide Digiatech, LLC and its counsel pursuant to paragraph 7 of the *Interim Order (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Senior Secured Liens and Superpriority Administrative Expense Claims, and (C) Utilize Cash Collateral; (II) Granting Adequate Protection to the Prepetition Secured Lender; (III) Modifying the Automatic Stay; (IV) Scheduling Final hearing; and (V) Granting Related Relief* (D.I. 72).

11. In connection with the ongoing utilization of the Cash Management System, the Debtors shall continue to maintain records with respect to all transfers of cash in the ordinary course so that all transactions (including Intercompany Transactions) may be readily ascertained, traced, recorded properly, and distinguished between prepetition and postpetition transactions and shall make such records available to the U.S. Trustee upon request.

12. The Debtors shall comply with, to the extent applicable, *inter alia*, the requirements of Delaware Local Rule 4001-3, unless otherwise ordered by this Court.

13. Notwithstanding the Debtors' use of a consolidated cash management system, the Debtors shall calculate quarterly fees under 28 U.S.C. § 1930(a)(6) based on the disbursements of each Debtor, regardless of which entity pays those disbursements.

14. As soon as practicable after entry of this Final Order, the Debtors shall serve a copy of this Final Order on the Banks.

15. The Debtors are authorized to take, or cause to be taken, all actions necessary to effectuate the relief granted pursuant to this Final Order in accordance with the Motion.

16. The requirements set forth in Bankruptcy Rule 6003 are satisfied by the contents of the Motion.

17. The requirement of Bankruptcy Rule 6004(a) is waived.

18. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, this Final Order shall be immediately effective and enforceable upon its entry.

19. The Court retains jurisdiction with respect to all matters arising from or related to the interpretation or implementation of this Final Order.

Dated: February 25th, 2021
Wilmington, Delaware


MARY F. WALRATH
6 UNITED STATES BANKRUPTCY JUDGE

Exhibit 1**Debtors' Bank Accounts**

	Account Holder	Bank Name	Last Four Digits of Account #	Account Type/Purpose
1.	Knotel, Inc.	Bridge Bank, a division of Western Alliance Bank	0738	Operating Account
2.	Knotel, Inc.	JPMorgan Chase	8695	Operating Account
3.	Knotel Geometry LLC	JPMorgan Chase	6876	Operating Account
4.	42 Floors LLC	City National Bank	6451	Operating Account
5.	Knotel, Inc.	JPMorgan Chase	1620	Dormant Account
6.	Kkoin, LLC	JPMorgan Chase	2559	Dormant Account
7.	Knotel, Inc.	HSBC	5655	Dormant Account
8.	Knotel, Inc.	JPMorgan Chase	3778	Segregated Account
9.	Knotel, Inc.	Bridge Bank, a division of Western Alliance Bank	7269	Segregated Account
10.	Knotel, Inc.	Bridge Bank, a division of Western Alliance Bank	6390	Segregated / Savings Account
11.	Knotel, Inc.	JPMorgan Chase	7525	Segregated Customer Funds Account
12.	Knotel, Inc.	Wells Fargo	9100	Segregated Account

Schedule "E"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

KNOTEL, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Joint Administration Requested

Re: Docket No. 19, 52

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO PAY CERTAIN
PREPETITION WAGES, BENEFITS AND OTHER COMPENSATION
OBLIGATIONS, (II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR ALL
OBLIGATIONS RELATED THERETO, AND (III) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)² of the above captioned debtors and debtors in possession (collectively, the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 363, 507 and 541 of the Bankruptcy Code, Bankruptcy Rules 6003(b) and 6004 and Local Rule 9013-1(m): (i) authorizing the Debtors to pay and honor certain prepetition wages, benefits and other compensation obligations; (ii) authorizing and directing banks and financial institutions to receive, process, honor and pay checks presented for payment and electronic payment requests relating to prepetition employee wages and benefits; and (iii) granting related relief, all as more fully described in the Motion; and the Court having previously entered the Interim Order; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and it appearing that the relief requested by this Motion

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms not defined herein are used as defined in the Motion.

is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, in a reasonable exercise of their business judgment, to: (i) pay or otherwise honor the Employee Obligations, including the Uncashed Independent Contractor Paychecks, Expense reimbursements, Severance Benefits, and Unpaid Wages; (ii) honor and continue the Employee Programs that were in effect as of the Petition Date in the ordinary course of business; and (iii) make all Withholding Obligation payments relating to the Employee Obligations as required by law; provided, however, that the aggregate of cash payments of prepetition Employee Obligations made to, or on behalf of, an individual Employee shall not exceed \$13,650 per Employee as provided in section 507(a)(4) - (5) of the Bankruptcy Code; and provided, further, that payments on account of Severance Benefits to any insider (as such term is defined in section 101(31) of the Bankruptcy Code) shall not exceed the maximum provided by section 503(c)(2) of the Bankruptcy Code. For the avoidance of doubt, this authority is inclusive of any prepetition amounts that may become payable under this Final Order to third-party service providers that administer, insure or otherwise facilitate the Employee Obligations.
3. The Debtors shall not make payments to Employees in connection with any Bonus Programs absent further order of the Court.
4. The Debtors are authorized, but not directed, to pay Severance Benefits to non-insiders and insiders (as such term is defined in section 101(31) of the Bankruptcy Code) in accordance with the Debtors' severance program laid out in the Severance Table in the Motion,

and subject to the restrictions set forth in 11 U.S.C. § 503(c). To the extent that the estates incur an obligation for Severance Benefits in excess of the sums estimated in the Budget (as defined in Docket No. 72) and the amount of total administrative expense claims exceeds the amount of the DIP Loans (as defined in Docket No. 72), the buyer of the Debtors' assets shall assume such excess administrative costs consistent with the Stalking Horse Agreement (as such term is defined in the bid procedures order (Docket No. 227) (the "Bid Procedures Order")) and as confirmed in the Bid Procedures Order.

5. The Debtors are authorized, but not directed, to issue postpetition checks or to effect postpetition fund transfer requests in replacement of any checks or fund transfer requests that are dishonored as a consequence of these chapter 11 cases with respect to prepetition amounts owed to their Employees.

6. All banks and other financial institutions are hereby directed to receive, process, honor, and pay any and all checks presented for payment and electronic transfer requests made by the Debtors related to the payment of the obligations described in the Motion and approved herein, whether such checks were presented or such electronic transfer requests were submitted before, or are presented or submitted after, the Petition Date. All such banks and financial institutions are further directed to rely on the Debtors' designation of any particular check or electronic payment request as approved pursuant to this Final Order.

7. Subject to the requirements of this Final Order, the Debtors are authorized, but not directed, to modify, change and/or discontinue any of the Employee Obligations to implement new Employee Obligations in the ordinary course of business during the pendency of these chapter 11 cases in their discretion without the need for further Court approval. Subject to Paragraph 2 of this Order, nothing in this Final Order authorizes or approves any payments or

transfers subject to section 503(c) of the Bankruptcy Code. Further, nothing in this Final Order shall be deemed to violate or permit a violation of section 503(c) of the Bankruptcy Code.

8. Nothing in the Motion or in this Final Order is intended or should be construed as (a) an admission as to the validity or priority of any claim against the Debtors, (b) a waiver of the Debtors' rights to dispute any claim, including the validity or priority thereof or (c) an approval or assumption of any agreement, contract or lease whether under section 365(a) of the Bankruptcy Code or otherwise. Likewise, any payment made pursuant to this Final Order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

9. The Debtors are authorized and empowered to take such actions as may be necessary and appropriate to implement the terms of this Final Order.

10. The Court finds and determines that the requirements of Bankruptcy Rule 6003 are satisfied and the relief requested herein is necessary to avoid immediate and irreparable harm.

11. Notwithstanding Bankruptcy Rule 6004(h), this Final Order shall be effective and enforceable immediately upon entry hereof.

12. This Court shall retain jurisdiction to hear and determine all matters related to the interpretation or implementation of this Final Order.

Dated: February 25th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Schedule "F"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Knotel, Inc., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

Re: D.I. 9, 62

**FINAL ORDER AUTHORIZING DEBTORS TO (A) CONTINUE
INSURANCE POLICIES AND AGREEMENTS RELATING THERETO,
(B) HONOR CERTAIN PREPETITION OBLIGATIONS IN RESPECT THEREOF,
(C) RENEW, REVISE, EXTEND, SUPPLEMENT, CHANGE OR ENTER INTO NEW
INSURANCE COVERAGE AS NEEDED IN THEIR BUSINESS JUDGMENT AND (D)
CONTINUE TO HONOR INSURANCE PREMIUM FINANCE OBLIGATIONS**

Upon the motion (the “Motion”)² of the above-captioned debtors and debtors in possession (the “Debtors”) for entry of an interim order (the “Interim Order”) and a final order (this “Final Order”) pursuant to sections 105(a), 362(d), 363(b), 363(c), 364 and 1107(a) of the Bankruptcy Code, as supplemented by Bankruptcy Rules 6003 and 6004(h) authorizing the Debtors to (a) continue insurance policies and agreements relating thereto, (b) honor certain prepetition obligations in respect thereof, (c) renew, revise, extend, supplement, change or enter into new insurance coverage or premium financing agreements as needed in their business judgment, and (d) continue to honor insurance premium finance obligations; and upon consideration of the First Day Declaration; and due and sufficient notice of the Motion having been given under the circumstances; and it appearing that no other or further notice need be

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms not defined in this Order are used as defined in the Motion.

provided under the circumstances; and it appearing that the relief requested by this Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on a final basis as set forth herein.
2. The Debtors are authorized, but not directed, to maintain their Insurance Policies and Premium Finance Agreement and to pay the Insurance Obligations and Premium Finance Obligations arising post-petition under or in connection with the Insurance Policies or Premium Finance Agreement as such obligations become due.
3. The Debtors are authorized, but not directed, to enter into new insurance policies or programs and premium financing agreements in the ordinary course of business through the renewal, supplement, revision, extension of the Insurance Policies and Premium Finance Agreement or the purchase of new insurance policies or entry into new premium financing agreements to the extent that the Debtors determine that such action is necessary or appropriate in their business judgment, provided, however, that the Debtors will provide the Official Committee of Unsecured Creditors (the "Committee") with notice prior to their entry into new insurance policies or programs and premium financing agreements and the Committee shall have three days to object.
4. This order shall not create any obligation on the part of the Debtors or their officers, directors, attorneys or agents to pay any of the obligations discussed herein or in the Motion, and none of the foregoing persons shall have any liability on account of any decision by the Debtors not to pay such obligations, and nothing in this order shall be deemed to increase,

reclassify, elevate to an administrative expense status or otherwise affect such obligations to the extent they are not paid.

5. All applicable banks and other financial institutions are hereby authorized and required to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date, provided that sufficient funds are on deposit in the applicable accounts to cover such payments. Such banks and financial institutions are authorized to rely on the representations of the Debtors as to which checks are issued or authorized to be paid pursuant to this Order.

6. To the extent that the Insurance Policies, Premium Finance Agreement, or any related contracts or agreements, including any agreements between the Debtors and any broker or agent, are executory contracts under section 365 of the Bankruptcy Code, neither the relief granted hereby nor any actions or payments made by the Debtors pursuant to this order shall be constitute assumption or rejection of any such contract pursuant to section 365 of the Bankruptcy Code.

7. The automatic stay is hereby modified, pursuant to section 362(d) of the Bankruptcy Code, solely to the extent necessary to (i) permit the Debtors' employees to proceed against Travelers with any Workers' Compensation Claims and (ii) allow Travelers to pay valid Workers' Compensation Claims and related costs.

8. The relief requested in the Motion is necessary to avoid immediate and irreparable harm to the Debtors, and timely entry of this Final Order is not prohibited by Bankruptcy Rule 6003(b).

9. Notwithstanding Bankruptcy Rule 6004(h), this Order shall be effective and enforceable immediately upon entry hereof.

10. The Court shall retain jurisdiction over any matters arising from or related to implementing or interpreting this Order.

Dated: February 25th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Schedule "G"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re Knotel, Inc., <i>et al.</i> , Debtors. ¹	Chapter 11 Case No. 21-10146 (MFW) Jointly Administered
In re Knotel Canada, Inc., Debtor. ²	Chapter 11 Case No. 21-10540 (MFW) Joint Administration Requested

**ORDER (I) AUTHORIZING KNOTEL CANADA, INC., TO ACT AS FOREIGN
REPRESENTATIVE AND (II) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”)³ of Knotel Canada, Inc. (“Knotel Canada”), and Knotel, Inc., and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), for entry of an order (this “Order”) (a) authorizing Knotel Canada to act as foreign representative on behalf of the Debtors’ estates pursuant to section 1505 of the Bankruptcy Code and (b) granting related relief, all as more fully set forth in the Motion;

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003

² The last four digits of Knotel Canada, Inc.’s business number are 0136 and its service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

³ Capitalized terms not defined herein are defined in the Motion.

and adequate notice of the Motion having been given; and it appearing that the relief requested by this Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Knotel Canada is hereby authorized to act as the Foreign Representative on behalf of the Debtors' and their estates, including for itself and Knotel, Inc., in connection with the Canadian Proceeding. As Foreign Representative, Knotel Canada shall be authorized and shall have the power to act in any way permitted by applicable foreign law, including (a) seeking recognition of any of the Debtors' chapter 11 cases in the Canadian Proceeding, (b) requesting that the Canadian Court lend assistance to this Court in protecting the Debtors' property located within the territorial jurisdiction of Canada, (c) seeking any other appropriate relief from the Canadian Court that Knotel Canada deems just and proper in furtherance of the protection of the Debtors' estates and (d) consistent with any orders of the Canadian Court, retaining Canadian professionals on behalf of itself and Knotel, Inc., and paying the costs of the Court-appointed information officer and its counsel, each without further order of this Court.
3. This Court requests the aid and assistance of the Canadian Court to recognize the Debtors' chapter 11 cases as a "foreign main proceeding" and Knotel Canada as a "foreign representative" pursuant to the CCAA, and to recognize and give full force and effect in all provinces and territories of Canada to this Order.
4. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

5. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: March 11th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Schedule "H"

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Knotel, Inc., *et al.*,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

Re: D.I. 383

**INTERIM ORDER DIRECTING PREVIOUSLY ENTERED ORDERS AS
SUPPLEMENTED SHALL GOVERN KNOTEL CANADA, INC., PROSPECTIVELY**

Upon the motion (the “Motion”)² of Knotel Canada, Inc. (“Knotel Canada”) and Knotel, Inc., and its affiliated debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “Debtors”), for entry of an interim order (this “Interim Order”) to have certain orders previously entered by this Court, as supplemented by **Exhibit 1** attached hereto, govern in the chapter 11 case of Knotel Canada prospectively, as more fully described in the Motion; and upon consideration of the First Day Declaration; and adequate notice of the Motion having been given; and it appearing that the relief requested by the Motion is in the best interests of the Debtors, their estates, their creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003

² Capitalized terms not defined herein are defined in the Motion.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED on an interim basis as set forth herein.
2. The orders listed in Exhibit 1 attached hereto (the “Original Orders”), as supplemented therein, are applicable to the chapter 11 case of Knotel Canada to the extent the relief granted in each of the Original Orders is relevant to Knotel Canada’s case.
3. The Original Orders shall be made applicable to Knotel Canada’s chapter 11 cases *nunc pro tunc* to March 8, 2021.
4. With respect to the Original Orders, the terms “Petition Date,” “prepetition,” and “postpetition” shall refer to March 8, 2021, as applicable to Knotel Canada.
5. The Debtors are authorized, but not directed, to file a notice with an amended Exhibit 1 identifying any additional prior orders that they desire to be made applicable to Knotel Canada. Such notice shall be provided to: (i) the Office of the United States Trustee; (ii) counsel to the DIP Lender and Prepetition Lender; (iii) counsel to the Committee; and (iv) all parties requesting notice pursuant to Bankruptcy Rule 2002. Absent any objection within seven (7) calendar days of service of such notice, the newly identified orders shall be deemed effective and applicable to Knotel Canada *nunc pro tunc* to March 8, 2021.
6. The Debtors and the Clerk of the Court are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.
7. Responses or objections to the Motion and entry of a final order with respect to the Motion must: (a) be made in writing; (b) state with particularity the grounds therefor; (c) conform to the Bankruptcy Rules and the Local Rules; and (d) be served upon (i) counsel to the Debtors, Milbank LLP, 2029 Century Park East, 33rd Floor, Los Angeles, California 90067,

Attn: Mark Shinderman (mshinderman@milbank.com) and Daniel B. Denny (ddenny@milbank.com) and Morris, Nichols, Arsht & Tunnell LLP, 1201 N. Market Street, 16th Floor, P.O. Box 1347, Wilmington, Delaware, 19899-1347, Attn: Robert J. Dehney (rdehney@morrisnichols.com), Matthew B. Harvey (mharvey@morrisnichols.com), Matthew O. Talmo (mtalmo@morrisnichols.com), and Eric W. Moats (emoats@morrisnichols.com); (ii) counsel to the Debtors' postpetition agent, Sullivan & Worcester LLP, 1633 Broadway, New York, New York 10019, Attn: Jeffrey Gleit (jgleit@sullivanlaw.com); (iii) counsel to the Official Committee of Unsecured Creditors, Lowenstein Sandler LLP, One Lowenstein Drive, Roseland, New Jersey 07068, Attn: Michael S. Etkin, Esq. (metkin@lowenstein.com); and (iv) the Office of the United States Trustee for the District of Delaware, 844 N. King Street, Wilmington, Delaware 19801, Attn: Joseph J. McMahon, Jr. (joseph.mcmahon@usdoj.gov) (the "Notice Parties").

8. The deadline by which responses or objections to the Motion and the final order must be filed and received by counsel to the Debtors is March 23, 2021, at 4:00 p.m. (prevailing Eastern Time). A final hearing, if required, on the Motion will be held on March 30, 2021, at 11:30 a.m. (prevailing Eastern Time). If no responses or objections are filed to the Motion and entry of this Interim Order on a final basis, the Court may enter a final order without further notice or a hearing.

9. Notwithstanding the possible applicability of Bankruptcy Rules 6004(h), 7062, 9014 or otherwise, this Interim Order shall be immediately effective and enforceable upon its entry.

10. The Court retains jurisdiction with respect to all matters arising from or related to the interpretation or implementation of this Interim Order.

Dated: March 11th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Original Orders
(As Supplemented Herein)

D.I.	Date	Order	Supplement ¹
57	2/3/21	Order Authorizing the Debtors to (I) File (A) a Consolidated List of Creditors and (B) a Consolidated List of Debtors' Top Thirty Creditors, (II) Provide Notices, Including Notices of Commencement of Cases and Section 341 Meeting, and (III) Granting Related Relief	
59	2/3/21	Order Approving Debtors' Application for an Order Appointing Omni Agent Solutions as Claims and Noticing Agent for the Debtors <i>Nunc Pro Tunc</i> to the Petition Date	
227	2/22/21	Order Approving (I) the Debtors' Entry into the Stalking Horse Agreement and Related Expense Reimbursement (II) the Bidding Procedures in Connection with the Sale of All or Substantially All of the Debtors' Assets, (III) the Procedures for the Assumption and Assignment Of Executory Contracts and Unexpired Leases, (IV) the Form and Manner of Notice of the Sale Hearing, Assumption Procedures, and Auction Results, (V) Dates for an Auction and Sale Hearing and (VI) Granting Related Relief	
253	2/24/21	Order Approving Employment and Retention of Milbank LLP as Attorneys for Debtors and Debtors in Possession <i>Nunc Pro Tunc</i> to the Petition Date	
263	2/24/21	Order Authorizing the Retention and Employment of Morris, Nichols, Arsh & Tunnell LLP as Delaware Bankruptcy Co-counsel for the Debtors <i>Nunc Pro Tunc</i> to the Petition Date	
264	2/24/21	Order Authorizing the Debtors to File Under Seal Portions of Their Creditor Matrix and Other Filings Containing Certain Confidential Commercial Information	

¹ Capitalized terms used but not defined are defined in the respective orders.

Order			Supplement ¹
D.I.	Date		
266	2/24/21	Order Authorizing the Retention and Employment of Omni Agent Solutions as Administrative Agent for the Debtors and Debtors in Possession <i>Nunc Pro Tunc</i> to the Petition Date	
267	2/24/21	Final Order (I) Authorizing the Debtors to Pay Certain Prepetition Taxes and Fees, (II) Authorizing Banks and Financial Institutions to Honor and Process Checks and Transfers Related Thereto, and (III) Granting Related Relief	
278	2/25/21	Order (I) Approving Procedures for (A) Interim Compensation and Reimbursement of Expenses of Retained Professionals and (B) Expense Reimbursement for Official Committee Members and (II) Granting Related Relief	
279	2/25/21	Final Order (I) Authorizing Payment of Prepetition Claims of Certain Critical Vendors and (II) Granting Related Relief	
280	2/25/21	Final Order (I) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Utility Services, (II) Approving Proposed Adequate Assurance of Payment to Utility Providers and Authorizing Debtors to Provide Additional Assurance, (III) Establishing Procedures to Resolve Requests for Additional Assurance and (IV) Granting Related Relief	

D.I.	Date	Order	Supplement ¹
281	2/25/21	Final Order (I) Authorizing Continued Use of Cash Management System, (II) Authorizing Use of Prepetition Bank Accounts, Account Control Agreements, and Payment Methods, (III) Authorizing Use of Existing Business Forms, (IV) Authorizing Continuation of Ordinary Course Intercompany Transactions, (V) Granting Administrative Priority to Postpetition Intercompany Claims, and (VI) Extending Time to Comply With the Requirements of 11 U.S.C. § 345(b)	Additional Bank Account Acct. Holder: Knotel Canada, Inc. Bank Name: JPMorgan Chase Last Four Digits of Acct. No: 9154 Acct. Type/Purpose: Operating Acct.
282	2/25/21	Final Order (I) Authorizing the Debtors to Pay Certain Prepetition Wages, Benefits and Other Compensation Obligations, (II) Authorizing Financial Institutions to Honor All Obligations Related Thereto, and (III) Granting Related Relief	
283	2/25/21	Final Order Authorizing Debtors to (A) Continue Insurance Policies and Agreements Relating Thereto, (B) Honor Certain Prepetition Obligations in Respect Thereof, (C) Renew, Revise, Extend, Supplement, Change or Enter Into New Insurance Coverage as Needed in Their Business Judgment and (D) Continue to Honor Insurance Premium Finance Obligations	
299	2/25/21	Order Pursuant to 11 U.S.C. §§ 327(e) and 328(a) of the Bankruptcy Code, Bankruptcy Rule 2014(a), and Local Rule 2014-1 Authorizing Retention and Employment of Fenwick & West, LLP as Corporate Counsel for the Debtors <i>Nunc Pro Tunc</i> to the Petition Date	

Schedule "I"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

KNOTEL, INC., *et al.*,

Debtors.¹

)
) Chapter 11
)
) Case No. 21-10146 (MFW)
)
) (Jointly Administered)
)
)

ORDER PURSUANT TO SECTION 105 OF THE BANKRUPTCY CODE AND
BANKRUPTCY RULE 9019 APPROVING COMPROMISE AND SETTLEMENT TERM
SHEET AMONG THE DEBTORS, THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS, AND DIGIATECH, LLC; (II) AMENDING BIDDING PROCEDURES
ORDER; (III) AUTHORIZING AMENDMENTS TO THE STALKING HORSE
AGREEMENT; AND (IV) GRANTING RELATED RELIEF

Upon the joint motion [D.I. 366] (the “*Motion*”)² of the above-captioned debtors and debtors in possession (collectively, the “*Debtors*”) and the stalking horse bidder and DIP lender Digiatech, LLC (“*Digiatech*”), for entry of an order pursuant to section 105 of title 11 of the United States Code (the “*Bankruptcy Code*”) and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”), (I) approving the compromise set forth in the settlement term sheet (the “*Term Sheet*”) by and among: (i) the Debtors; (ii) the Committee; and (iii) Digiatech (collectively, the “*Parties*”) attached hereto as Exhibit 1; (II) in connection therewith, amending the Bidding Procedures Order; (III) authorizing the Debtors and Digiatech to amend the Stalking Horse Agreement in conformity with the proposed settlement, and (IV) granting related relief, all

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion or the Bidding Procedures Order, as applicable.

as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having authority to enter a final order consistent with Article III of the United States Constitution; and having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having reviewed the Motion and any objections thereto; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion is granted.
2. Pursuant to section 105 of the Bankruptcy Code and Bankruptcy Rule 9019, the settlement evinced by the Term Sheet, a copy of which is attached hereto as Exhibit 1, is approved in all respects and incorporated herein as if set forth at length.
3. The Bidding Procedures Order is hereby amended to provide that the Termination Fee in the amount of \$2,100,000 is approved as set forth in the Stalking Horse Agreement.
4. The terms and conditions set forth in the Term Sheet shall be binding for all purposes in these cases as among and between all of the Parties.
5. The Debtors and Digiatech are authorized to enter into such amendments to the Stalking Horse Agreement as necessary to reflect the terms and conditions of the settlement set forth in the Term Sheet with the consent of the Committee, which consent shall not be unreasonably withheld.

6. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

8. The Debtors are authorized to take all reasonable actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

9. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of the Term Sheet, subsequent settlement agreement, and this Order.

Dated: March 11th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Term Sheet

IN RE KNOTEL, INC., *ET AL.*
COMMITTEE SETTLEMENT TERM SHEET

THIS COMMITTEE SETTLEMENT TERM SHEET (THE “**TERM SHEET**”) SUMMARIZES CERTAIN KEY TERMS OF A GLOBAL RESOLUTION WITH RESPECT TO A SETTLEMENT AND COMPROMISE OF ALL CLAIMS AND CAUSES OF ACTION ASSERTED BY AND AMONG THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS (THE “**COMMITTEE**”), DIGIATECH, LLC (“**DIGIATECH**”), NEWMARK PARTNERS, L.P. (“**NEWMARK**”), AND THE DEBTORS, INCLUDING, WITHOUT LIMITATION, A RELEASE AND WAIVER OF THE COMMITTEE’S CHALLENGE RIGHTS (AS DEFINED IN THE BIDDING PROCEDURES ORDER AND FINAL DIP ORDER) THAT THE COMMITTEE HAS OR COULD HAVE ASSERTED IN RESPECT OF THE PREPETITION SECURED DEBT OBLIGATIONS AND DIP OBLIGATIONS AND THE RELATED PREPETITION LIENS OF THE PREPETITION SECURED LENDER AND THE DIP LIENS OF THE DIP LENDER (EACH AS DEFINED IN THE FINAL DIP ORDER), THE DEBTORS’ MOTION TO SELL SUBSTANTIALLY ALL OF ITS ASSETS (THE “**SALE MOTION**”), AND DIGIATECH’S STALKING HORSE AGREEMENT AND CREDIT BID, AND SHALL BE SUBJECT TO THE COMPLETION OF DEFINITIVE DOCUMENTS INCORPORATING THE TERMS SET FORTH HEREIN, INCLUDING ANY NECESSARY AMENDMENTS TO THE STALKING HORSE AGREEMENT.

THIS TERM SHEET SHALL BE BINDING AS TO THE KEY TERMS REFLECTED HEREIN BUT SHALL OTHERWISE BE SUBJECT TO THE EXECUTION OF DEFINITIVE DOCUMENTATION. THIS TERM SHEET DOES NOT CONTAIN ALL OF THE TERMS OF A PROPOSED PLAN OF LIQUIDATION OR AMENDMENT TO THE STALKING HORSE AGREEMENT.

Unless otherwise indicated, capitalized terms used but not defined in this Term Sheet shall have the meanings ascribed to them in the Sale Motion and Bidding Procedures Order, as applicable.

<u>SUMMARY OF KEY TERMS</u>	
Cash for Distribution to Holders of General Unsecured Claims	The sum of \$6.2 million (the “ <u>GUC Fund</u> ”) shall be set aside for distribution to holders of allowed general unsecured claims pursuant to a Plan of Liquidation (the “ <u>Plan</u> ”) at the Committee’s direction; <i>provided</i> that the Committee may elect to reallocate any portion of the GUC Fund to fund costs associated with administering the wind-down of the Debtors’ estates. The GUC Fund shall be funded first from available cash-on-hand in the Debtors’ estates (including the Settlement Proceeds previously received by the Debtors and Digiatech’s cash collateral) and second, to the extent that \$6.2 million does not remain in the Debtors’ estates at Closing, Digiatech will cause Newmark and Newmark agrees to fund the shortfall in accordance with its parent guarantee under Section 10.17 of the Stalking Horse Agreement, which guarantee shall be deemed to apply to the additional economic obligations under this Term Sheet and any definitive documents with respect thereto. To the extent that Digiatech breaches the Stalking Horse Agreement by not Closing as required, the releases set forth herein are void.

Waiver of Avoidance Actions by Digiatech	Section 2.01(r) of the Stalking Horse Agreement shall be amended to provide for the sale of Avoidance Actions to Digiatech, excluding any Avoidance Actions against Insiders. In addition, the Stalking Horse Agreement shall be Amended to provide that Digiatech shall not sell, transfer, assign or convey the Avoidance Actions to any other person or entity and that Digiatech covenants and agrees that it will not pursue or attempt in any manner to collect on the Avoidance Actions, and that these provisions will survive the closing for a period of 6 years and 5 days.
Claims against the Debtors' Directors and Other Estates' Claims Excluded from Sale and Transferred to Liquidating Trust	The Stalking Horse Agreement shall be amended to exclude from the definition of Purchased Assets any claims and causes of action against the Debtors' current and former directors and/or officers (the " <u>D&O Claims</u> ") and other estates' claims (together with the D&O Claims, the " <u>Estates Causes of Action</u> "). The Estates Causes of Action shall be conveyed and transferred to the Liquidating Trust under the Plan. The Plan will provide for a release of the sole independent director. Any D&O Claims against the current CIO, the COO, the CFO, and the GC will be limited to all available insurance proceeds; provided, however that if any of these individuals knowingly, recklessly, or through gross negligence take or took any action or fail or failed to act which jeopardizes insurance coverage and the insurance carrier therefore declines coverage, this limitation will no longer apply. The Plan will not otherwise limit the liability of or release any other current or former director and/or officer of the Debtors. For the avoidance of doubt, all cross claims, counterclaims, defenses and offsets of the potential defendants remain and are not waived. Potential defendants, if any, retain their rights of indemnity and advancement, if any and subject to the Bankruptcy Code. To the extent there is a joint or common interest privilege, that privilege, if any, is not being waived by the transfer of the potential causes of action.
Waiver of Committee Challenge, withdrawal of objections and General Release	All discovery in connection with the Committee's Challenge Rights will cease immediately upon the execution of this Term Sheet. Upon entry of an order by the Bankruptcy Court approving the settlement in this Term Sheet, the Committee agrees to immediately withdraw all outstanding discovery requests and deposition notices. Upon approval of this Term Sheet the Committee agrees to withdraw the Hilco objection [Docket No. 347]. The Committee agrees to waive and release its Challenge Rights as defined under the Bidding Procedures Order [Docket No. 227] and the Final DIP Order [Docket No. 330], as well as any other claims, causes of action, or challenges against Digiatech, Newmark and any of its affiliates, representatives, etc. to the fullest extent permitted by law. The form and substance of such release shall be fully set forth in the definitive documents and shall be reasonably acceptable to the parties to this Term Sheet. Digiatech shall be entitled as the Buyer under the Stalking Horse Agreement to credit bid the full amount of the indebtedness and the obligations owing to it under the Prepetition Credit Agreements and the DIP Credit Agreement pursuant to 363(k) of the Bankruptcy Code and the Stalking Horse Bid shall be deemed a Qualified Bid at the Auction and the Committee agrees to waive all rights with respect thereto. Nothing in this Section shall in any way limit or release the obligations of Digiatech and Newmark under this Term Sheet and any definitive documents with respect thereto, under the Stalking Horse Agreement (as may be amended), the DIP Facility

	and the Final DIP Order.
Waiver of Digiatech/Newmark Claims	Digiatech and Newmark and their respective parents, subsidiaries and affiliates agree to waive and release any and all claims for distributions against the estates, including any deficiency claims they may have, other than claims in connection with any breach of the Stalking Horse Agreement, and the DIP Facility (except as modified by this Term Sheet and any definitive documents with respect thereto).
Wind-Down Matters	The Stalking Horse Agreement shall be amended to increase the wind-down budget from \$100,000 to \$500,000 (the “<u>Wind-Down Amount</u>”) which shall be funded by Digiatech as part of its Purchase Price (as defined in the Stalking Horse Agreement). Newmark agrees to guarantee Digiatech’s obligation to fund the Wind-Down Amount in accordance with its parent guarantee under Section 10.17 of the Stalking Horse Agreement. The Wind-Down Amount shall be used by the Debtors to prepare and obtain confirmation of a combined Disclosure Statement and Plan and the wind-down of the Debtors’ estates pursuant to a Wind-Down Budget, which shall be in form and substance reasonably acceptable to the Committee. The Committee shall select the Liquidating Trustee who shall be charged with the winding down of the Chapter 11 Cases. The Liquidating Trustee shall be responsible for filing the final tax returns and otherwise discharging the responsibilities set forth in the Plan and Liquidating Trust Agreement. This amount is in addition to the assumption of liabilities set forth in section 2.03(f) of the Stalking Horse Agreement and as clarified in the Bid Procedures Order.
Plan of Liquidation	Shortly after the closing of the Sale to Digiatech, but without any cost or expense to Digiatech except as set forth in this Term Sheet, any definitive documents with respect thereto, the Stalking Horse Agreement, as may be amended, the DIP Facility, and the Final DIP Order, the Debtors shall file a combined Plan and Disclosure Statement, which will establish a Liquidating Trust, and proceed with a joint hearing consistent with the terms of this Term Sheet and otherwise subject to consent of the parties, which consent shall not be withheld unreasonably.
Amendments to Stalking Horse Agreement and Bidding Procedures Order	The Stalking Horse Agreement shall be amended as necessary to reflect the terms of this Term Sheet and the Global Settlement, including, without limitation, to provide that the Purchase Price shall be increased to reflect (i) the funding of the \$6.2m GUC Fund, (ii) the increase in the wind-down budget from \$100,000 to \$500,000 (a \$400,000 increase) and (iii) the settlement of the Employment Claim (as defined below) in the amount of \$110,000 (such amounts, collectively, the “ <u>Settlement Amounts</u> ”). In addition, Digiatech and the Debtors shall apply to the Bankruptcy Court to amend the Stalking Horse Agreement and the Bid Procedures Order to (i) reinstate the Termination Fee in the amount of \$2,100,000 as set forth in the Stalking Horse Agreement prior to its deemed amendment in connection with the entry of the Bidding Procedures Order; and (ii) provide that any Overbid (as defined therein) must include the Settlements Amounts, the Expense Reimbursement, and the Termination Fee, as applicable and subject to the approval of the Bankruptcy Court. If the Bankruptcy Court denies the Debtors and Digiatech’s request for the reinstatement of the Termination Fee, the Debtors and Digiatech shall seek approval of an increase of the Expense Reimbursement cap to \$750,000. For the avoidance of doubt, any Overbid by a subsequent successful bidder must assume and include the Settlement Amounts, Expense

	Reimbursement, and, if applicable, the Termination Fee. In view of the concessions made by Digiatech and Newmark in connection with this Term Sheet, the Committee agrees to support such application. The Court's failure to grant such application for any reason will have no impact on this Term Sheet. On or before March 8, 2021, provided that the parties hereto shall have agreed upon a form of amendment to the Stalking Horse Agreement resolving the Offer Employees issues contemplated by this Term Sheet, the Debtors shall seek authority to approve this Term Sheet and the transactions contemplated hereby and the corresponding amendments to the Stalking Horse Agreement and the Bid Procedures Order.
Canadian Insolvency Filings	Digiatech reaffirms its obligation under the Stalking Horse Agreement to pay Taxes (as defined in the Stalking Horse Agreement) of the Debtors which may become due and payable or otherwise arising in connection with the filing or administration of insolvency proceedings of the Debtors' direct Canadian subsidiaries, to the extent that such Taxes constitute Personal Liability Taxes (as defined in the Stalking Horse Agreement).
Employee Issues	Notwithstanding anything set forth in Section 7.17 of the Stalking Horse Agreement to the contrary, Digiatech agrees to provide a list of Offer Employees (as defined in the Stalking Horse Agreement) to the Debtors no later than March 8, 2021 along with written offers of employment to certain officers of the Debtors. Digiatech shall have the right to supplement the list of Offer Employees to add additional employees at any time on or before the closing date. Section 7.17(a) of the Stalking Horse Agreement shall be amended to reflect this change.
Counterparties	Digiatech is authorized to contact all landlords and contract counterparties in connection with negotiating proposed cure amounts and any other potential disputes.
Settlement of Employment Claim	Digiatech authorizes the Debtors to use available cash-on-hand in the Debtors' estates, if any, to pay the settlement of a threatened action by a former employee (the " <u>Employment Claim</u> ") in the amount of \$110k. This obligation will be considered payable under the Stalking Horse Agreement, and as such will be contingent upon Digiatech being the winning bidder and the Closing of the transactions contemplated under the Stalking Horse Agreement and subject to Newmark's parent guarantee under the Stalking Horse Agreement and this Term Sheet and any definitive documents with respect thereto.
Funding	Newmark agrees to provide Digiatech with the necessary funding in accordance with its parent guarantee under Section 10.17 of the Stalking Horse Agreement which shall be deemed to apply to the additional economic obligations under this Term Sheet and any definitive documents with respect thereto in order for Digiatech to fulfill its obligations under this Term Sheet and the Stalking Horse Agreement as of and after the closing date.
Sale Hearing; Request to Reschedule	In the event that no qualified bids are received by noon on March 12, 2021, the Committee will agree to the cancelling of the auction and will support a request by the Debtors and Digiatech to schedule the Sale Hearing as soon after noon on March 12 as practicable.

Closing	The Debtors shall cooperate to close the transaction as soon as possible following the entry of the Sale Order in form and substance satisfactory to Digiatech on a date to be selected by Digiatech. At Closing the fees and expenses set forth and included in the DIP Budget for the DIP Lender and the Prepetition Secured Lender (as adequate protection) shall be paid for the period through and including the Closing Date.
Preservation of Defenses and Set-Off Rights	For the avoidance of doubt, all defenses and set-off rights in connection with Digiatech's or any transferee of Digiatech's assertion of claims being transferred to Digiatech by the Debtors under the Stalking Horse Agreement are expressly preserved.
Access to Debtors' Books and Records	Section 7.06 of the Stalking Horse Agreement will be amended to provide the Committee, access to the Debtors' books and records and appropriate transition services subsequent to the closing of the Stalking Horse Agreement. ¹

Agreed and accepted by:

On behalf of Digiatech, LLC

By: _____

Name: Michael Rispoli

Title: Chief Financial Officer

On behalf of Newmark Partners, L.P.

By: _____

Name: Michael Rispoli

Title: Chief Financial Officer

On behalf of the Official Committee of Unsecured Creditors

By: _____

Name: _____

Title: _____

On behalf of Knotel, Inc. and its applicable affiliates

By: _____

Name: _____

Title: _____

¹ For the avoidance of doubt, section 7.06 of the Stalking Horse Agreement already provides these rights to the Debtors and any subsequently identified estate fiduciaries.

Closing	The Debtors shall cooperate to close the transaction as soon as possible following the entry of the Sale Order in form and substance satisfactory to Digiatech on a date to be selected by Digiatech. At Closing the fees and expenses set forth and included in the DIP Budget for the DIP Lender and the Prepetition Secured Lender (as adequate protection) shall be paid for the period through and including the Closing Date.
Preservation of Defenses and Set-Off Rights	For the avoidance of doubt, all defenses and set-off rights in connection with Digiatech's or any transferee of Digiatech's assertion of claims being transferred to Digiatech by the Debtors under the Stalking Horse Agreement are expressly preserved.
Access to Debtors' Books and Records	Section 7.06 of the Stalking Horse Agreement will be amended to provide the Committee, access to the Debtors' books and records and appropriate transition services subsequent to the closing of the Stalking Horse Agreement. ¹

Agreed and accepted by:

On behalf of Digiatech, LLC

By: _____

Name: _____

Title: _____

On behalf of Newmark Partners, L.P.

By: _____

Name: _____

Title: _____

**On behalf of the Official Committee of
Unsecured Creditors**

By: _____

Name: *Michael Etkin*

Title: *Counsel to the Committee*

**On behalf of Knotel, Inc. and its applicable
affiliates**

By: _____

Name: _____

Title: _____

¹ For the avoidance of doubt, section 7.06 of the Stalking Horse Agreement already provides these rights to the Debtors and any subsequently identified estate fiduciaries.

Closing	The Debtors shall cooperate to close the transaction as soon as possible following the entry of the Sale Order in form and substance satisfactory to Digiatech on a date to be selected by Digiatech. At Closing the fees and expenses set forth and included in the DIP Budget for the DIP Lender and the Prepetition Secured Lender (as adequate protection) shall be paid for the period through and including the Closing Date.
Preservation of Defenses and Set-Off Rights	For the avoidance of doubt, all defenses and set-off rights in connection with Digiatech's or any transferee of Digiatech's assertion of claims being transferred to Digiatech by the Debtors under the Stalking Horse Agreement are expressly preserved.
Access to Debtors' Books and Records	Section 7.06 of the Stalking Horse Agreement will be amended to provide the Committee, access to the Debtors' books and records and appropriate transition services subsequent to the closing of the Stalking Horse Agreement. ¹

Agreed and accepted by:

On behalf of Digiatech, LLC

By: _____
Name: _____
Title: _____

On behalf of Newmark Partners, L.P.

By: _____
Name: _____
Title: _____

On behalf of the Official Committee of Unsecured Creditors

By: _____
Name: _____
Title: _____

On behalf of Knotel, Inc. and its applicable affiliates

By:  _____
Name: Amit Khanna
Title: General Counsel

¹ For the avoidance of doubt, section 7.06 of the Stalking Horse Agreement already provides these rights to the Debtors and any subsequently identified estate fiduciaries.

Schedule "J"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re

KNOTEL, INC., et al.,¹

Debtors.

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

AMENDED ORDER APPROVING (I) THE DEBTORS' ENTRY INTO THE STALKING HORSE AGREEMENT AND RELATED EXPENSE REIMBURSEMENT (II) THE BIDDING PROCEDURES IN CONNECTION WITH THE SALE OF ALL OR SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS, (III) THE PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES, (IV) THE FORM AND MANNER OF NOTICE OF THE SALE HEARING, ASSUMPTION PROCEDURES, AND AUCTION RESULTS, (V) DATES FOR AN AUCTION AND SALE HEARING AND (VI) GRANTING RELATED RELIEF

Upon the motion [Docket No. 16] (the “*Bidding Procedures Motion*”)² of the above-captioned debtors and debtors in possession (collectively, the “*Debtors*”) for entry of an order (the “*Original Bidding Procedures Order*”) [Docket No. 227], (a) authorizing the Debtors to enter into and perform under an asset purchase agreement attached to the Bidding Procedures Motion as Exhibit B (the “*Stalking Horse Agreement*”) between the Debtors and the Stalking Horse Bidder (as defined therein), subject to the solicitation of higher or otherwise better offers for the Debtors’ Assets (as defined therein); (b) approving the bidding procedures attached to the Original Bidding Procedures Order as Exhibit 1 (the “*Original Bidding Procedures*”) in connection with the sale of the Assets, (c) approving procedures for assuming and assigning executory contracts and

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“*PACER*”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion or the Bidding Procedures, as applicable.

unexpired leases, including notice of proposed cure amounts, (d) approving the form and manner of (1) notice of the Auction and Sale Hearing (the “***Sale Notice***”), attached to the Original Bidding Procedures Order as Exhibit 2; (2) notice of the Assumption Procedures (the “***Assumption Notice***”), attached to the Original Bidding Procedures Order as Exhibit 3, and (3) notice of Successful Bidder and Back-Up Bidder (the “***Notice of Successful Bidder***”), attached to the Original Bidding Procedures Order as Exhibit 4, (e) establishing dates and deadlines in connection with the Sale and the approval thereof, including the Bid Deadline, the date of the Auction, if any, and the Sale Hearing, and (f) granting related relief, all as more fully set forth in the Bidding Procedures Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court having authority to enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Bidding Procedures Motion in this district to be proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Bidding Procedures Motion to be in the best interests of the Debtors’ estates, their creditors, and other parties in interest; and this Court having found that the Debtors’ notice of the Bidding Procedures Motion and opportunity for a hearing on the Bidding Procedures Motion were appropriate and that no other notice thereof need be provided; and this Court having reviewed the Bidding Procedures Motion and the filed objections, and having heard the statements in support of the relief requested therein at a hearing before this Court on February 18, 2021 (the “***Bidding Procedures Hearing***”); and this Court having determined that the legal and factual bases set forth in the Bidding Procedures Motion and at the Bidding Procedures Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and based on the agreements set forth on the record at

the Bidding Procedures Hearing; and after due deliberation and sufficient cause appearing therefor, the Court entered the Original Bidding Procedures Order; and upon the *Joint Motion of the Debtors and Digiatech, LLC pursuant to section 105 of the Bankruptcy Code and Bankruptcy Rule 9019 for Entry of an Order (I) Approving Compromise and Settlement Term Sheet among the Debtors, the Official Committee of Unsecured Creditors, Digiatech, LLC, and Newmark Partners, L.P.; (II) Amending Bidding Procedures Order; (III) Authorizing Amendments to the Stalking Horse Agreement; and (IV) Granting Related Relief* [Docket No. 366] (the “**Settlement Motion**”) and, following the hearing before this Court to consider the Settlement Motion on March 11, 2021 at 10:00 a.m. (prevailing Eastern Time) (the “**Settlement Hearing**”), the Court’s Order approving the Settlement Motion (the “**Settlement Order**”), the Court further authorizes the amendment of the Original Bidding Procedures Order by and through the entry of this order (this “**Order**” or the “**Amended Bidding Procedures Order**”), as follows;

THE COURT HEREBY FINDS THAT:

A. Statutory Predicates. The predicates for the relief granted herein are sections 105, 363, 365, 503, and 507 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 9014.

B. Notice of Bidding Procedures Motion. The Debtors’ notice of the Bidding Procedures Motion, the Bidding Procedures Hearing, and the entry of the Original Bidding Procedures Order was sufficient under the circumstances of this case and complied with all applicable requirements of the Bankruptcy Code, the Bankruptcy Rules, and the applicable Local Rules. Accordingly, no other or further notice of the Bidding Procedures Motion or the entry of the Original Bidding Procedures Order is necessary or required.

C. Notice of Settlement Motion. As provided in the Settlement Order, the Debtors’ notice of the Settlement Motion, the Settlement Hearing, and the entry of the Settlement Order was sufficient under the circumstances of this case and complied with all applicable requirements of

the Bankruptcy Code, the Bankruptcy Rules, and the applicable Local Rules. Accordingly, no other or further notice of the amendment of the Original Bidding Procedures Order or the entry of this Amended Bidding Procedures Order is necessary or required.

D. Bidding Procedures and Amended Bidding Procedures. The Debtors have articulated good and sufficient reasons for authorizing and approving the Bidding Procedures, as modified herein pursuant to the Settlement Order (the “***Amended Bidding Procedures***”) attached hereto as Exhibit 1, which were developed in good faith, are fair, reasonable, and appropriate under the circumstances, and are designed to maximize the recovery on, and realizable value of, the Debtors’ assets (including, for the avoidance of doubt, any causes of action belonging to the Debtors, rights under leases or other contracts, and intellectual property rights or other intangible assets) (the “***Assets***”), as determined by the Debtors in an exercise of their business judgment.

E. Sale Notice. The Sale Notice is reasonably calculated to provide all interested parties with timely and proper notice of the proposed Sale, including: (i) the date, time, and place of the Auction (if one is held); (ii) the Original Bidding Procedures and certain dates and deadlines related thereto; (iii) the objection deadline for the Sale and the date, time, and place of the Sale Hearing; (iv) reasonably specific identification of the assets for sale; (v) representations describing the Sale as being free and clear of liens, claims, interests, and other encumbrances; and (vi) notice of the proposed assumption and assignment of the Assigned Contracts to the Successful Bidder and the rights, procedures, and deadlines for objecting thereto, and no other or further notice of the Sale shall be required.

F. Assumption Procedures. The Contract Assumption Notice (as defined herein) is reasonably calculated to provide counterparties to the Assigned Contracts with proper notice of

the intended assumption and assignment of their executory contracts, any Cure Payments (as defined herein), and the Assumption Procedures (as defined herein).

G. Other Findings. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the preceding findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the preceding conclusions of law constitute findings of fact, they are adopted as such.

IT IS HEREBY ORDERED THAT:

1. The Bidding Procedures Motion is granted to the extent set forth in this Order.
2. All objections to the relief requested in the Bidding Procedures Motion that have not been withdrawn, waived, or settled prior to or at the Bidding Procedures Hearing are overruled.

I. Important Dates and Deadlines

3. **Bid Deadline.** March 12, at 10:00 a.m., prevailing Eastern Time, is the deadline by which all Bids must be actually received by the parties specified in the Original Bidding Procedures and/or the Amended Bidding Procedures.

4. **Auction.** March 12, at 2:00 p.m., prevailing Eastern Time, is the date and time the Auction, if one is needed, will be held in accordance with the Original Bidding Procedures and/or the Amended Bidding Procedures by video via Zoom or a similar service. The Debtors shall send written notice of the date, time, and place of the Auction to the Qualified Bidders no later than two hours before such Auction, and will post notice of the date, time, and place of the Auction no later than two business days before such Auction on the website of the Debtors' notice, claims, and solicitation agent at <https://www.omniagentsolutions.com/knotel>. Any interested party seeking to attend the Auction via Zoom meeting room shall contact proposed Debtors' counsel Milbank LLP

at least one day prior to the start of the Auction as set forth in the Original Bidding Procedures and/or the Amended Bidding Procedures.

5. **Sale Objection Deadline.** March 16, 2021, at 12:00 p.m., prevailing Eastern Time (the “***Sale Objection Deadline***”) is the deadline by which objections to the entry of an order by the Court approving the Sale, including to the Stalking Horse Agreement, the *First Amendment to Stalking Horse Agreement* dated as of March 11, 2021 (the “***Amendment to the Stalking Horse Agreement***”), attached hereto as Exhibit 2, the conduct of the Auction and the choice of Successful Bidder and/or Back-Up Bidder, the assumption of any Assigned Contract and adequate assurance of future performance (other than objections to Cure Amounts and the Subsequently Designated Assigned Contracts, as defined in paragraph 25(g) herein) (each a “***Sale Objection***” and collectively, the “***Sale Objections***”) shall be filed. Such objections must (a) be in writing, (b) state, with specificity, the legal and factual bases thereof, and (c) be filed with the Court and served so as to be actually received by: (i) counsel to the Debtors, Milbank LLP, 2029 Century Park East, 33rd Floor, Los Angeles, California 90067, Attn: Mark Shinderman, Esq. (email mshinderman@milbank.com) and Daniel Denny, Esq. (email ddenny@milbank.com); (ii) counsel to the Stalking Horse Bidder, Sullivan & Worcester LLP, 1633 Broadway, New York, New York 10019, Attn: Jeffrey R. Gleit, Esq (email jgleit@sullivanlaw.com); (iii) the Office of the United States Trustee for the District of Delaware, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attn: Joseph McMahon (email Joseph.McMahon@UST.DNJ.GOV); and (iv) counsel to the Official Committee of Unsecured Creditors (the “***Committee***”), Lowenstein Sandler LLP, One Lowenstein Drive, Roseland, New Jersey 07068, Attn: Michael Etkin (email metkin@lowenstein.com), Bruce Buechler (email bbuechler@lowenstein.com), and Wojciech Jung (email wjung@lowenstein.com) (the parties identified in (i) through (iv), collectively, the

“Objection Notice Parties”). Any party or entity who fails to timely make an objection to the Sale on or before the Sale Objection Deadline shall be forever barred from asserting any objection to the Sale, including with respect to the transfer of the assets free and clear of all liens, claims, encumbrances, and other interests.

6. **Reply Deadline.** All replies to any Sale Objection, except for those filed after the Sale Objection Deadline, must be filed by 12 noon (prevailing Eastern Time) on March 17, 2021 (the ***“Reply Deadline”***).

7. **Sale Hearing.** March 18, 2021, at 2:00 p.m. (prevailing Eastern Time) is the date and time for the hearing for the Court to consider the Successful Bid; *provided, however*, that the Sale Hearing may be continued by the Debtors in accordance with the Original Bidding Procedures and/or the Amended Bidding Procedures or by further Order of the Court, from time to time, without further notice to creditors or parties in interest.

8. **Subsequently Designated Assigned Contracts Objection Deadline.** March 24, 2021, at 4:00 p.m., prevailing Eastern Time (the ***“Subsequently Designated Assigned Contracts Objection Deadline”***) is the deadline by which Contract Objections with respect to the Subsequently Designated Assigned Contracts shall be filed. Such objections must (a) be in writing, (b) state, with specificity, the legal and factual bases thereof, and (c) be filed with the Court and served so as to be actually received by the Objection Notice Parties. Any party or entity who fails to timely make an objection with respect to the Subsequently Designated Assigned Contracts on or before the Subsequently Designated Assigned Contracts Deadline shall be forever barred from asserting any objection with respect to the Subsequently Designated Assigned Contracts.

9. **Adequate Assurance.** The Stalking Horse Bidder shall provide information regarding adequate assurance of future performance to counterparties of proposed Assigned Contracts no later than March 10, 2021 (eight (8) days before the scheduled Sale Hearing). Objections to adequate assurance of future performance of the Assigned Contracts by the Successful Bidder must be filed with the Court and served on the Objection Notice Parties no later than the Sale Objection Deadline.

10. **Cigna.** Notwithstanding anything in this Order to the contrary, unless Cigna (as defined in the Objection of Cigna [D.I. 119] (“*Cigna Objection*”)) and the Debtors agree otherwise, the Debtors shall, not later than 4:00 p.m. two (2) business days prior to the Sale Hearing, provide to Cigna, through its counsel of record: (i) written notice of Debtors’ irrevocable (subject to closing of the Sale) decision as to whether it proposes to assume and assign the Cigna Agreements (as defined in the Cigna Objection) to the Successful Bidder as part of the Sale, or reject the Cigna Agreements as of the Closing Date; (ii) the identity of the Successful Bidder; and (iii) adequate assurance information for the Successful Bidder, including a good faith estimate as to the number of employees of the Debtors who will become employees of the Successful Bidder.

II. Stalking Horse and Bid Protections.

11. The Debtors are hereby authorized to select Digiatech, LLC, together with any designated affiliate thereof, as the Stalking Horse Bidder (the “*Stalking Horse Bidder*”).

12. The Debtors are authorized, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, to enter into and perform under the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, subject to the solicitation of higher or otherwise better offers for the Purchased Assets (as defined in the Stalking Horse Agreement) and entry of the Sale Order.

13. The Stalking Horse Agreement and the Amendment to the Stalking Horse Agreement are authorized and approved in the forms attached to the Bidding Procedures Motion as Exhibit B, and to this Order as Exhibit 2, respectively, as the stalking horse bid for the Purchased Assets (the “*Stalking Horse Bid*”), and is binding as between the Debtors and the Stalking Horse Bidder, provided, however, except for the Committee, which has waived and released its Challenge Rights as defined under the Original Bidding Procedures Order and the Final DIP Order (as set forth in Paragraphs 38 and 39 below), any other party in interest’s right to object to the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, is preserved and will be heard in connection with the Sale Hearing if the Stalking Horse is the Successful Bidder and if a timely objection is filed. Notwithstanding the foregoing, if as a result of objections sustained by the Court to the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, said changes would result in a Material Adverse Effect (as defined in the Stalking Horse Agreement), the Stalking Horse Bidder reserves its right to exercise any rights provided thereunder together with all other rights of the Stalking Horse Bidder under the Stalking Horse Agreement, all of which shall be expressly preserved, notwithstanding the entry of this Order.

14. (a) Section 363(k) of the Bankruptcy Code, including the Court’s authority as set forth therein, shall be applicable to the Stalking Horse Bid, (b) the Stalking Horse Bidder shall be deemed a Qualified Bidder, and (c) the Stalking Horse Bid shall be deemed a Qualified Bid for all purposes under this Order and the Amended Bidding Procedures.

15. The Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, shall be binding and enforceable as between the Debtors and the Stalking Horse Bidder in accordance with its terms subject to entry of the Sale Order. The failure to describe

specifically or include any provision of the Stalking Horse Agreement, the Amendment to the Stalking Horse Agreement, or related documents in the Bidding Procedures Motion or herein shall not diminish or impair the effectiveness of such provision as to such parties. The Stalking Horse Agreement, the Amendment to the Stalking Horse Agreement, and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto, solely in accordance with the terms thereof, without further order of the Court.

16. The Termination Fee and Expense Reimbursement (each as defined in the Stalking Horse Agreement, and collectively, the “***Bid Protections***”) are approved in their entirety, with the Expense Reimbursement limited to documented and reasonable expenses relating to the Sale, and subject to review by the Office of the United States Trustee and the Committee. The obligation of the Debtors to pay the Bid Protections shall (i) be subject to the terms of the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, (ii) be the joint and several obligation of the Debtors and payable only upon the closing of a higher or otherwise better bid for the Sale of the Assets, (iii) constitute an administrative expense of the Debtors under section 364(c)(1) of the Bankruptcy Code with priority over any and all administrative expenses of the kind specified in section 503(b) or 507(b) of the Bankruptcy Code, and (iv) survive the termination of the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, or dismissal or conversion of the Chapter 11 Cases.

17. Subject to this Order, the Amended Bidding Procedures and entry of the Sale Order, the Debtors and Stalking Horse Bidder are granted all rights and remedies provided to them under the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, including, without limitation, the right to specifically enforce the Stalking Horse Agreement, as

amended by the Amendment to the Stalking Horse Agreement (including with respect to the Bid Protections) in accordance with its terms.

III. Auction, Amended Bidding Procedures, Sale Notice, and Related Relief.

18. The Amended Bidding Procedures, including the Bid Protections contained therein, substantially in the form attached hereto as Exhibit 1, are incorporated herein and are hereby approved in their entirety, and the Amended Bidding Procedures shall govern the submission, receipt, and analysis of all Bids relating to any proposed Sale. Any party desiring to submit a Bid shall comply with the Amended Bidding Procedures and this Order. The Debtors are authorized to take any and all reasonable actions necessary to implement the Amended Bidding Procedures, subject to the provisions of this Order.

19. For the avoidance of doubt and notwithstanding anything to the contrary contained in this Order, this Order does not approve the sale of the Assets or authorize the consummation of the Sale, such approval and authorization (if any) to be considered only at the Sale Hearing and all rights of all parties in interest to object to such approval and authorization are reserved.

20. Subject to the terms of the Amended Bidding Procedures, in the event of a competing Qualified Bid, the Stalking Horse Bidder will be entitled, but not obligated, to submit overbids and will be entitled in any such overbids to credit bid all of its claims pursuant to section 363(k) of the Bankruptcy Code, including the Court's authority as set forth therein.

21. Except as provided in the Stalking Horse Agreement, no person or entity shall be entitled to any expense reimbursement, break-up fee, topping, termination, or other similar fee or payment in connection with any Sale, and by submitting a bid, such person or entity is deemed to have waived their right to request or file with this Court any request for expense reimbursement or any fee of any nature, whether by virtue of section 503(b) of the Bankruptcy Code or otherwise.

22. Any deposit provided by a Qualified Bidder shall be held in a segregated account by the Debtors or their agent in accordance with the Amended Bidding Procedures, and shall not become property of the Debtors' bankruptcy estates unless and until released to the Debtors pursuant to the terms of the purchase agreement with such Qualified Bidder or order of this Court.

23. The Sale Notice, substantially in the form attached to the Original Bidding Procedures Order as Exhibit 2, is hereby approved. As soon as was reasonably practicable following the entry of the Original Bidding Procedures Order, the Debtors caused the Original Bidding Procedures, the Sale Notice, and the Assumption Notice to be served upon the following parties, and their respective counsel, if known (collectively, the "**Notice Parties**"): (a) counsel to the Committee; (b) the U.S. Trustee for the District of Delaware; (c) the United States Attorney's Office for the District of Delaware; (d) the Internal Revenue Service; (e) the attorneys general for the states in which the Debtors operate; (f) any parties known or reasonably believed to have expressed an interest in the Debtors' assets; (g) all entities known or reasonably believed to have asserted a lien, encumbrance, claim, or other interest in any of the Debtors' assets; (h) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (i) all known creditors of the Debtors. In addition, as soon as was practicable, after entry of the Original Bidding Procedures Order, the Debtors published the Sale Notice, with any modification necessary for ease of publication, once in The New York Times National Edition to provide notice to any other potential interested parties. Moreover, as soon as practicable after entry of this Order, in the event the Debtors receive any Qualified Bids, the Debtors shall provide electronic notice of this Order and the Amended Bidding Procedures to any Qualified Bidder prior to the start of the Auction.

IV. The Assumption and Assignment Procedures.

24. The procedures set forth below regarding the assumption and assignment of the executory contracts and unexpired leases proposed to be assumed by the Debtors pursuant to

section 365(b) of the Bankruptcy Code and assigned to the Successful Bidder pursuant to section 365(f) of the Bankruptcy Code in connection with the Sale (the “**Assumption Procedures**”) are hereby approved to the extent set forth herein.

25. These Assumption Procedures shall govern the assumption and assignment of all of the Debtors’ executory contracts and unexpired leases to be assumed and assigned in connection with the Sale (each, an “**Assigned Contract**,” and, collectively, the “**Assigned Contracts**”), subject to the payment of any payments necessary to cure any defaults arising under any Assigned Contract (the “**Cure Payments**”):

- a. **Contract Assumption Notice.** On or prior to February 22, 2021 (the “**Assumption Notice Deadline**”), the Debtors filed with the Court and served a notice of contract assumption (the “**Assumption Notice**”), in substantially the form attached to the Original Bidding Procedures Order as Exhibit 3, via overnight delivery on all counterparties to all potential Assigned Contracts (each, a “**Counterparty**” and, collectively, the “**Counterparties**”). The Assumption Notice included, without limitation, a list of Assigned Contracts (the “**Assigned Contract List**”) that may be assumed and assigned in connection with the Sale and the Cure Payment, if any, that the Debtors believe is required to be paid to the applicable Counterparty under Bankruptcy Code sections 365(b)(1)(A) and (B) for each of the Assigned Contracts. If no Cure Payment is listed on the Assigned Contracts List for a particular Assigned Contract, the Debtors’ asserted Cure Payment for such Assigned Contract shall be deemed to be \$0.00; *provided, however*, if an Assigned Contract is not listed on the Assigned Contracts List attached to an Assumption Notice, supplemental Assumption Notice or revised Assumption Notice at all, it may not be assumed and assigned via the Bidding Procedures Motion. If a Counterparty objects to the Cure Payment, the Counterparty must file with the Court and serve on the Objection Notice Parties a written objection (a “**Contract Objection**”) on or before the Sale Objection Deadline. Service of an Assumption Notice does not constitute an admission that such contract is an executory contract or unexpired lease or that such stated Cure Payment constitutes a claim against the Debtors or a right against the Successful Bidder (all rights with respect thereto being expressly reserved). Further, the inclusion of a contract or lease on the Assumption Notice is not a guarantee that such contract will ultimately be assumed and assigned. The Debtors were permitted to

amend or modify the Assumption Notice no later than March 8, 2021 (ten (10) days prior to the Sale Hearing), except as provided below with respect to Subsequently Designated Assigned Contracts.

- b. Cure Payments.** The payment of the applicable Cure Payments specified in the Assumption Notice by the Successful Bidder or the Debtors, as applicable, after the expiration of the applicable objection period and the failure of any applicable Counterparty to object to the proposed Cure Payment or to the assumption or assignment of its executory contract or unexpired lease, shall (i) effect a cure of all defaults existing thereunder as of the filing of the Assumption Notice, and (ii) compensate for any actual pecuniary loss to such counterparty resulting from such default.
- c. Cure Objections and Contract Objections.**

 - a. Objections, if any, to any proposed Cure Payments of an Assignment Contract (each, as defined above, a “***Cure Objection***”), must (i) be in writing, (ii) comply with the applicable provisions of the Bankruptcy Rules, and the Local Rules, (iii) state with specificity the nature of the objection and the correct cure amount alleged by the objecting counterparty, together with any applicable and appropriate documentation in support thereof, and (iv) be filed with the Court and served, so as to be actually received by, the Objection Notice Parties, before March 12, 2021 at 5:00 p.m. (prevailing Eastern Time) (the “***Cure Objection Deadline***”), except as otherwise set forth below with respect to Assigned Contracts added to the Assigned Contracts List (or for which a previously stated Cure Payment associated with any Assigned Contract is modified) less than ten (10) days but no later than one (1) day prior to the Sale Hearing (collectively, the “***Subsequently Designated Assigned Contracts***”). If the parties are unable to consensually resolve a Cure Objection timely filed by the Cure Objection Deadline prior to the Sale Hearing, the amount to be paid or reserved shall be the subject of a status conference at the time of the Sale Hearing and, if necessary, determined at a hearing on March 23, 2021, at 2:00 p.m. prevailing Eastern Time or such other date determined by the Court.
 - b. Objections, if any, to the proposed assumption and assignment of a contract or lease other than with respect to any proposed Cure Amount, including objections to adequate assurance of future performance (each a “***Contract Objection***”), must (i) be in writing, (ii) comply with the

applicable provisions of the Bankruptcy Rules, and the Local Rules, (iii) state with specificity the nature of the objection, together with any applicable and appropriate documentation in support thereof, and (iv) be filed with the Court and served, so as to be actually received by, the Objection Notice Parties, before the Sale Objection Deadline, except as otherwise set forth below with respect to Subsequently Designated Assigned Contracts.

- d. **Changes to Assigned Contract List and Cure Payments.** Up until one (1) day prior to the Sale Hearing, the Debtors are authorized but not directed, to (i) add previously omitted Assigned Contracts to the Assigned Contracts List as contracts that may be assumed and assigned to a Successful Bidder in accordance with the definitive agreement for the Sale, or (ii) modify the previously stated Cure Payment associated with any Assigned Contract; *provided however*, objections to the Subsequently Designated Assigned Contracts shall be filed by the Subsequently Designated Assigned Contracts Deadline. Such objections must (a) be in writing, (b) state, with specificity, the legal and factual bases thereof, and (c) be filed with the Court and served so as to be actually received by the Objection Notice Parties. Any party or entity who fails to timely make an objection with respect to the Subsequently Designated Assigned Contracts on or before the Subsequently Designated Assigned Contracts Deadline shall be forever barred from asserting any objection with respect to the Subsequently Designated Assigned Contracts.
- e. **Changes to Assigned Contract List and Cure Payments.** Up until one (1) day prior to Closing of the Sale, the Debtors are authorized, but not directed, to remove an Assigned Contract from the Assigned Contract List that a successful bidder proposes be assumed and assigned in connection with the Sale (excluding the Cigna Agreements).
- f. **Notice of Successful Bidder/Adequate Assurance Objections.** As soon as practicable after the conclusion of the Auction and in no event later than 12 hours after the conclusion of the Auction, the Debtors shall file with the Court and post on the case website, <https://www.omniagentsolutions.com/knotel>, and, if possible, shall email to each non-debtor counterparty to the Assigned Contracts or their counsel, the notice, substantially in the form attached to the Original Bidding Procedures Order as Exhibit 4 thereto (the “**Notice of Successful Bidder**”), identifying any Successful Bidder and Back-Up Bidder, together with a copy of the Successful Bidder’s proposed purchase agreement and financial and other information

regarding adequate assurance of future performance of the Assigned Contracts, and serve the Notice of Successful Bidder on the Counterparties by overnight delivery, and the Counterparties shall file any Contract Objections solely on the basis of adequate assurance of future performance by the Successful Bidder other than any Stalking Horse Bidder (each, an “**Adequate Assurance Objection**”) not later than the Sale Objection Deadline.

- g. Assigned Contracts.** At the Sale Hearing, the Debtors will seek Court approval of the assumption and assignment to the Successful Bidder of the Assigned Contracts; *provided* that, in the event the Successful Bidder is not the Stalking Horse Bidder, objections to adequate assurance of future performance of the Assigned Contracts by such Successful Bidder will be heard at a subsequent hearing, as set forth in paragraph 25(i) below. The inclusion of an Assigned Contract on an Assumption Notice will not (a) obligate the Debtors to assume any Assigned Contract listed thereon nor the Successful Bidder to take assignment of such Assigned Contract or (b) constitute any admission or agreement of the Debtors that such Assigned Contract is an executory contract.
- h. Dispute Resolution.** To the extent that the parties are unable to consensually resolve any Contract Objection prior to the commencement of the Sale Hearing, including, without limitation, any dispute with respect to the cure amount required to be paid to the applicable Counterparty under Bankruptcy Code sections 365(b)(1)(A) and (B) (any such dispute, a “**Cure Dispute**”), such Contract Objection will be adjudicated at the Sale Hearing or at such other date and time as may be fixed by the Court; *provided, however*, (A) Contract Objections to Assigned Contracts added to the Assigned Contract List up until ten (10) days prior to the Sale Hearing shall be heard and resolved at the Sale Hearing; and (B) Contract Objections to the Subsequently Designated Assigned Contracts shall be heard and resolved at a subsequent hearing before the Court at such day and time as may be fixed by the Court.
- i. Back-Up Bidder Adequate Assurance Objections.** In the event that a Successful Bidder does not consummate the Sale and a Back-Up Bidder has been previously identified, the Debtors shall file with the Court and post on the case website, <https://www.omniagentsolutions.com/knotel>, a Notice of Intent to Proceed with Back-Up Bid, together with a copy of the Back-Up Bidder’s proposed purchase agreement and financial and other information regarding adequate assurance of future performance of the Assigned Contracts by the Back-Up Bidder (including the name of the Back-Up Bidder and description of its business), and serve

the Notice of Intent to Proceed with Back-Up Bid on the Counterparties by overnight delivery, and the Counterparties shall have seven (7) days to file and serve on the Objection Notice Parties a Contract Objection solely on the basis of adequate assurance of future performance by the Back-Up Bidder. If any objections are filed, the Debtors shall schedule a hearing, which may be expedited, upon reasonable notice under the circumstances (which shall be no less than ten (10) days after the Notice of Intent to Proceed with Back-Up Bid is filed), with respect to such Contract Objections.

- j. **Contract Assumption or Deemed Rejection at Closing.** No Assigned Contract shall be deemed assumed and assigned pursuant to section 365 of the Bankruptcy Code until the later of (i) the date the Court has entered an order authorizing the assumption and assignment of such Assigned Contracts or (ii) the date the Sale has closed. Any executory contracts and unexpired leases that are not Assigned Contracts will be deemed rejected at Closing.

26. Any party failing to timely file an objection to the Cure Payment or the proposed assumption and assignment of an Assigned Contract listed on the Contract Assumption Notice is deemed to have consented to (a) such Cure Payment, (b) the assumption and assignment of such Assigned Contract, (c) the related relief requested in the Bidding Procedures Motion, and (d) the Sale. Such party shall be forever barred and estopped from objecting to the Cure Payments, the assumption and assignment of the Assigned Contract, adequate assurance of future performance, the relief requested in the Bidding Procedures Motion, whether applicable law excuses such counterparty from accepting performance by, or rendering performance to, the Successful Bidder for purposes of section 365(c)(1) of the Bankruptcy Code, and from asserting any additional cure or other amounts against the Debtors and the Successful Bidder, as applicable, with respect to such party's Assigned Contract.

V. Assumption Notice and Notice of Successful Bidder.

27. The Assumption Notice attached to the Original Bidding Procedures Order as Exhibit 3 and the Notice of Successful Bidder attached to the Original Bidding Procedures Order as Exhibit 4 are hereby approved.

28. To provide the Counterparties with information concerning the Successful Bidder and any back-up bidder who may be assigned their contracts or leases and enable them to object to such assignment on adequate assurance grounds (to the extent the Successful Bidder/Back-up Bidder is not the Stalking Horse Bidder), as soon as practicable after the Auction and in no event less than twelve (12) hours after the Auction, the Debtors shall file with the Court and serve on all Counterparties the Notice of Successful Bidder.

VI. Back-Up Bidder.

29. Following entry of the Sale Order, if the Successful Bidder fails to consummate the Successful Bid, the Debtors may designate the Back-Up Bid, which can be the Stalking Horse Bid, to be the new Successful Bid and the Back-Up Bidder to be the new Successful Bidder, and file a Notice of Intent to Proceed with Back-Up Bid in accordance with paragraph 25 above. Subject to resolution of any adequate assurance objections filed pursuant to paragraph 25 above, which may be heard on reasonable notice under the circumstances (which shall be no less than ten (10) days after the Notice of Intent to Proceed with Back-Up Bid is filed), the Debtors will be authorized, but not required, to consummate the transaction with the Back-Up Bidder without further order of this Court, so long as such Back-Up Bid shall have been approved in connection with the Court's approval of the Successful Bid, or subject to Court approval if not. In such case of a breach or failure to perform on the part of the Successful Bidder and in such other circumstances as may be specified in the definitive documentation governing the Successful Bid, the defaulting Successful Bidder's deposit shall be forfeited to the Debtors. The Debtors' right to seek all available damages,

including specific performance, from any defaulting Successful Bidder (including any Back-Up Bidder designated as a Successful Bidder) in accordance with the terms of the Amended Bidding Procedures are reserved.

30. Notwithstanding anything to the contrary in the Amended Bidding Procedures, the Stalking Horse Bidder, if selected as Back-Up Bidder at the Auction, shall keep its bid in place until the Closing of the Successful Bid.

VII. Access to Debtors' Employees.

31. The Stalking Horse Bidder and any subsequently Qualified Bidder shall have access to the Debtors' employees upon request to the Debtors, with notice to the Committee.

32. The Stalking Horse Bidder or Qualified Bidder may meet with the Debtors' employees in groups only, together with a representative from the Debtors, subject to agreed upon discussion points with the Debtors. The Debtors will consult with the Committee regarding any bidder's proposed meetings with employees in advance of any such meeting(s).

33. For a period of one year from the Auction, the Stalking Horse Bidder agrees, if it is not the Successful Bidder, not to solicit, hire, or retain as a consultant, any current employee of the Debtors' unless such employee has been terminated by the Debtors or the Successful Bidder.

VIII. Committee Consultation Rights.

34. The Debtors shall consult with the Committee prior to authorizing any communication between bidders.

35. The Debtors shall share copies of any bids received with the Committee's professionals immediately following the Bid Deadline.

36. The Committee shall be consulted by the Debtors prior to any changes made to the Amended Bidding Procedures.

37. The Debtors shall consult with the Committee in determining the Successful Bid.

IX. Waiver and Release of Committee's Challenge Rights.

38. The Committee has waived and released its Challenge Rights as defined under the Original Bidding Procedures Order and the Final DIP Order, as well as any other claims, causes of action, or challenges against the Stalking Horse Bidder, Newmark Partners, L.P. ("**Newmark**") and any of their affiliates or representatives to the fullest extent permitted by law. The form and substance of the Committee's release shall be fully set forth in the definitive documents and shall be reasonably acceptable to the parties to the settlement Term Sheet attached to the Settlement Order as Exhibit 1 (the "**Term Sheet**"). Nothing in the release shall in any way limit or release the obligations of the Stalking Horse Bidder and Newmark under the Term Sheet and any definitive documents with respect thereto, the Stalking Horse Agreement (as amended by the Amendment to the Stalking Horse Agreement), the DIP Facility or the Final DIP Order.

39. Upon entry of this Order, (a) the Stalking Horse Bidder shall be automatically entitled to all rights provided under section 363(k) of the Bankruptcy Code in connection with the Stalking Horse Bid and any other credit bid made by the Stalking Horse Bidder, and (b) the Stalking Horse Bidder's Prepetition Liens and Prepetition Secured Debt Obligations shall be deemed valid and enforceable, and the Stalking Horse Bidder shall be entitled to credit bid the full amount of the indebtedness and the obligations owing to it under the Prepetition Credit Agreements and the DIP Credit Agreement pursuant to 363(k) of the Bankruptcy Code. The Stalking Horse Bid shall be deemed a Qualified Bid at the Auction, and the Committee has waived and released all rights with respect thereto.

X. Miscellaneous.

40. Pursuant to the Original Bid Procedures Order, the Committee hereby agrees not to object to or challenge the prepetition payment of \$1,000,000 to Newmark & Company Real Estate, Inc. for real estate advisory services.

41. Notwithstanding any provision of the DIP Credit Agreement to the contrary, the Debtors are hereby authorized to use the approximate \$6 million received from the settlement of a litigation claim shortly before the Petition Date.

42. The Stalking Horse Agreement shall be deemed amended to clarify that section 2.01 will not include deposits in connection with rejected executory contracts and unexpired leases as Purchased Assets.

43. As provided in section 2.03(f) of the Stalking Horse Agreement, the Stalking Horse Bidder is obligated to fund costs of administration of these Chapter 11 Cases until the Closing Date, provided, however, that nothing herein shall obligate the Stalking Horse Bidder to fund costs of administration under the Stalking Horse Agreement in the event that the Stalking Horse Bidder is not the Successful Bidder at the Auction. The obligations of the Stalking Horse Bidder under the Stalking Horse Agreement, as amended by the Amendment to the Stalking Horse Agreement, are independent from any obligations of Digiatech, as DIP Lender, under the DIP Credit Agreement, the Interim DIP Order and any final order approving the transactions contemplated thereunder.

44. The failure to include or reference a particular provision of the Amended Bidding Procedures specifically in this Order shall not diminish or impair the effectiveness or enforceability of such a provision.

45. In the event of any inconsistencies between this Order and the Bidding Procedures Motion, this Order shall govern in all respects. In the event of any inconsistencies between this Order and the Amended Bidding Procedures, this Order shall govern in all respects.

46. Any substantial contribution claims by any Bidder are deemed waived.

47. This Order shall be binding on and inure to the benefit of the Debtors, including any chapter 7 or chapter 11 trustee or other fiduciary appointed for the estates of the Debtors.

48. This Order shall constitute the findings of fact and conclusions of law.

49. To the extent this Order is inconsistent with any prior order or pleading with respect to the Bidding Procedures Motion in these cases, the terms of this Order shall govern.

50. To the extent any of the deadlines set forth in this Order do not comply with the Local Rules, such Local Rules are waived and the terms of this Order shall govern.

51. Notice of the Bidding Procedures Motion as provided therein shall be deemed good and sufficient notice of such Bidding Procedures Motion and the requirements of Bankruptcy Rule 6004(a) and the Local Rules are satisfied by such notice.

52. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

53. The Debtors shall serve this Order in accordance with all applicable rules and shall file a certificate of service evidencing compliance with this requirement.

54. The Debtors are authorized to take all reasonable actions necessary to effectuate the relief granted in this Order in accordance with the Bidding Procedures Motion.

55. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: March 11th, 2021
Wilmington, Delaware


MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1
Amended Bidding Procedures

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

KNOTEL, INC., et al.,

Debtors.¹

Chapter 11

Case No. 21-10146 (MFW)

Jointly Administered

**AMENDED BIDDING PROCEDURES IN CONNECTION
WITH THE SALE OF THE ASSETS OF THE DEBTORS**

On January 31, 2021, the above-captioned debtors and debtors in possession (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

On February 22, 2021, the Bankruptcy Court entered an order [Docket No. 227] (the “Bidding Procedures Order”) approving, among other things, the bidding procedures attached thereto as Exhibit 1 (the “Bidding Procedures”).

On [●], 2021, the Bankruptcy Court entered that certain *Order Pursuant To Section 105 Of The Bankruptcy Code And Bankruptcy Rule 9019 Approving Compromise And Settlement Term Sheet Among The Debtors, The Official Committee Of Unsecured Creditors, And Digiatech, LLC; (II) Amending Bidding Procedures Order; (III) Authorizing Amendments To The Stalking Horse Agreement; And (IV) Granting Related Relief* [Docket No. [●]] (the “Settlement Order”).

In connection with the Settlement Order, and to implement the terms thereof, on [●], 2021, the Bankruptcy Court entered an order [Docket No. [●]] (the “Amended Bidding Procedures Order”) approving, among other things, these bidding procedures (the “Amended Bidding Procedures”).²

As described in the Amended Bidding Procedures Order, the Debtors have entered into an asset purchase agreement dated as of January 31, 2021 (together with the First Amendment to the Stalking Horse Agreement dated as of March 11, 2021, the “Stalking Horse Agreement”) with Digiatech, LLC (or its designee, the “Stalking Horse Bidder”) pursuant to which, among other things, the Stalking Horse Bidder has committed to (a) purchase, acquire, and take assignment and

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://www.omniagentsolutions.com/knotel> or, alternatively, via the Bankruptcy Court at <https://ecf.deb.uscourts.gov/cgi-bin/login.pl> with a Public Access to Court Electronic Records (“PACER”) account, which may be obtained at <https://pacer.uscourts.gov>. The location of Debtor Knotel, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 5-9 Union Square West, New York, NY 10003.

² Capitalized terms used but not defined herein have the meanings ascribed in the Amended Bidding Procedures Order or the Stalking Horse Agreement (as defined below), as applicable.

delivery of, free and clear of all liens, claims, encumbrances, and other interests (except as otherwise provided in the Stalking Horse Agreement), substantially all of the Debtors' assets as set forth in the Stalking Horse Agreement, and (b) assume certain liabilities associated with the Debtors' operations to the extent expressly set forth in the Stalking Horse Agreement (collectively, the "Stalking Horse Bid"), for a purchase price (the "Amended Stalking Horse Purchase Price") consisting of (i) a credit bid, pursuant to section 363(k) of the Bankruptcy Code, in an amount equal to \$70,000,000 subject to adjustments; (ii) \$6.81 million in cash (the "Settlement Amount") and (iii) the assumption of certain liabilities.

The Stalking Horse Agreement and the Amended Bidding Procedures Order provide for (i) a break-up fee in the amount of \$2,100,000 (the "Termination Fee") and (ii) reimbursement of the Stalking Horse Bidder's actual, reasonable, documented out-of-pocket expenses up to an amount not to exceed \$500,000 ("Expense Reimbursement"), and together with the Termination Fee, the "Bid Protections") on the terms and conditions set forth in the Stalking Horse Agreement.

The Bidding Procedures set forth the process by which the Debtors are authorized to solicit the highest or otherwise best bid or bids (each, a "Bid") for the Debtors' assets (including, for the avoidance of doubt, any causes of action belonging to the Debtors, rights under leases or other contracts, and intellectual property rights or other intangible assets, the "Assets"), culminating in an auction (the "Auction") if competing Qualified Bids (as defined herein) are received. The sale is contemplated to be implemented under section 363(b) of the Bankruptcy Code (the "Sale") pursuant to the terms and conditions of either (a) the Stalking Horse Agreement, as the same may be amended pursuant to the terms thereof, or (b) such other applicable asset purchase agreement upon the receipt of a Successful Bid (as defined herein) that the Debtors have determined in their business judgment is the best or highest bid in accordance with these Bidding Procedures.

Copies of the Bidding Procedures Order, the Amended Bidding Procedures Order, or any other documents in the Debtors' chapter 11 cases are available upon request to **Omni Agent Solutions** by calling (866) 771-0565 (Domestic) or (818) 581-2989 (International) or by visiting <https://www.omniagentsolutions.com/knotel>.

A. Potential Bidder.

For purposes of the Bidding Procedures, a "Potential Bidder" shall refer to any person or entity interested in submitting a bid.

B. Due Diligence.

(i) Access to Due Diligence.

Any Potential Bidder that (i) executes a confidentiality agreement on customary terms that are reasonably acceptable to the Debtors (a "Confidentiality Agreement")³, (ii) provides sufficient evidence, as reasonably determined by the Debtors that the Potential Bidder intends to obtain due

³ Potential Bidders may obtain a Confidentiality Agreement by contacting the Debtors' advisors listed below.

diligence and participate in the sale process for a bona fide purpose consistent with these Bidding Procedures and (iii) provides evidence of such Potential Bidder's financial capability to acquire the Assets, the adequacy of which will be assessed by the Debtors (with the assistance of their advisors) (any such Potential Bidder being referred to as an "Acceptable Bidder") will be eligible to receive due diligence materials and access to certain non-public information regarding the Assets. The Debtors will provide each Acceptable Bidder with such information as is reasonably contemplated to enable such Acceptable Bidder to make a Bid for Assets. The Debtors will also provide to each Acceptable Bidder reasonable due diligence information as requested by such Acceptable Bidder in writing, as soon as reasonably practicable after such request. The Debtors will post substantially all written due diligence provided to any Acceptable Bidder to the Debtors' electronic data room (the "Data Room"). The Debtors may restrict or limit access of an Acceptable Bidder to the Data Room if the Debtors determine, based on their reasonable business judgment, that certain information in the Data Room is sensitive, proprietary, or otherwise not appropriate for disclosure to such Acceptable Bidder.

The initial due diligence period will end on the Bid Deadline (as defined herein). Following the Bid Deadline, the Debtors may, in their reasonable discretion, furnish additional non-public information to a Qualified Bidder or Qualified Bidders that submitted a Qualified Bid (each as defined herein), but shall have no obligation to do so.

Each Potential Bidder shall comply with all reasonable requests for additional information and due diligence access requested by the Debtors or their advisors, regarding qualification as an Acceptable Bidder or Qualified Bidder, the terms of the Potential Bidder's Bid, or the ability of the Potential Bidder to acquire the Assets. Failure by a Potential Bidder to comply with such reasonable requests for additional information and due diligence access may be a basis for the Debtors, to determine that such bidder is no longer a Potential Bidder or that any bid made by such Potential Bidder is not a Qualified Bid.

In connection with the provision of due diligence information to Acceptable Bidders, the Debtors will not furnish any confidential information relating to the Debtors, the Assets or liabilities, or the Sale to any person except an Acceptable Bidder or such Acceptable Bidder's duly-authorized representatives, in each case, to the extent provided in the applicable Confidentiality Agreement.

The Debtors and their financial advisors will coordinate all reasonable requests for additional information and due diligence access from Acceptable Bidders; provided that the Debtors may decline to provide such information to Acceptable Bidders who, in the Debtors' reasonable business judgment, have not established that such Acceptable Bidders intend in good faith to, or have the capacity to, consummate their Bid. No conditions relating to the completion of due diligence will be permitted to exist after the Bid Deadline.

The Debtors also reserve the right to withhold any diligence materials from an Acceptable Bidder who the Debtors reasonably determine is a competitor of the Debtors or is affiliated with any competitor of the Debtors. Neither the Debtors nor their representatives will be obligated to furnish information of any kind whatsoever to any person that is not determined to be an Acceptable Bidder. The Debtors will make any diligence information available to the Stalking Horse Bidder if such diligence has been made available to any other Acceptable Bidder.

Each Acceptable Bidder will be deemed to acknowledge and represent that it: (a) either directly or through its advisors has had an opportunity to conduct any and all due diligence regarding the Debtors' Assets and liabilities prior to making any Qualified Bid; (b) has relied solely upon its own or its advisors' independent review, investigation, and/or inspection of any documents and/or the Assets and liabilities in making any Qualified Bid; and (c) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law, or otherwise regarding the Debtors' Assets or liabilities, or the completeness of any information provided in connection therewith, except as expressly stated in these Bidding Procedures or the Acceptable Bidder's proposed purchase agreement (including, in the case of the Stalking Horse Bidder, the Stalking Horse Agreement). Neither the Debtors nor any of their employees, officers, directors, affiliates, subsidiaries, representatives, agents, advisors, or professionals are responsible for, and will bear no liability with respect to, any information obtained by Acceptable Bidders in connection with the Sale.

The Debtors have designated Moelis & Company, 399 Park Avenue, 5th Floor, New York, NY 10022 Attn: Adam Keil (Adam.Keil@moelis.com), Rachel Murray (Rachel.Murray@moelis.com), Larry Kwon (Larry.Kwon@moelis.com), and Kevin Hagedorn (Kevin.Hagedorn@moelis.com) to coordinate all reasonable requests for additional information and due diligence access.

(ii) **No Communications Among Acceptable Bidders.**

There must be no communications regarding the Debtors' sale process between and among Acceptable Bidders (including, for the avoidance of doubt, the Stalking Horse Bidder), unless the Debtors have previously authorized such communication in writing. The Debtors reserve the right, in their reasonable business judgment, to disqualify any Acceptable Bidders that have communications between and amongst themselves.

C. Bid Requirements.

To be eligible to participate in the Auction, a Potential Bidder must deliver to the Debtors and their advisors, a written, irrevocable offer that must be determined by the Debtors, in their reasonable business judgment, to satisfy each of the following conditions (collectively, the "Bid Requirements"):

- (i) **Purpose.** Each Potential Bidder must state that the Bid includes an offer by the Potential Bidder to purchase some or all of the Assets and identify the Assets with reasonable specificity and the particular liabilities, if any, the Potential Bidder seeks to assume.
- (ii) **Purchase Price.** Each Bid must clearly set forth the purchase price to be paid for the Assets (the "Purchase Price") and must (a) indicate the source of cash consideration, including funding commitments, and confirm that such consideration is not subject to any contingencies, and (b) identify separately the cash and non-cash components of the Purchase Price, which non-cash components shall be limited only to credit-bids and assumed liabilities. The Bid should include

a detailed sources and uses schedule. The Purchase Price must include (i) an aggregate amount of cash sufficient to pay all amounts owed to Digiatech, LLC, in its capacity as DIP Lender (the “DIP Facility Claims”) outstanding at the closing (or, if the holder of any such DIP Facility Claims so consents, such payment may be effected, in lieu of cash, by way of credit bid pursuant to section 363(k) of the Bankruptcy Code), (ii) the assumption or payment in cash of all allowed administrative claims, all allowed tax priority claims, all allowed other priority claims, and all allowed other secured claims, and (iii) the payment of all cure amounts and all other amounts required to effect the assumption and assignment of all applicable executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code (any executory contracts and unexpired leases that are not assumed and assigned will be deemed rejected at closing).

- (iii) **Minimum Bid.** The value of each Bid for all or substantially all of the Debtors’ Assets, as determined by the Debtors in their business judgment, must exceed (a) the Amended Stalking Horse Purchase Price (including the Settlement Amount), plus (b) the maximum amount of Bid Protections payable to the Stalking Horse Bidder under the Stalking Horse Agreement in the form of the Termination Fee in the amount of \$2,100,000 and the Expense Reimbursement of up to \$500,000, plus (c) the minimum Bid increment of \$500,000 (or such other amount as the Debtors may determine, which amount may be less than \$500,000, including with respect to a Bid for less than all Assets). The Debtors and their advisors will determine, in their reasonable business judgment, the value of any assumed liabilities that differ from those included in the Stalking Horse Bid.

Each Bid seeking to acquire only the U.S. Assets or only the Foreign Assets must have a value that in the Debtors’ reasonable business judgment, either independently or in conjunction with one or more other Bids, exceeds the value that would be realized for such individual asset or combination of assets pursuant to the Stalking Horse Bid.

- (iv) **Bid Deposit.** Each Bid must be accompanied by a cash deposit (made by wire transfer or certified or cashier’s check) equal to 7.5% of the aggregate value of the cash and non-cash consideration of the Bid (the “Good Faith Deposit”), which will be held in a segregated account established by the Debtors. To the extent a Qualified Bid is modified before, during, or after the Auction in any manner that increases the purchase price contemplated by such Qualified Bid, the Debtors reserve the right to require that such Qualified Bidder increase its Good Faith Deposit so that it equals 10% of the increased Purchase Price.
- (v) **Committed Financing.** If a Bid is not accompanied by evidence of the Potential Bidder’s capacity to consummate the Sale transaction set forth in its Bid with cash on hand, each Bid must include committed financing documented to the Debtors’ satisfaction that demonstrates that the Potential Bidder has received sufficient debt and/or equity funding commitments to satisfy the Potential Bidder’s Purchase Price and other obligations (including any assumed liabilities) under its Bid. Such funding commitments or other financing must not be subject to any internal

approvals, syndication requirements, diligence, or credit committee approvals, and shall have covenants, conditions and term and termination provisions acceptable to the Debtors.

- (vi) **Pro Forma Capital Structure.** Each Bid must include a description of the Bidder's pro forma capital structure.
- (vii) **Good Faith Offer.** Each Bid must constitute a good faith, bona fide offer to purchase the Assets set forth in such Bid.
- (viii) **Marked Agreement.** Each Bid must be accompanied by clean and duly executed transaction documents including, at a minimum, a draft purchase agreement, including the exhibits and schedules related thereto, and any related material documents integral to such Bid pursuant to which the Potential Bidder proposes to effectuate the Sale, along with redlines of such agreements marked to reflect any amendments and modifications from the Stalking Horse Agreement and any other applicable transaction documents relating to the Stalking Horse Bid, which amendments and modifications may not be inconsistent with these Bidding Procedures. Each such draft purchase agreement must provide for payment in cash at closing of the Bid Protections to the Stalking Horse Bidder. The documents contemplated by this Section C (viii) shall herein be referred to as the "**Qualified Bid Documents.**"
- (ix) **Contracts and Leases; Employees.** Each Bid must identify an initial schedule of executory contracts and unexpired leases to be assumed and assigned to the Potential Bidder in connection with the Sale. Each Bid must identify with specificity (i) the party responsible for satisfying cure amounts and other amounts that have accrued under assumed and assigned contracts and leases after the Petition Date and prior to the Closing, including amounts that have accrued but not yet become due prior to the Closing, (ii) the Debtors' leases to be assumed and assigned to the Potential Bidder; and (iii) which of the Debtors' employees or groups thereof will be offered employment with the Potential Bidder to the extent it is the Successful Bidder and the Closing occurs.
- (x) **No Contingencies.** A Bid must contain a clear statement that it is not conditioned on any contingency, including, among others, on obtaining any of the following (a) financing, (b) shareholder, board of directors, or other approvals (including regulatory approvals), and/or (c) the outcome or completion of a due diligence review by the Potential Bidder.
- (xi) **Binding and Irrevocable.** A Potential Bidder's Bid must be irrevocable unless and until the Debtors accept a higher Bid and such Potential Bidder is not selected as the Back-Up Bidder (as defined herein). In the event a Bid is chosen as the Back-Up Bid (as defined below), it must remain irrevocable until the Debtors and the Successful Bidder consummate the Sale.

- (xii) **Joint Bids**. The Debtors will be authorized to approve joint Bids in their reasonable discretion, on a case-by-case basis.
- (xiii) **Adequate Assurance Information**. Each Bid must be accompanied by sufficient and adequate financial and other information (the “Adequate Assurance Information”) to demonstrate, to the reasonable satisfaction of the Debtors, that such Potential Bidder (a) has the financial wherewithal and ability to consummate the acquisition of the Assets covered by the Bid (the “Closing”), and (b) can provide adequate assurance of future performance in satisfaction of the requirements under section 365(f)(2)(B) of the Bankruptcy Code, and the Potential Bidder’s willingness to perform, under any contracts that are proposed to be assumed and assigned to such party (any executory contracts and unexpired leases that are not assumed and assigned will be deemed rejected at closing). Such evidence may also include audited and unaudited financial statements, tax returns, bank account statements, a description of the proposed business to be conducted at the premises and/or any other documentation that the Debtors further request. The Bid must also identify a contact person that parties may contact to obtain additional Adequate Assurance Information.
- (xiv) **Identity**. Each Bid must fully disclose the identity of each entity that will be participating in connection with such Bid (including any equity owners or sponsors, if the purchaser is an entity formed for the purpose of consummating the acquisition of the Assets), and the complete terms of any such participation, along with sufficient evidence that the Potential Bidder is legally empowered, by power of attorney or otherwise, to complete the transactions on the terms contemplated by the parties. A Bid must also fully disclose any connections or agreements with the Debtors, any known, potential, prospective bidder, or Qualified Bidder (as defined herein), or any officer, director, or equity security holder of the Debtors.
- (xv) **Authorization**. Each Bid must contain evidence that the Potential Bidder has obtained authorization or approval from its board of directors and, if required, its shareholders (or a comparable governing body reasonably acceptable to the Debtors) with respect to the submission of its Bid and the consummation of the transactions contemplated in such Bid.
- (xvi) **No Fees**. Except as otherwise provided in the Stalking Horse Agreement with respect to the Stalking Horse Bid: (a) each Potential Bidder presenting a Bid or Bids will bear its own costs and expenses (including legal fees) in connection with the proposed transaction; (b) by submitting its Bid, each Potential Bidder agrees to waive its right to request or receive fees or reimbursement of expenses on any basis, including under section 503(b) of the Bankruptcy Code; and (c) each Bid must expressly state that the Bid does not entitle the Potential Bidder to any break-up fee, termination fee, expense reimbursement, or similar type of payment or reimbursement.
- (xvii) **Adherence to Amended Bidding Procedures**. By submitting its Bid, each Potential Bidder is agreeing to (a) abide by and honor the terms of these Bidding

Procedures and agrees not to submit a Bid or seek to reopen the Auction after conclusion of the Auction and (b) serve as Back-Up Bidder, if its Bid is selected as the next highest or next best bid after the Successful Bid with respect to the applicable assets.

- (xviii) **Regulatory Approvals and Covenants.** A Bid must set forth each regulatory and third-party approval required for the Potential Bidder to consummate the applicable Sale, if any, and the time period within which the Potential Bidder expects to receive such governmental, licensing, regulatory, or third-party approvals (and in the case that receipt of any such approval is expected to take more than thirty days following execution and delivery of the asset purchase agreement, those actions the Potential Bidder will take to ensure receipt of such approvals as promptly as possible).
- (xix) **As-Is, Where-Is.** Each Bid must include a written acknowledgement and representation that the Potential Bidder (a) has had an opportunity to conduct any and all due diligence regarding the Assets and liabilities prior to making its Bid, (b) has relied solely upon its own or its advisors' independent review, investigation, and/or inspection of any documents and/or the Assets and liabilities in making its Bid, and (c) did not rely upon any written or oral statements, representations, promises, warranties, or guaranties whatsoever, whether express, implied, by operation of law, or otherwise, regarding the Assets, liabilities, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Potential Bidder's proposed purchase agreement for the Assets.
- (xx) **Time Frame for Closing.** A Bid by a Potential Bidder must be reasonably likely (based on experience, and other considerations) to be consummated, if selected as the Successful Bid (as defined herein), within a time frame reasonably acceptable to the Debtors.
- (xxi) **Consent to Jurisdiction.** The Potential Bidder must submit to the jurisdiction of the Bankruptcy Court and waive any right to a jury trial in connection with any disputes relating to the Debtors' qualification of Bids, the Auction, the construction and enforcement of these Bidding Procedures, the Sale documents, and the Closing, as applicable.

Bids fulfilling all of the preceding requirements, as determined by the Debtors and their advisors, in their reasonable business judgment, will be deemed to be "Qualified Bids," and those parties submitting Qualified Bids will be deemed to be "Qualified Bidders." The Debtors shall provide the Stalking Horse Bidder with the number of Qualified Bids received and the amount of each respective Qualified Bid. The Debtors reserve the right to work with any Potential Bidder in advance of the Auction to cure any deficiencies in a Bid that is not initially deemed to be a Qualified Bid. In addition, the Debtors reserve the right to waive any of the Qualified Bid requirements set forth above and deem a Bid to be a Qualified Bid notwithstanding any non-compliance with such requirements.

For the avoidance of doubt, the Stalking Horse Bidder will be deemed a Qualified Bidder by the Debtors in accordance with these Bidding Procedures, and the Stalking Horse Bid will be deemed a Qualified Bid, which qualifies the Stalking Horse Bidder to participate in the Auction as a Qualified Bidder. If the Stalking Horse Bid is chosen as the Successful Bid, the rights and obligations of the Stalking Horse Bidder shall be as set forth in the Stalking Horse Agreement (as the same may be modified in connection with the Auction). If the Stalking Horse Bid is selected as the Back-Up Bid, it must remain irrevocable only for so long as is required under the Stalking Horse Agreement.

Promptly after the Bid Deadline, the Debtors and their advisors will determine which Potential Bidders are Qualified Bidders and will notify the Potential Bidders whether Bids submitted constitute, alone or together with other Bids, Qualified Bids so as to enable such Qualified Bidders to bid at the Auction. Any Bid that is not deemed a Qualified Bid will not be considered by the Debtors.

Qualified Bids must be received by each of the Debtors' advisors so as to be actually received no later than March 12, at 10:00 a.m., prevailing Eastern Time (the "Bid Deadline").

D. Evaluation of Qualified Bids.

Prior to the Auction, the Debtors and their advisors will evaluate Qualified Bids and identify the Qualified Bid that is, in the Debtors' reasonable business judgment, the highest or otherwise best Bid (the "Starting Bid"). In determining the Starting Bid, the Debtors will take into account, among other things, (i) the amount and nature of consideration offered in each Qualified Bid, (ii) the impact on customers, vendors, and employees, (iii) the execution risk attendant to any submitted Bids, (iv) the number, type, and nature of any changes to the Stalking Horse Agreement, if any, requested by the Qualified Bidder, including the type and obligations to be assumed in the Qualified Bid; (v) the net economic effect of any changes to the value to be received by the Debtors' estates from the transaction contemplated by the Qualified Bid, (vi) the tax consequences of such Qualified Bid, (vii) the impact on employees, including the number of employees proposed to be transferred and the Employee Obligations; (viii) the assumption of liabilities, including obligations under contracts and leases, and (ix) the cure amounts to be paid (collectively, the "Evaluation Criteria"). Not later than two business days prior to the date of the Auction, the Debtors will (1) notify the Stalking Horse Bidder as to which Qualified Bid is the Starting Bid and (2) distribute copies of the Starting Bid to each Qualified Bidder who has submitted a Qualified Bid.

If any Bid is determined by the Debtors not to be a Qualified Bid, the Debtors will refund such Potential Bidder's Good Faith Deposit and all accumulated interest thereon on or within ten business days after the Bid Deadline, or as soon as reasonably practicable thereafter.

E. No Qualified Bids.

If no Qualified Bids, other than the Stalking Horse Bid, are received by the Bid Deadline, then the Auction will not occur, the Stalking Horse Bidder will be deemed the Successful Bidder, and the Debtors will pursue entry of an order by the Bankruptcy Court approving the Stalking

Horse Agreement and authorizing the Sale to the Stalking Horse Bidder at the Sale Hearing (as defined herein).

F. Credit Bidding and Credit Bid Backup Bid.

At the Auction, any Qualified Bidder who has a valid and perfected lien on any Assets of the Debtors' estates (a "Secured Creditor") shall have the right to credit bid all or a portion of such Secured Creditor's allowed claims pursuant to section 363(k) of the Bankruptcy Code; *provided* that a Secured Creditor shall have the right to credit bid its claim only with respect to the collateral securing such claim; *provided, further* that a credit bid shall not constitute a Qualified Bid if the bid does not include a cash component sufficient to pay in full, in cash, all claims for which there are valid, perfected and unavoidable liens on any Assets included in such Bid that are senior in priority to those of the party seeking to credit bid (unless such senior lien holder consents to alternative treatment); *provided, further*, that any Secured Creditor, other than the Stalking Horse Bidder, that intends to participate in the Auction with a Bid that includes a credit bid shall, as a condition to such participation, (i) notify the Debtors at least five (5) calendar days prior to the Bid Deadline that it intends to submit a credit bid, and (ii) provide all documentation requested by the Debtors to establish the lien, claims, and encumbered assets that will be the subject of the Secured Creditor's potential credit bid. For the avoidance of doubt, a Secured Creditor shall be required to provide cash consideration in respect of any Assets to be acquired but do not constitute collateral securing such Secured Creditor's claim(s).

G. Auction.

If one or more Qualified Bids is received by the Bid Deadline, the Debtors will conduct the Auction with respect to the Debtors' Assets. The Auction will commence on **March 12, 2021, at 2:00 p.m., prevailing Eastern Time**, by video via Zoom or other similar conferencing service, or such later time or other place as the Debtors will timely notify all other Qualified Bidders.

The Auction will be conducted in accordance with the following procedures (the "Auction Procedures"):

- (i) the Auction will be conducted openly;
- (ii) only the Qualified Bidders, including the Stalking Horse Bidder, will be entitled to bid at the Auction;
- (iii) the Qualified Bidders, including the Stalking Horse Bidder, must appear, telephonically, or by video via Zoom, or through duly-authorized representatives at the Auction;
- (iv) any interested party will be permitted to attend the Auction by contacting Debtors' counsel Milbank LLP (Mark Shinderman, Esq. (email mshinderman@milbank.com) and Daniel Denny, Esq. (email ddenny@milbank.com) by email to request access to the Zoom meeting room at least one day prior to the start of the Auction;
- (v) bidding at the Auction will begin at the Starting Bid;

- (vi) subsequent Bids at the Auction, including any Bids by any Stalking Horse Bidder, must be made in minimum increments of \$500,000 (or such other amount as the Debtors may determine, which amount may be higher or lower than \$500,000) of additional value, if applicable;
- (vii) each Qualified Bidder will be informed of the terms of the previous Bids and the Debtors shall, during the course of the Auction, promptly inform each Qualified Bidder of which subsequent Bids reflect, in the Debtors' reasonable business judgment, the highest or otherwise best bid(s) for the Assets;
- (viii) the Auction will be transcribed to ensure an accurate recording of the bidding at the Auction;
- (ix) each Qualified Bidder will be required to confirm on the record of the Auction that it has not engaged in any collusion with respect to the bidding or the Sale;
- (x) the Auction will not close unless and until all Qualified Bidders have been given a reasonable opportunity to submit an overbid at the Auction to the then prevailing highest or otherwise best Bid, subject to the Debtors' right to require last and final Bids to be submitted on a "blind" basis;
- (xi) the Debtors reserve the right, in their reasonable business judgment, to adjourn the Auction one or more times to, among other things, (a) facilitate discussions between the Debtors and Qualified Bidders, (b) allow Qualified Bidders to consider how they wish to proceed, and (c) provide Qualified Bidders the opportunity to provide the Debtors with such additional evidence as the Debtors, in their reasonable business judgment, may require to establish that the Qualified Bidder has sufficient internal resources or has received sufficient non-contingent debt and/or equity funding commitments to consummate the proposed transaction at the prevailing amount; and
- (xii) the Auction will be governed by such other Auction Procedures as may be announced by the Debtors and their advisors, from time to time on the record at the Auction; *provided* that such other Auction Procedures are (a) not inconsistent with the Bidding Procedures Order, the Bankruptcy Code, or any other order of the Bankruptcy Court, (b) disclosed orally or in writing to all Qualified Bidders and other attendees at the Auction and recorded on the record, and (c) determined by the Debtors, in good faith, to further the goal of attaining the highest or otherwise best offer for the Assets.

To remain eligible to participate in the Auction, in each round of bidding, (i) each Qualified Bidder must submit a Bid in such round of bidding that is a higher or otherwise better offer than the immediately preceding highest or otherwise best Bid submitted by a Qualified Bidder in such round of bidding (the "Current High Bid"), which, in the event that the Current High Bid is a credit-bid submitted by the Stalking Horse Bidder, shall be in an amount greater than or equal to the Current High Bid plus the then applicable minimum bid increment, the Termination Fee of \$2,100,000, and the maximum amount of Expense Reimbursement payable to the Stalking Horse

Bidder, and (ii) to the extent a Qualified Bidder fails to submit a Bid in such round of bidding that is a higher or otherwise better offer than the immediately preceding highest or otherwise best Bid submitted by a Qualified Bidder in such round of bidding, as determined by the Debtors, in their reasonable business judgment, such Qualified Bidder shall be disqualified from continuing to participate in the Auction.

For the avoidance of doubt, nothing in the Auction Procedures will prevent the Debtors from exercising their respective fiduciary duties under applicable law (as reasonably determined in good faith by the Debtors in consultation with their outside legal counsel).

H. Acceptance of the Successful Bid or Successful Bids.

Upon the conclusion of the Auction (if such Auction is conducted), the Debtors, in the exercise of their reasonable business judgment, will identify the highest or otherwise best Qualified Bid for the Assets (the “Successful Bid,” and the person or entity submitting a Successful Bid, the “Successful Bidder”), which will be determined by considering, among other things, (a) the total expected consideration to be received by the Debtors, (b) the Qualified Bidder’s ability to close a transaction and the timing thereof (including any anticipated delays to Closing and the cost to the Debtors of such delays), and other matters affecting the execution risk associated with a particular Bid, (c) the expected net benefit to the estates, (d) the impact on customers, vendors, and employees, (e) the certainty of the Debtors being able to confirm a plan, and (f) any other criteria, including the Evaluation Criteria, as may be considered by the Debtors in their reasonable business judgment. The Successful Bidder or Successful Bidders and the Debtors shall, as soon as commercially reasonably practicable after the conclusion of the Auction, complete and sign all agreements, contracts, instruments, or other documents evidencing and containing the terms upon which such Successful Bid was made.

The Debtors shall file a notice in substantially the form annexed to the Bidding Procedures Order as Exhibit 4 (the “Notice of Successful Bidder”) identifying the Successful Bidder and attaching the proposed asset purchase agreement with the Successful Bidder, no later than twelve hours after the conclusion of the Auction. Such Notice of Successful Bidder shall also identify the Back-Up Bidder and contain either (i) a summary of the material terms of the Back-Up Bid or (ii) proposed asset purchase agreement with the Back-Up Bidder.

The Debtors will present the results of the Auction to the Bankruptcy Court at the Sale Hearing, at which certain findings will be sought from the Bankruptcy Court regarding the Auction, including, among other things, that (a) the Auction was conducted, and the Successful Bidder was selected, in accordance with these Bidding Procedures, (b) the Auction was fair in substance and procedure, and (c) consummation of the Successful Bid will provide the highest or otherwise best value for the Debtors’ Assets and is in the best interests of the Debtors’ estates.

If an Auction is held, the Debtors will be deemed to have accepted a Qualified Bid only when (a) such Qualified Bid is declared a Successful Bid at the Auction, and (b) definitive documentation has been executed in respect thereof. Such acceptance is conditioned upon approval by the Bankruptcy Court of the Successful Bid and entry of an order approving such Successful Bid (the “Sale Order”).

I. Sale Hearing.

A hearing before the Bankruptcy Court to consider approval of the Successful Bid or Successful Bids (the “Sale Hearing”), pursuant to which the Debtors and the Successful Bidder will consummate the Sale, will be held on **March 18, 2021, at 2:00 p.m.**, prevailing Eastern Time, before the Bankruptcy Court.

The Sale Hearing may be continued to a later date by the Debtors by sending notice prior to, or making an announcement at, the Sale Hearing. No further notice of any such continuance will be required to be provided to any party.

At the Sale Hearing, the Debtors will present the Successful Bid to the Bankruptcy Court for approval.

J. Designation of Back-Up Bidder(s).

If for any reason the Successful Bidder fails to consummate the Qualified Bid within the time permitted after the entry of the Confirmation Order approving the Sale to the Successful Bidder, then the Qualified Bidder(s) with the next-highest or otherwise second-best Bid (or combination of Bids) for the Assets (a “Back-Up Bidder”), as determined by the Debtors after consultation with their advisors, at the conclusion of the Auction and announced at that time to all the Qualified Bidders participating therein, will automatically be deemed to have submitted the highest or otherwise best Bid (a “Back-Up Bid”), and the Debtors will be authorized, but not required, to consummate the transaction pursuant to the Back-Up Bid as soon as commercially reasonably practicable without further order of the Bankruptcy Court (except with respect to any Back-Up Bidder adequate assurance objections that may be heard at a subsequent hearing in accordance with paragraph 25 of the Amended Bidding Procedures Order) upon at least 24 hours advance notice, which notice will be filed with the Bankruptcy Court.

Upon designation of the Back-Up Bidder at the Auction, the Back-Up Bid must remain open until the Closing of the Successful Bid.

K. Return of Good Faith Deposit to Qualified Bidders that Submit Qualified Bids.

The Good Faith Deposit of the Successful Bidder will, upon consummation of the Successful Bid, become property of the Debtors’ estates and be credited to the portion of the Purchase Price. If the Successful Bidder (or Back-Up Bidder) fails to consummate the Successful Bid (or Back-Up Bid), then the Good Faith Deposit of such Successful Bidder (or Back-Up Bidder) will be irrevocably forfeited to the Debtors and may be retained by the Debtors as damages, in addition to any and all rights, remedies, or causes of action that may be available to the Debtors, in each case, subject to the terms and conditions of the purchase agreement(s) with the Successful Bidder or Back-Up Bidder, as applicable.

The Good Faith Deposit of any unsuccessful Qualified Bidders (except for the Back-Up Bidder) will be returned within the earlier of five business days after the conclusion of the Auction or upon the permanent withdrawal of the proposed Sale of the Debtors’ Assets. The Good Faith Deposit of the Back-Up Bidder, if any, will be returned to such Back-Up Bidder no later than five business days after the Closing with the Successful Bidder.

Except as set forth in the first paragraph of this Section K, all deposits shall be held in a segregated account maintained by the Debtors and at no time shall be deemed property of the Debtors' estates absent further order of the Bankruptcy Court.

L. Reservation of Rights.

The Debtors reserve their rights to modify these Amended Bidding Procedures in good faith, including by setting procedures for an Auction, to further the goal of attaining the highest or otherwise best offer for the Assets, or impose, at or prior to the Auction, additional customary terms and conditions on the Sale of the Assets. The Debtors shall provide notice of any such modification to any Qualified Bidder, including the Stalking Horse Bidder.

All parties expressly reserve all of their rights (and do not waive any such rights) to seek Bankruptcy Court relief with regard to the Auction, the Amended Bidding Procedures, the Sale, and any related items (including, if necessary, to seek an extension of the Bid Deadline).

M. Consent to Jurisdiction.

All Qualified Bidders at the Auction will be deemed to have consented to the jurisdiction of the Bankruptcy Court and waived any right to a jury trial in connection with any disputes relating to the Sale, the Auction, and/or the construction and enforcement of these Amended Bidding Procedures, as applicable, and consented to the entry of a final order or judgment in any way related to these Bidding Procedures, the bid process, the Auction, the Sale Hearing, or the construction and enforcement of any agreement or any other document relating to a Sale if it is determined that the Bankruptcy Court would lack Article III jurisdiction to enter such a final order or judgment absent the consent of the parties.

Any parties raising a dispute relating to these Amended Bidding Procedures must request that such dispute be heard by the Bankruptcy Court on an expedited basis.

N. Fiduciary Out.

Nothing in these Amended Bidding Procedures will require any director, manager or officer of any Debtor to take any action, or to refrain from taking any action, with respect to these Bidding Procedures, that would violate his or her fiduciary duties to any Debtor.

O. Sale Is As Is/Where Is.

The Assets sold pursuant to these Amended Bidding Procedures will be conveyed at the Closing in their then present condition, "as is, with all faults, and without any warranty whatsoever, express or implied," except as otherwise expressly provided in the purchase agreement with the Successful Bidder.

* * * * *

Exhibit 2
Amendment to the Stalking Horse Agreement

Execution Version

FIRST AMENDMENT TO STALKING HORSE AGREEMENT

THIS FIRST AMENDMENT TO STALKING HORSE AGREEMENT (this "Amendment") to that certain Stalking Horse Agreement (as amended, the "Agreement"), dated as of January 31, 2021, by and among Knotel, Inc., a Delaware corporation ("Knotel"), the Subsidiaries of Knotel listed on Schedule A attached to the Agreement (each a "Selling Subsidiary" and all Selling Subsidiaries, together with Knotel, "Sellers"), Digiatech, LLC, a Delaware limited liability company, together with any designated affiliate thereof ("Buyer"), and, solely for purposes of Section 10.17 of the Agreement, Newmark Partners, L.P., a Delaware limited partnership ("Parent"), is entered into as of March 11, 2021 (the "Amendment Date"). Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

RECITALS:

WHEREAS, Section 10.01 of the Agreement provides that the Agreement may be amended by written agreement of the Parties;

WHEREAS, in accordance with that certain Committee Settlement Term Sheet dated as of March 8, 2021 (the "Term Sheet"), Buyer, Parent, Knotel and all of its debtor subsidiaries in the Chapter 11 Cases (the "Debtors") and the Official Committee of Unsecured Creditors appointed in the Chapter 11 Cases (the "Committee", and together with the Buyer, Parent and the Debtors, the "Settlement Parties") have reached key terms of a global resolution with respect to the settlement and compromise of all claims and causes of action asserted by Settlement Parties against one another, including, among other things, a release and waiver of the Committee's Challenge Rights (as defined in the Bidding Procedures Order [Docket No. 227] and the Final DIP Order [Docket No. 330]) that the Committee has or could have asserted in respect of (i) Buyer's claims as DIP Lender under the DIP Credit Agreement, (ii) Buyer's claims as Prepetition Secured Lender under the Prepetition Credit Agreements, (iii) the Sale Motion and (iv) this Agreement, including, without limitation, the rights of Buyer to credit bid all amounts owing to it under the DIP Credit Agreement and the Prepetition Credit Agreement under Section 363(k) of the Bankruptcy Code;

WHEREAS, subject to (i) the terms expressly set forth in the Term Sheet, (ii) the approval by the Bankruptcy Court of the Term Sheet, and (iii) the completion of definitive documents incorporating the terms of the Term Sheet, including this Amendment, the Term Sheet sets forth the key terms of the agreement of the Settlement Parties to modify certain aspects of the Agreement in order to provide for certain changes to the Stalking Horse Bid, the Auction and the ultimate funding and resolution of the Chapter 11 Cases;

WHEREAS, the Parties desire to amend the Agreement in order to incorporate the terms of the Term Sheet as set forth below.

NOW, THEREFORE, in consideration of the mutual covenants contained in the Agreement, and for other good and valuable consideration, the Parties agree as follows:

1. Amendment:

a. Article I of the Agreement is hereby amended to add the following defined terms in the appropriate alphabetical order:

“Committee” shall mean the Official Committee of Unsecured Creditors Appointed in the Chapter 11 Cases.

“Credit Bid” has the meaning set forth in Section 3.01(a) below.

“Employment Claim Amount” has the meaning set forth in Section 3.01(d) below.

“GUC Fund Amount” has the meaning set forth in Section 3.01(b) below.

“Offer List” has the meaning set forth in Section 7.17(a) below.

“Officer Employee” has the meaning set forth in Section 7.17(a) below.

“Retained Causes of Action” has the meaning set forth in Section 2.01(r) below.

“Wind-Down Amount” has the meaning set forth in Section 3.01(c) below.

b. Article I of the Agreement is hereby amended to delete the definition of “Purchase Price” in its entirety and replace it with the following:

“Purchase Price” means the sum of the Credit Bid, the GUC Fund Amount, the Wind-Down Amount, and the Employment Claim Amount.

c. Section 2.01(r) of the Agreement is hereby deleted in its entirety and replaced by the following:

“(r) all claims or causes of action of any nature under any provision of the Bankruptcy Code or applicable Law relating to the Business, the Purchased Assets, and/or Assumed Liabilities (including, for the avoidance of doubt, any avoidance claims or causes of action under chapter 5 of the Bankruptcy Code or applicable law (the “Avoidance Actions”), subject to the provisions of Section 7.20); provided, however, the Purchased Assets shall not include (x) any claims or causes of action for indemnification, (y) any claims and causes of action against Sellers’ current and former directors and/or officers, or (z) any Avoidance Actions against insiders (as defined in 11 U.S.C §101(31)) ((x), (y), and (z), collectively, the “Retained Causes of Action”);”

d. Section 2.02(f) of the Agreement is hereby deleted in its entirety and replaced by the following:

“(f) the Retained Causes of Action and the assets, properties and rights specifically set forth on Schedule 2.02(f);”

e. Section 3.01 of the Agreement is hereby deleted in its entirety and replaced by the following:

“Section 3.01 Purchase Price. Subject to the terms and conditions of this Agreement (as it may be amended, modified, and supplemented from time to time), in consideration of the sale of the Purchased Assets pursuant to the terms hereof, Buyer shall provide consideration to Sellers in the form of:

(a) a total credit bid in the amount of \$70,000,000 (the “Credit Bid”), whereby the Buyer shall credit:

(i) from outstanding Indebtedness under the DIP Facility at the Closing the amount outstanding under the DIP Facility at the Closing, including, for the avoidance of doubt, Roll-Up Loans (as defined in the DIP Order) up to the amount of \$20,400,000;

(ii) from outstanding Indebtedness under the Prepetition First Lien Credit Agreement any amounts outstanding up to the difference between \$70,000,000 minus (B) the amount credit bid pursuant to clause (i) above; and

(iii) the balance from outstanding Indebtedness under the Prepetition Second Lien Credit Agreement.

(b) cash to be delivered by or on behalf of Buyer to Sellers at the Closing in an amount equal to the sum of the following:

(i) the amount of \$6,200,000 (the "GUC Fund Amount"), which shall be set aside for distribution to holders of allowed general unsecured claims pursuant to a plan of liquidation;

(ii) the amount of \$500,000 (the "Wind-Down Amount"), which shall be used by Sellers to prepare and obtain confirmation of a liquidation plan and the wind-down of Sellers' estates pursuant to a wind-down budget, which shall be in form and substance reasonably acceptable to the Committee. For the avoidance of doubt, Buyer's delivery of the Wind-Down Amount shall be in addition to the assumption of liabilities set forth in Section 2.03(f); and

(iii) the amount of \$110,000 (the "Employment Claim Amount"), which shall be used by Sellers to settle a threatened action by a former employee of Sellers.

The above amounts set forth in Section 3.01(b)(i)-(iii) shall be payable first from all available cash-on-hand held by Sellers at the Closing and deliverable to Buyer under Section 2.01(b) hereof or otherwise, an accounting of which shall be provided by Sellers to Buyer and the Committee at least two (2) Business Days prior to the Closing. Any remaining amounts shall be paid by Buyer in cash at Closing and shall be subject to the obligations of Parent under Section 10.17 hereof.

(c) On or before the Auction, Buyer shall have the absolute right to increase the Purchase Price, including, without limitation by increasing the amount of the Credit Bid to include additional amounts owing under the Prepetition Credit Agreements."

e. Section 7.02 of the Agreement is hereby deleted in its entirety and replaced by the following:

"Section 7.02 Access to Information. From the date hereof until the Closing, Sellers shall (a) afford Buyer and its Representatives, on reasonable prior notice, full and free access to and the right to inspect all of the Leased Real Property, properties, assets, premises, Books and Records, Contracts and other documents and data related to the Business, subject, in each case, to applicable and appropriate COVID-19 Measures; (b) furnish Buyer and its Representatives with such financial, operating and other data and information related to the Business as Buyer or any of its Representatives may reasonably request; (c) instruct the Representatives of Sellers to cooperate with Buyer in its investigation of the Business; and (d) permit, cooperate, and facilitate communication

between Buyer and any Contract counterparty in connection with Buyer's negotiation of proposed cure amounts and any other potential disputes with respect to such Contract. Any investigation pursuant to this Section 7.02 shall be conducted in such manner as not to interfere unreasonably with the conduct of the Business or any other businesses of Sellers. No investigation by Buyer or other information received by Buyer shall operate as a waiver or otherwise affect any representation, warranty or agreement given or made by Sellers in this Agreement (as it may be amended, modified, and supplemented from time to time)."

f. Section 7.06 of the Agreement is hereby deleted in its entirety and replaced by the following:

"Section 7.06 Preservation of Records. Sellers (or any subsequently appointed bankruptcy estate representative, including, but not limited to, a trustee, a liquidating trustee, a creditor trustee or a plan administrator) and Buyer agree that each of them shall preserve and keep the Books and Records held by it relating to the pre-Closing Business for a period commencing on the Petition Date and ending at such date on which the Chapter 11 Cases have been closed, and shall make such Books and Records available to the other Party and the Committee (and permit such other Party and the Committee to make extracts and copies of such Books and Records at its own expense) as may be reasonably required by such Party or the Committee, as applicable, in connection with, among other things, any insurance claims, any other matters related to the Chapter 11 Cases, legal proceedings or Tax audits against or governmental investigations of Sellers or Buyer or in order to enable Sellers or Buyer to comply with their respective obligations under this Agreement (as it may be amended, modified, and supplemented from time to time) and each other agreement, document or instrument contemplated hereby or thereby. In the event that Sellers, on the one hand, or Buyer, on the other hand, wish to destroy such records during the foregoing period, such Party shall first give twenty (20) days' prior written notice to the other and such other Party shall have the right at its option and expense, upon prior written notice given to such Party within that twenty (20) day period, to take possession of the records within thirty (30) days after the date of such notice."

g. Section 7.17(a) of the Agreement is hereby deleted in its entirety and replaced by the following:

"(a) No later than March 10, 2021, Buyer shall have (x) provided to Knotel (with a copy made available to the Committee) a list (the "Offer List") of Employees to whom Buyer or its designated Affiliate or Affiliates shall extend offers of employment (the "Offer Employees") and (y) extended written offers of employment to certain officers of Knotel (the "Officer Employees"). Any offers of employment to Offer Employees and Officer Employees shall be made by Buyer or its designated Affiliate or Affiliates prior to the Closing and shall be effective as of the Closing Date. Buyer shall be entitled to supplement the Offer List to add additional Employees at any time prior to the Closing by written notice to Knotel, and any additional Employee added to the Offer List shall be deemed an Offer Employee. Buyer may provide in each offer of employment to an Offer Employee that such offer of employment is subject to such Offer Employee's compliance with and completion of Buyer's standard hiring practices and policies. All such individuals who accept such offers of employment by the Closing Date, and commence such employment immediately after the Closing, with Buyer or its Affiliates are hereinafter referred to as the "Transferred Employees."

h. Article VII of the Agreement is hereby amended by adding the following as a new Section 7.20:

“Section 7.20 Avoidance Actions. Neither Buyer nor any Designated Buyer shall sell, transfer, assign, or convey the Avoidance Actions to any other person or entity, and Buyer and any Designated Buyer covenants and agrees that it will not pursue or attempt in any manner to collect on the Avoidance Actions, and these covenants will survive the Closing Date for a period of six (6) years and five (5) days following the Closing Date notwithstanding any other provision of the Agreement (as it may be amended, modified, and supplemented from time to time). For the avoidance of doubt, it is intended that Buyer and any Designated Buyer will waive and not pursue the Avoidance Actions to the fullest extent permitted by law.”

i. Section 10.17 of the Agreement is hereby deleted in its entirety and replaced by the following:

“Section 10.17 Parent Guaranty. Notwithstanding anything to the contrary under this Agreement, as it may be amended, modified, and supplemented from time to time, Parent undertakes to cause Buyer and any Designated Buyer to timely meet, and guarantees the performance of, all of Buyer’s obligations and any Designated Buyer’s obligations herein (including, for the avoidance of doubt, the GUC Fund Amount, the Wind-Down Amount, the Employment Claim Amount, the Assumed Liabilities, and any additional economic obligations under this Agreement, as it may be amended, modified, and supplemented from time to time, and in each Transaction Document and to the extent Buyer or any Designated Buyer does not timely meet any obligation herein or in any such Transaction Document (including any payment obligations) Parent shall directly perform such obligation on behalf of Buyer or such Designated Buyer. This guaranty shall be a guaranty of payment and performance and not of collection, and Parent hereby agrees that its obligation hereunder shall be primary and unconditional (and not as a surety), subject in all respects to the terms and conditions of this Agreement, as it may be amended, modified, and supplemented from time to time. To the extent Parent is called upon to perform any such obligation on behalf of Buyer or any Designated Buyer, Parent shall have all of the rights that Buyer or such Designated Buyer, as applicable, would have had if Buyer or such Designated Buyer, as applicable, performed such obligation directly.”

j. Schedule A of the Agreement is hereby amended to add the following Selling Subsidiary:

“Knotel Canada, Inc.”

2. Ratification. The Agreement, as amended hereby, is ratified by the Parties and is valid and in full force and effect. In the case of any conflict between the Agreement and this Amendment, the provisions of this Amendment shall control. For the avoidance of doubt, all defenses and set-off rights in connection with Buyer’s or any Designated Buyer’s assertion of claims transferred to Buyer or any Designated Buyer under the Agreement are expressly preserved. This Amendment shall be effective as of the Amendment Date.
3. Applicable Law. This Amendment shall be governed by, and shall be construed and interpreted in accordance with, the law of the State of Delaware.

4. Counterpart Signatures. This Amendment may be executed in multiple counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts, taken together, shall constitute one and the same Amendment.

[Remainder of Page Intentionally Left Blank; Signature Page Follows]

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be duly executed and delivered by their proper and duly authorized officers effective as of the Amendment Date.

KNOTEL, INC.,
on behalf of itself and as a Seller and on
behalf of each of its Subsidiaries listed on
Schedule A as the sole stockholder or
member, as applicable, of each such
Subsidiary

By _____
Name:
Title:

DIGIATECH, LLC, as Buyer

By _____
Name:
Title:

NEWMARK PARTNERS, L.P, as Parent
(solely for purposes of Section 10.17)

By _____
Name:
Title:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF KNOTEL, INC. and KNOTEL CANADA, INC.
APPLICATION OF KNOTEL CANADA, INC. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Court File No.: CV-21-00658434-00CL

	ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)
	PROCEEDING COMMENCED AT TORONTO
	SUPPLEMENTAL ORDER (FOREIGN MAIN PROCEEDING)
	CASSELS BROCK & BLACKWELL LLP Scotia Plaza, Suite 2100 40 King Street West Toronto, Ontario M5H 3C2 Shayne Kukulowicz Tel: 416.860.6463 skukulowicz@cassels.com Natalie E. Levine Tel: 416.860.6568 nlevine@cassels.com Ben Goodis Tel: 416.869.5312 bgoodis@cassels.com Lawyers for the Canadian Filing Entities

Tab 32

CITATION: Canwest Publishing Inc., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST
INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes, Alex Cobb and Duncan Ault* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior
Secured Lenders' Syndicate
Peter Griffin for the Management Directors
Robin B. Schwill and Natalie Renner for the Ad Hoc Committee of 9.25% Senior
Subordinated Noteholders
David Byers and Maria Konyukhova for the proposed Monitor, FTI Consulting
Canada Inc.

PEPALL J.

REASONS FOR DECISION

Introduction

[1] Canwest Global Communications Corp. ("Canwest Global") is a leading Canadian media company with interests in (i) newspaper publishing and digital media; and (ii) free-to-air television stations and subscription based specialty television channels. Canwest Global, the entities in its Canadian television business (excluding CW Investments Co. and its subsidiaries) and the National Post Company (which prior to October 30, 2009 owned and published the National Post) (collectively, the "CMI Entities"), obtained protection from their creditors in a

*Companies' Creditors Arrangement Act*¹ ("CCAA") proceeding on October 6, 2009.² Now, the Canwest Global Canadian newspaper entities with the exception of National Post Inc. seek similar protection. Specifically, Canwest Publishing Inc./Publications Canwest Inc. ("CPI"), Canwest Books Inc. ("CBI"), and Canwest (Canada) Inc. ("CCI") apply for an order pursuant to the CCAA. They also seek to have the stay of proceedings and the other benefits of the order extend to Canwest Limited Partnership/Canwest Société en Commandite (the "Limited Partnership"). The Applicants and the Limited Partnership are referred to as the "LP Entities" throughout these reasons. The term "Canwest" will be used to refer to the Canwest enterprise as a whole. It includes the LP Entities and Canwest Global's other subsidiaries which are not applicants in this proceeding.

[2] All appearing on this application supported the relief requested with the exception of the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders. That Committee represents certain unsecured creditors whom I will discuss more fully later.

[3] I granted the order requested with reasons to follow. These are my reasons.

[4] I start with three observations. Firstly, Canwest Global, through its ownership interests in the LP Entities, is the largest publisher of daily English language newspapers in Canada. The LP Entities own and operate 12 daily newspapers across Canada. These newspapers are part of the Canadian heritage and landscape. The oldest, The Gazette, was established in Montreal in 1778. The others are the Vancouver Sun, The Province, the Ottawa Citizen, the Edmonton Journal, the Calgary Herald, The Windsor Star, the Times Colonist, The Star Phoenix, the Leader-Post, the Nanaimo Daily News and the Alberni Valley Times. These newspapers have an estimated average weekly readership that exceeds 4 million. The LP Entities also publish 23 non-daily

¹ R.S.C. 1985, c. C. 36, as amended.

² On October 30, 2009, substantially all of the assets and business of the National Post Company were transferred to the company now known as National Post Inc.

newspapers and own and operate a number of digital media and online operations. The community served by the LP Entities is huge. In addition, based on August 31, 2009 figures, the LP Entities employ approximately 5,300 employees in Canada with approximately 1,300 of those employees working in Ontario. The granting of the order requested is premised on an anticipated going concern sale of the newspaper business of the LP Entities. This serves not just the interests of the LP Entities and their stakeholders but the Canadian community at large.

[5] Secondly, the order requested may contain some shortcomings; it may not be perfect. That said, insolvency proceedings typically involve what is feasible, not what is flawless.

[6] Lastly, although the builders of this insolvent business are no doubt unhappy with its fate, gratitude is not misplaced by acknowledging their role in its construction.

Background Facts

(i) Financial Difficulties

[7] The LP Entities generate the majority of their revenues through the sale of advertising. In the fiscal year ended August 31, 2009, approximately 72% of the LP Entities' consolidated revenue derived from advertising. The LP Entities have been seriously affected by the economic downturn in Canada and their consolidated advertising revenues declined substantially in the latter half of 2008 and in 2009. In addition, they experienced increases in certain of their operating costs.

[8] On May 29, 2009 the Limited Partnership failed, for the first time, to make certain interest and principal reduction payments and related interest and cross currency swap payments totaling approximately \$10 million in respect of its senior secured credit facilities. On the same day, the Limited Partnership announced that, as of May 31, 2009, it would be in breach of certain financial covenants set out in the credit agreement dated as of July 10, 2007 between its predecessor, Canwest Media Works Limited Partnership, The Bank of Nova Scotia as administrative agent, a syndicate of secured lenders ("the LP Secured Lenders"), and the predecessors of CCI, CPI and CBI as guarantors. The Limited Partnership also failed to make

principal, interest and fee payments due pursuant to this credit agreement on June 21, June 22, July 21, July 22 and August 21, 2009.

[9] The May 29, 2009, defaults under the senior secured credit facilities triggered defaults in respect of related foreign currency and interest rate swaps. The swap counterparties (the “Hedging Secured Creditors”) demanded payment of \$68.9 million. These unpaid amounts rank *pari passu* with amounts owing under the LP Secured Lenders’ credit facilities.

[10] On or around August 31, 2009, the Limited Partnership and certain of the LP Secured Lenders entered into a forbearance agreement in order to allow the LP Entities and the LP Secured Lenders the opportunity to negotiate a pre-packaged restructuring or reorganization of the affairs of the LP Entities. On November 9, 2009, the forbearance agreement expired and since then, the LP Secured Lenders have been in a position to demand payment of approximately \$953.4 million, the amount outstanding as at August 31, 2009. Nonetheless, they continued negotiations with the LP Entities. The culmination of this process is that the LP Entities are now seeking a stay of proceedings under the CCAA in order to provide them with the necessary “breathing space” to restructure and reorganize their businesses and to preserve their enterprise value for the ultimate benefit of their broader stakeholder community.

[11] The Limited Partnership released its annual consolidated financial statements for the twelve months ended August 31, 2009 and 2008 on November 26, 2009. As at August 31, 2009, the Limited Partnership had total consolidated assets with a net book value of approximately \$644.9 million. This included consolidated current assets of \$182.7 million and consolidated non-current assets of approximately \$462.2 million. As at that date, the Limited Partnership had total consolidated liabilities of approximately \$1.719 billion (increased from \$1.656 billion as at August 31, 2008). These liabilities consisted of consolidated current liabilities of \$1.612 billion and consolidated non-current liabilities of \$107 million.

[12] The Limited Partnership had been experiencing deteriorating financial results over the past year. For the year ended August 31, 2009, the Limited Partnership’s consolidated revenues decreased by \$181.7 million or 15% to \$1.021 billion as compared to \$1.203 billion for the year

ended August 31, 2008. For the year ended August 31, 2009, the Limited Partnership reported a consolidated net loss of \$66 million compared to consolidated net earnings of \$143.5 million for fiscal 2008.

(ii) Indebtedness under the Credit Facilities

[13] The indebtedness under the credit facilities of the LP Entities consists of the following.

- (a) The LP senior secured credit facilities are the subject matter of the July 10, 2007 credit agreement already mentioned. They are guaranteed by CCI, CPI and CBI. The security held by the LP Secured Lenders has been reviewed by the solicitors for the proposed Monitor, FTI Consulting Canada Inc. and considered to be valid and enforceable.³ As at August 31, 2009, the amounts owing by the LP Entities totaled \$953.4 million exclusive of interest.⁴
- (b) The Limited Partnership is a party to the aforementioned foreign currency and interest rate swaps with the Hedging Secured Creditors. Defaults under the LP senior secured credit facilities have triggered defaults in respect of these swap arrangements. Demand for repayment of amounts totaling \$68.9 million (exclusive of unpaid interest) has been made. These obligations are secured.
- (c) Pursuant to a senior subordinated credit agreement dated as of July 10, 2007, between the Limited Partnership, The Bank of Nova Scotia as administrative agent for a syndicate of lenders, and others, certain subordinated lenders agreed to provide the Limited Partnership with access to a term credit facility of up to \$75

³ Subject to certain assumptions and qualifications.

⁴ Although not formally in evidence before the court, counsel for the LP Secured Lenders advised the court that currently \$382,889,000 in principal in Canadian dollars is outstanding along with \$458,042,000 in principal in American dollars.

million. CCI, CPI, and CBI are guarantors. This facility is unsecured, guaranteed on an unsecured basis and currently fully drawn. On June 20, 2009, the Limited Partnership failed to make an interest payment resulting in an event of default under the credit agreement. In addition, the defaults under the senior secured credit facilities resulted in a default under this facility. The senior subordinated lenders are in a position to take steps to demand payment.

- (d) Pursuant to a note indenture between the Limited Partnership, The Bank of New York Trust Company of Canada as trustee, and others, the Limited Partnership issued 9.5% per annum senior subordinated unsecured notes due 2015 in the aggregate principal amount of US \$400 million. CPI and CBI are guarantors. The notes are unsecured and guaranteed on an unsecured basis. The noteholders are in a position to take steps to demand immediate payment of all amounts outstanding under the notes as a result of events of default.

[14] The LP Entities use a centralized cash management system at the Bank of Nova Scotia which they propose to continue. Obligations owed pursuant to the existing cash management arrangements are secured (the “Cash Management Creditor”).

(iii) LP Entities’ Response to Financial Difficulties

[15] The LP Entities took a number of steps to address their circumstances with a view to improving cash flow and strengthening their balance sheet. Nonetheless, they began to experience significant tightening of credit from critical suppliers and other trade creditors. The LP Entities’ debt totals approximately \$1.45 billion and they do not have the liquidity required to make payment in respect of this indebtedness. They are clearly insolvent.

[16] The board of directors of Canwest Global struck a special committee of directors (the “Special Committee”) with a mandate to explore and consider strategic alternatives. The Special Committee has appointed Thomas Strike, the President, Corporate Development & Strategy Implementation, as Recapitalization Officer and has retained Gary Colter of CRS Inc. as

Restructuring Advisor for the LP Entities (the “CRA”). The President of CPI, Dennis Skulsky, will report directly to the Special Committee.

[17] Given their problems, throughout the summer and fall of 2009, the LP Entities have participated in difficult and complex negotiations with their lenders and other stakeholders to obtain forbearance and to work towards a consensual restructuring or recapitalization.

[18] An ad hoc committee of the holders of the senior subordinated unsecured notes (the “Ad Hoc Committee”) was formed in July, 2009 and retained Davies Ward Phillips & Vineberg as counsel. Among other things, the Limited Partnership agreed to pay the Committee’s legal fees up to a maximum of \$250,000. Representatives of the Limited Partnership and their advisors have had ongoing discussions with representatives of the Ad Hoc Committee and their counsel was granted access to certain confidential information following execution of a confidentiality agreement. The Ad Hoc Committee has also engaged a financial advisor who has been granted access to the LP Entities’ virtual data room which contains confidential information regarding the business and affairs of the LP Entities. There is no evidence of any satisfactory proposal having been made by the noteholders. They have been in a position to demand payment since August, 2009, but they have not done so.

[19] In the meantime and in order to permit the businesses of the LP Entities to continue to operate as going concerns and in an effort to preserve the greatest number of jobs and maximize value for the stakeholders of the LP Entities, the LP Entities have been engaged in negotiations with the LP Senior Lenders, the result of which is this CCAA application.

(iv) The Support Agreement, the Secured Creditors’ Plan and the Solicitation Process

[20] Since August 31, 2009, the LP Entities and the LP administrative agent for the LP Secured Lenders have worked together to negotiate terms for a consensual, prearranged restructuring, recapitalization or reorganization of the business and affairs of the LP Entities as a going concern. This is referred to by the parties as the Support Transaction.

[21] As part of this Support Transaction, the LP Entities are seeking approval of a Support Agreement entered into by them and the administrative agent for the LP Secured Lenders. 48% of the LP Secured Lenders, the Hedging Secured Creditors, and the Cash Management Creditor (the “Secured Creditors”) are party to the Support Agreement.

[22] Three interrelated elements are contemplated by the Support Agreement and the Support Transaction: the credit acquisition, the Secured Creditors’ plan (the “Plan”), and the sale and investor solicitation process which the parties refer to as SISP.

[23] The Support Agreement contains various milestones with which the LP Entities are to comply and, subject to a successful bid arising from the solicitation process (an important caveat in my view), commits them to support a credit acquisition. The credit acquisition involves an acquisition by an entity capitalized by the Secured Creditors and described as AcquireCo. AcquireCo. would acquire substantially all of the assets of the LP Entities (including the shares in National Post Inc.) and assume certain of the liabilities of the LP Entities. It is contemplated that AcquireCo. would offer employment to all or substantially all of the employees of the LP Entities and would assume all of the LP Entities’ existing pension plans and existing post-retirement and post-employment benefit plans subject to a right by AcquireCo., acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities. The credit acquisition would be the subject matter of a Plan to be voted on by the Secured Creditors on or before January 31, 2010. There would only be one class. The Plan would only compromise the LP Entities’ secured claims and would not affect or compromise any other claims against any of the LP Entities (“unaffected claims”). No holders of the unaffected claims would be entitled to vote on or receive any distributions of their claims. The Secured Creditors would exchange their outstanding secured claims against the LP Entities under the LP credit agreement and the swap obligations respectively for their *pro rata* shares of the debt and equity to be issued by AcquireCo. All of the LP Entities’ obligations under the LP secured claims calculated as of the date of closing less \$25 million would be deemed to be satisfied following the closing of the Acquisition Agreement.

LP secured claims in the amount of \$25 million would continue to be held by AcquireCo. and constitute an outstanding unsecured claim against the LP Entities.

[24] The Support Agreement contemplates that the Financial Advisor, namely RBC Dominion Securities Inc., under the supervision of the Monitor, will conduct the solicitation process. Completion of the credit acquisition process is subject to a successful bid arising from the solicitation process. In general terms, the objective of the solicitation process is to obtain a better offer (with some limitations described below) than that reflected in the credit acquisition. If none is obtained in that process, the LP Entities intend for the credit acquisition to proceed assuming approval of the Plan. Court sanction would also be required.

[25] In more detailed terms, Phase I of the solicitation process is expected to last approximately 7 weeks and qualified interested parties may submit non-binding proposals to the Financial Advisor on or before February 26, 2010. Thereafter, the Monitor will assess the proposals to determine whether there is a reasonable prospect of obtaining a Superior Offer. This is in essence a cash offer that is equal to or higher than that represented by the credit acquisition. If there is such a prospect, the Monitor will recommend that the process continue into Phase II. If there is no such prospect, the Monitor will then determine whether there is a Superior Alternative Offer, that is, an offer that is not a Superior Offer but which might nonetheless receive approval from the Secured Creditors. If so, to proceed into Phase II, the Superior Alternative Offer must be supported by Secured Creditors holding more than at least 33.3% of the secured claims. If it is not so supported, the process would be terminated and the LP Entities would then apply for court sanction of the Plan.

[26] Phase II is expected to last approximately 7 weeks as well. This period allows for due diligence and the submission of final binding proposals. The Monitor will then conduct an assessment akin to the Phase 1 process with somewhat similar attendant outcomes if there are no Superior Offers and no acceptable Alternative Superior Offers. If there were a Superior Offer or an acceptable Alternative Superior Offer, an agreement would be negotiated and the requisite approvals sought.

[27] The solicitation process is designed to allow the LP Entities to test the market. One concern is that a Superior Offer that benefits the secured lenders might operate to preclude a Superior Alternative Offer that could provide a better result for the unsecured creditors. That said, the LP Entities are of the view that the solicitation process and the support transaction present the best opportunity for the businesses of the LP Entities to continue as going concerns, thereby preserving jobs as well as the economic and social benefits of their continued operation. At this stage, the alternative is a bankruptcy or liquidation which would result in significant detriment not only to the creditors and employees of the LP Entities but to the broader community that benefits from the continued operation of the LP Entities' business. I also take some comfort from the position of the Monitor which is best captured in an excerpt from its preliminary Report:

The terms of the Support Agreement and SISP were the subject of lengthy and intense arm's length negotiations between the LP Entities and the LP Administrative Agent. The Proposed Monitor supports approval of the process contemplated therein and of the approval of those documents, but without in any way fettering the various powers and discretions of the Monitor.

[28] It goes without saying that the Monitor, being a court appointed officer, may apply to the court for advice and directions and also owes reporting obligations to the court.

[29] As to the objection of the Ad Hoc Committee, I make the following observations. Firstly, they represent unsecured subordinated debt. They have been in a position to take action since August, 2009. Furthermore, the LP Entities have provided up to \$250,000 for them to retain legal counsel. Meanwhile, the LP Secured Lenders have been in a position to enforce their rights through a non-consensual court proceeding and have advised the LP Entities of their abilities in that regard in the event that the LP Entities did not move forward as contemplated by the Support Agreement. With the Support Agreement and the solicitation process, there is an enhanced likelihood of the continuation of going concern operations, the preservation of jobs and the maximization of value for stakeholders of the LP Entities. It seemed to me that in the face of these facts and given that the Support Agreement expired on January 8, 2010, adjourning the

proceeding was not merited in the circumstances. The Committee did receive very short notice. Without being taken as encouraging or discouraging the use of the comeback clause in the order, I disagree with the submission of counsel to the Ad Hoc Committee to the effect that it is very difficult if not impossible to stop a process relying on that provision. That provision in the order is a meaningful one as is clear from the decision in *Muscletech Research & Development Inc.*⁵. On a come back motion, although the positions of parties who have relied bona fide on an Initial Order should not be prejudiced, the onus is on the applicants for an Initial Order to satisfy the court that the existing terms should be upheld.

Proposed Monitor

[30] The Applicants propose that FTI Consulting Canada Inc. serve as the Monitor. It currently serves as the Monitor in the CMI Entities' CCAA proceeding. It is desirable for FTI to act; it is qualified to act; and it has consented to act. It has not served in any of the incompatible capacities described in section 11.7(2) of the CCAA. The proposed Monitor has an enhanced role that is reflected in the order and which is acceptable.

Proposed Order

[31] As mentioned, I granted the order requested. It is clear that the LP Entities need protection under the CCAA. The order requested will provide stability and enable the LP Entities to pursue their restructuring and preserve enterprise value for their stakeholders. Without the benefit of a stay, the LP Entities would be required to pay approximately \$1.45 billion and would be unable to continue operating their businesses.

⁵ 2006 CarswellOnt 264 (S.C.J.).

(a) Threshold Issues

[32] The chief place of business of the Applicants is Ontario. They qualify as debtor companies under the CCAA. They are affiliated companies with total claims against them that far exceed \$5 million. Demand for payment of the swap indebtedness has been made and the Applicants are in default under all of the other facilities outlined in these reasons. They do not have sufficient liquidity to satisfy their obligations. They are clearly insolvent.

(b) Limited Partnership

[33] The Applicants seek to extend the stay of proceedings and the other relief requested to the Limited Partnership. The CCAA definition of a company does not include a partnership or a limited partnership but courts have exercised their inherent jurisdiction to extend the protections of an Initial CCAA Order to partnerships when it was just and convenient to do so. The relief has been held to be appropriate where the operations of the partnership are so intertwined with those of the debtor companies that irreparable harm would ensue if the requested stay were not granted: *Re Canwest Global Communications Corp*⁶ and *Re Lehndorff General Partners Ltd*⁷.

[34] In this case, the Limited Partnership is the administrative backbone of the LP Entities and is integral to and intertwined with the Applicants' ongoing operations. It owns all shared information technology assets; it provides hosting services for all Canwest properties; it holds all software licences used by the LP Entities; it is party to many of the shared services agreements involving other Canwest entities; and employs approximately 390 full-time equivalent employees who work in Canwest's shared services area. The Applicants state that failure to extend the stay to the Limited Partnership would have a profoundly negative impact on the value of the Applicants, the Limited Partnership and the Canwest Global enterprise as a whole. In

⁶ 2009 CarswellOnt 6184 at para. 29 (S.C.J.).

⁷ (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div.).

addition, exposing the assets of the Limited Partnership to the demands of creditors would make it impossible for the LP Entities to successfully restructure. I am persuaded that under these circumstances it is just and convenient to grant the request.

(c) Filing of the Secured Creditors' Plan

[35] The LP Entities propose to present the Plan only to the Secured Creditors. Claims of unsecured creditors will not be addressed.

[36] The CCAA seems to contemplate a single creditor-class plan. Sections 4 and 5 state:

s.4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s.5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

[37] Case law has interpreted these provisions as authorizing a single creditor-class plan. For instance, Blair J. (as he then was) stated in *Re Philip Services Corp.*⁸: " There is no doubt that a debtor is at liberty, under the terms of sections 4 and 5 of the CCAA, to make a proposal to

⁸ 1999 CarswellOnt 4673 (S.C.J.).

secured creditors or to unsecured creditors or to both groups."⁹ Similarly, in *Re Anvil Range Mining Corp.*¹⁰, the Court of Appeal stated: "It may also be noted that s. 5 of the CCAA contemplates a plan which is a compromise between a debtor company and its secured creditors and that by the terms of s. 6 of the Act, applied to the facts of this case, the plan is binding only on the secured creditors and the company and not on the unsecured creditors."¹¹

[38] Based on the foregoing, it is clear that a debtor has the statutory authority to present a plan to a single class of creditors. In *Re Anvil Range Mining Corp.*, the issue was raised in the context of the plan's sanction by the court and a consideration of whether the plan was fair and reasonable as it eliminated the opportunity for unsecured creditors to realize anything. The basis of the argument was that the motions judge had erred in not requiring a more complete and in depth valuation of the company's assets relative to the claims of the secured creditors.

[39] In this case, I am not being asked to sanction the Plan at this stage. Furthermore, the Monitor will supervise a vigorous and lengthy solicitation process to thoroughly canvass the market for alternative transactions. The solicitation should provide a good indication of market value. In addition, as counsel for the LP Entities observed, the noteholders and the LP Entities never had any forbearance agreement. The noteholders have been in a position to take action since last summer but chose not to do so. One would expect some action on their part if they themselves believed that they "were in the money". While the process is not perfect, it is subject to the supervision of the court and the Monitor is obliged to report on its results to the court.

[40] In my view it is appropriate in the circumstances to authorize the LP Entities to file and present a Plan only to the Secured Creditors.

⁹ Ibid at para. 16.

¹⁰ (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), leave to appeal to S.C.C. refused (March 6, 2003).

¹¹ Ibid at para. 34.

(d) DIP Financing

[41] The Applicants seek approval of a DIP facility in the amount of \$25 million which would be secured by a charge over all of the assets of the LP Entities and rank ahead of all other charges except the Administration Charge, and ahead of all other existing security interests except validly perfected purchase money security interests and certain specific statutory encumbrances.

[42] Section 11.2 of the CCAA provides the statutory jurisdiction to grant a DIP charge. In *Re Canwest*¹², I addressed this provision. Firstly, an applicant should address the requirements contained in section 11.2 (1) and then address the enumerated factors found in section 11.2(4) of the CCAA. As that list is not exhaustive, it may be appropriate to consider other factors as well.

[43] Applying these principles to this case and dealing firstly with section 11.2(1) of the CCAA, notice either has been given to secured creditors likely to be affected by the security or charge or alternatively they are not affected by the DIP charge. While funds are not anticipated to be immediately necessary, the cash flow statements project a good likelihood that the LP Entities will require the additional liquidity afforded by the \$25 million. The ability to borrow funds that are secured by a charge will help retain the confidence of the LP Entities' trade creditors, employees and suppliers. It is expected that the DIP facility will permit the LP Entities to conduct the solicitation process and consummate a recapitalization transaction of a sale of all or some of its assets. The charge does not secure any amounts that were owing prior to the filing. As such, there has been compliance with the provisions of section 11.2 (1).

[44] Turning then to a consideration of the factors found in section 11.2(4) of the Act, the LP Entities are expected to be subject to these CCAA proceedings until July 31, 2010. Their business and financial affairs will be amply managed during the proceedings. This is a

¹² Supra, note 7 at paras. 31-35.

consensual filing which is reflective of the confidence of the major creditors in the current management configuration. All of these factors favour the granting of the charge. The DIP loan would enhance the prospects of a viable compromise or arrangement and would ensure the necessary stability during the CCAA process. I have already touched upon the issue of value. That said, in relative terms, the quantum of the DIP financing is not large and there is no readily apparent material prejudice to any creditor arising from the granting of the charge and approval of the financing. I also note that it is endorsed by the proposed Monitor in its report.

[45] Other factors to consider in assessing whether to approve a DIP charge include the reasonableness of the financing terms and more particularly the associated fees. Ideally there should be some evidence on this issue. Prior to entering into the forbearance agreement, the LP Entities sought proposals from other third party lenders for a DIP facility. In this case, some but not all of the Secured Creditors are participating in the financing of the DIP loan. Therefore, only some would benefit from the DIP while others could bear the burden of it. While they may have opted not to participate in the DIP financing for various reasons, the concurrence of the non participating Secured Creditors is some market indicator of the appropriateness of the terms of the DIP financing.

[46] Lastly, I note that the DIP lenders have indicated that they would not provide a DIP facility if the charge was not approved. In all of these circumstances, I was prepared to approve the DIP facility and grant the DIP charge.

(e) Critical Suppliers

[47] The LP Entities ask that they be authorized but not required to pay pre-filing amounts owing in arrears to certain suppliers if the supplier is critical to the business and ongoing operations of the LP Entities or the potential future benefit of the payments is considerable and of value to the LP Entities as a whole. Such payments could only be made with the consent of the proposed Monitor. At present, it is contemplated that such suppliers would consist of certain newspaper suppliers, newspaper distributors, logistic suppliers and the Amex Bank of Canada. The LP Entities do not seek a charge to secure payments to any of its critical suppliers.

[48] Section 11.4 of the CCAA addresses critical suppliers. It states:

11.4(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares the person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied upon the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[49] Mr. Byers, who is counsel for the Monitor, submits that the court has always had discretion to authorize the payment of critical suppliers and that section 11.4 is not intended to address that issue. Rather, it is intended to respond to a post-filing situation where a debtor company wishes to compel a supplier to supply. In those circumstances, the court may declare a person to be a critical supplier and require the person to supply. If the court chooses to compel a person to supply, it must authorize a charge as security for the supplier. Mr. Barnes, who is counsel for the LP Entities, submits that section 11.4 is not so limited. Section 11.4 (1) gives the court general jurisdiction to declare a supplier to be a "critical supplier" where the supplier provides goods or services that are essential to the ongoing business of the debtor company. The permissive as opposed to mandatory language of section 11.4 (2) supports this interpretation.

[50] Section 11.4 is not very clear. As a matter of principle, one would expect the purpose of section 11.4 to be twofold: (i) to codify the authority to permit suppliers who are critical to the continued operation of the company to be paid and (ii) to require the granting of a charge in circumstances where the court is compelling a person to supply. If no charge is proposed to be granted, there is no need to give notice to the secured creditors. I am not certain that the distinction between Mr. Byers and Mr. Barnes' interpretation is of any real significance for the purposes of this case. Either section 11.4(1) does not oust the court's inherent jurisdiction to make provision for the payment of critical suppliers where no charge is requested or it provides authority to the court to declare persons to be critical suppliers. Section 11.4(1) requires the person to be a supplier of goods and services that are critical to the companies' operation but does not impose any additional conditions or limitations.

[51] The LP Entities do not seek a charge but ask that they be authorized but not required to make payments for the pre-filing provision of goods and services to certain third parties who are critical and integral to their businesses. This includes newsprint and ink suppliers. The LP Entities are dependent upon a continuous and uninterrupted supply of newsprint and ink and they have insufficient inventory on hand to meet their needs. It also includes newspaper distributors who are required to distribute the newspapers of the LP Entities; American Express whose corporate card programme and accounts are used by LP Entities employees for business related expenses; and royalty fees accrued and owing to content providers for the subscription-based on-line service provided by FPinfomart.ca, one of the businesses of the LP Entities. The LP Entities believe that it would be damaging to both their ongoing operations and their ability to restructure if they are unable to pay their critical suppliers. I am satisfied that the LP Entities may treat these parties and those described in Mr. Strike's affidavit as critical suppliers but none will be paid without the consent of the Monitor.

(f) Administration Charge and Financial Advisor Charge

[52] The Applicants also seek a charge in the amount of \$3 million to secure the fees of the Monitor, its counsel, the LP Entities' counsel, the Special Committee's financial advisor and

counsel to the Special Committee, the CRA and counsel to the CRA. These are professionals whose services are critical to the successful restructuring of the LP Entities' business. This charge is to rank in priority to all other security interests in the LP Entities' assets, with the exception of purchase money security interests and specific statutory encumbrances as provided for in the proposed order.¹³ The LP Entities also request a \$10 million charge in favour of the Financial Advisor, RBC Dominion Securities Inc. The Financial Advisor is providing investment banking services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

[53] In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

¹³ This exception also applies to the other charges granted.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[54] I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

[55] There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum

of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

[56] The Applicants also seek a directors and officers charge (“D & O charge”) in the amount of \$35 million as security for their indemnification obligations for liabilities imposed upon the Applicants’ directors and officers. The D & O charge will rank after the Financial Advisor charge and will rank *pari passu* with the MIP charge discussed subsequently. Section 11.51 of the CCAA addresses a D & O charge. I have already discussed section 11.51 in *Re Canwest*¹⁴ as it related to the request by the CMI Entities for a D & O charge. Firstly, the charge is essential to the successful restructuring of the LP Entities. The continued participation of the experienced Boards of Directors, management and employees of the LP Entities is critical to the restructuring. Retaining the current officers and directors will also avoid destabilization. Furthermore, a CCAA restructuring creates new risks and potential liabilities for the directors and officers. The amount of the charge appears to be appropriate in light of the obligations and liabilities that may be incurred by the directors and officers. The charge will not cover all of the directors’ and officers’ liabilities in a worse case scenario. While Canwest Global maintains D & O liability insurance, it has only been extended to February 28, 2009 and further extensions are unavailable. As of the date of the Initial Order, Canwest Global had been unable to obtain additional or replacement insurance coverage.

[57] Understandably in my view, the directors have indicated that due to the potential for significant personal liability, they cannot continue their service and involvement in the

¹⁴ Supra note 7 at paras. 44-48.

restructuring absent a D & O charge. The charge also provides assurances to the employees of the LP Entities that obligations for accrued wages and termination and severance pay will be satisfied. All secured creditors have either been given notice or are unaffected by the D & O charge. Lastly, the Monitor supports the charge and I was satisfied that the charge should be granted as requested.

(h) Management Incentive Plan and Special Arrangements

[58] The LP Entities have made amendments to employment agreements with 2 key employees and have developed certain Management Incentive Plans for 24 participants (collectively the “MIPs”). They seek a charge in the amount of \$3 million to secure these obligations. It would be subsequent to the D & O charge.

[59] The CCAA is silent on charges in support of Key Employee Retention Plans (“KERPs”) but they have been approved in numerous CCAA proceedings. Most recently, in *Re Canwest*¹⁵, I approved the KERP requested on the basis of the factors enumerated in *Re Grant Forrest*¹⁶ and given that the Monitor had carefully reviewed the charge and was supportive of the request as were the Board of Directors, the Special Committee of the Board of Directors, the Human Resources Committee of Canwest Global and the Adhoc Committee of Noteholders.

[60] The MIPs in this case are designed to facilitate and encourage the continued participation of certain senior executives and other key employees who are required to guide the LP Entities through a successful restructuring. The participants are critical to the successful restructuring of the LP Entities. They are experienced executives and have played critical roles in the restructuring initiatives to date. They are integral to the continued operation of the business

¹⁵ Supra note 7.

¹⁶ [2009] O.J. No. 3344 (S.C.J.).

during the restructuring and the successful completion of a plan of restructuring, reorganization, compromise or arrangement.

[61] In addition, it is probable that they would consider other employment opportunities in the absence of a charge securing their payments. The departure of senior management would distract from and undermine the restructuring process that is underway and it would be extremely difficult to find replacements for these employees. The MIPs provide appropriate incentives for the participants to remain in their current positions and ensures that they are properly compensated for their assistance in the reorganization process.

[62] In this case, the MIPs and the MIP charge have been approved in form and substance by the Board of Directors and the Special Committee of Canwest Global. The proposed Monitor has also expressed its support for the MIPs and the MIP charge in its pre-filing report. In my view, the charge should be granted as requested.

(i) Confidential Information

[63] The LP Entities request that the court seal the confidential supplement which contains individually identifiable information and compensation information including sensitive salary information about the individuals who are covered by the MIPs. It also contains an unredacted copy of the Financial Advisor's agreement. I have discretion pursuant to Section 137(2) of the *Courts of Justice Act*¹⁷ to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record. That said, public access is an important tenet of our system of justice.

[64] The threshold test for sealing orders is found in the Supreme Court of Canada decision of *Sierra Club of Canada v Canada (Minister of Finance)*¹⁸. In that case, Iacobucci J. stated that an

¹⁷ R.S.O. 1990, c. C.43, as amended.

¹⁸ [2002] 2 S.C.R. 522.

order should only be granted when: (i) it is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and (ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[65] In *Re Canwest*¹⁹ I applied the *Sierra Club* test and approved a similar request by the Applicants for the sealing of a confidential supplement containing unredacted copies of KERPs for the employees of the CMI Entities. Here, with respect to the first branch of the *Sierra Club* test, the confidential supplement contains unredacted copies of the MIPs. Protecting the disclosure of sensitive personal and compensation information of this nature, the disclosure of which would cause harm to both the LP Entities and the MIP participants, is an important commercial interest that should be protected. The information would be of obvious strategic advantage to competitors. Moreover, there are legitimate personal privacy concerns in issue. The MIP participants have a reasonable expectation that their names and their salary information will be kept confidential. With respect to the second branch of the *Sierra Club* test, keeping the information confidential will not have any deleterious effects. As in the *Re Canwest* case, the aggregate amount of the MIP charge has been disclosed and the individual personal information adds nothing. The salutary effects of sealing the confidential supplement outweigh any conceivable deleterious effects. In the normal course, outside of the context of a CCAA proceeding, confidential personal and salary information would be kept confidential by an employer and would not find its way into the public domain. With respect to the unredacted Financial Advisor agreement, it contains commercially sensitive information the disclosure of which could be harmful to the solicitation process and the salutary effects of sealing it outweigh

¹⁹ *Supra*, note 7 at para. 52.

any deleterious effects. The confidential supplements should be sealed and not form part of the public record at least at this stage of the proceedings.

Conclusion

[66] For all of these reasons, I was prepared to grant the order requested.

Pepall J.

Released: January 18, 2010

CITATION: CanWest Global Communications Corp., 2010 ONSC 222
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100118

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE COMPANIES'
CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR
ARRANGEMENT OF CANWEST GLOBAL
COMMUNICATIONS CORP. AND THE OTHER
APPLICANTS LISTED ON SCHEDULE "A"

REASONS FOR DECISION

Pepall J.

Released: January 18, 2010

Tab 33

CITATION: Target Canada Co. (Re), 2015 ONSC 303
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TARGET CANADA CO., TARGET CANADA
HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA
PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO)
CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA
PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Tracy Sandler and Jeremy Dacks*, for the Target Canada Co., Target Canada
Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp.,
Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target
Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the
“Applicants”)

Jay Swartz, for the Target Corporation

Alan Mark, Melaney Wagner, and Jesse Mighton, for the Proposed Monitor,
Alvarez and Marsal Canada ULC (“Alvarez”)

Terry O'Sullivan, for The Honourable J. Ground, Trustee of the Proposed
Employee Trust

Susan Philpott, for the Proposed Employee Representative Counsel for employees
of the Applicants

HEARD and ENDORSED: January 15, 2015

REASONS: January 16, 2015

ENDORSEMENT

[1] Target Canada Co. (“TCC”) and the other applicants listed above (the “Applicants”) seek relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “CCAA”). While the limited partnerships listed in Schedule “A” to the draft Order (the “Partnerships”) are not applicants in this proceeding, the Applicants seek to have a stay of

proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

[2] TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

[3] In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

[4] Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

[5] After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

[6] Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

[7] The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
- b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key

- employee retention plan (the “KERP”) to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
 - d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

[8] The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the “breathing room” required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

[9] TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise 1 S. à r.l. (“NE1”), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

[10] TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC’s employees are not represented by a union, and there is no registered pension plan for employees.

[11] The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

[12] A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk and a Starbucks café. Each store typically employs approximately 100 – 150 people, described as “Team Members” and “Team Leaders”, with a total of approximately 16,700 employed at the “store level” of TCC’s retail operations.

[13] TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

[14] In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation’s Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

[15] TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

[16] TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

[17] Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

[18] Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

[19] Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

[20] NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

[21] As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

[22] TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

[23] Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

[24] Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

[25] On this initial hearing, the issues are as follows:

- a) Does this court have jurisdiction to grant the CCAA relief requested?
 - a) Should the stay be extended to the Partnerships?
 - b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
 - c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
 - d) Should the Court approve protections for employees?
 - e) Is it appropriate to allow payment of certain pre-filing amounts?
 - f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
 - g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
 - h) Should the court exercise its discretion to approve the Court-ordered charges?

[26] "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc. (Re)*, [2004] O.J. No. 1257, [Stelco], leave to appeal refused, [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336, where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a]

reasonable proximity of time as compared with the time reasonably required to implement a restructuring” (at para 26). The decision of Farley, J. in *Stelco* was followed in *Prizm Income Fund (Re)*, [2011] O.J. No. 1491 (SCJ), 2011 and *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4286, (SCJ) [*Canwest*].

[27] Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of “insolvent person” under the *Bankruptcy and Insolvency Act* (the “BIA”) or under the test developed by Farley J. in *Stelco*.

[28] I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the “breathing space” afforded by a stay of proceedings or other available relief under the CCAA.

[29] I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company’s assets are situated, if there is no place of business in Canada.

[30] In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC’s 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC’s operations work in Ontario.

[31] The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured “going concern” solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*, [2010] SCC 50 (“*Century Services*”) that “courts frequently observe that the CCAA is skeletal in nature”, and does not “contain a comprehensive code that lays out all that is permitted or barred”. The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more “rules-based” approach of the BIA.

[32] Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a “liquidation” or wind-down of the debtor companies’ assets or business.

[33] The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

[34] In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

[35] The required audited financial statements are contained in the record.

[36] The required cash flow statements are contained in the record.

[37] Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

[38] Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

[39] The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

[40] I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

[41] Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

[42] It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd. (1993)*, 17 CBR (3d) 24 (Ont. Gen. Div.); *Re Prizm Income Fund*, 2011 ONSC 2061; *Re Canwest Publishing Inc.* 2010 ONSC 222 ("Canwest Publishing") and *Re Canwest Global Communications Corp.*, 2009 CarswellOnt 6184 ("Canwest Global").

[43] In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

[44] The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

[45] The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *Re T. Eaton Co.*, 1997 CarswellOnt 1914 (Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

[46] In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

[47] The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

[48] I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

[49] The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

[50] I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

[51] With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

[52] Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

[53] In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

[54] The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

[55] In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

[56] The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP. It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

[57] The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Re Nortel Networks Corp.*, 2009 CarswellOnt 1330 (S.C.J.) [*Nortel Networks (KERP)*], and *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Ont. S.C.J.). In *U.S. Steel Canada Inc.*, 2014 ONSC 6145, I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services

could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

[58] In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

[59] Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

[60] The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the “Employee Representative Counsel”), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

[61] I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 (S.C.J.) (Nortel Networks Representative Counsel)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;
- (iii) the avoidance of multiplicity of legal retainers; and
- (iv) the balance of convenience and whether it is fair and just to creditors of the estate.

[62] The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC’s ability to operate during and implement its controlled and orderly wind-down process.

[63] Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

[64] The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

- a) Logistics and supply chain providers;
- b) Providers of credit, debt and gift card processing related services; and
- c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

[65] In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

[66] In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

[67] TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively, the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

[68] The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

[69] The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

[70] The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other

potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

[71] Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

[72] Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

[73] With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

[74] In *Canwest Publishing Inc.*, 2010 ONSC 222, Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;
- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed Charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the Charge; and
- f. The position of the Monitor.

[75] Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

[76] The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

[77] Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a “super priority” charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

[78] I accept the submissions of counsel to the Applicants that the requested Directors’ Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors’ Charge is granted.

[79] In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

[80] The stay of proceedings is in effect until February 13, 2015.

[81] A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

[82] The comeback hearing is to be a “true” comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

[83] Finally, a copy of Lazard’s engagement letter (the “Lazard Engagement Letter”) is attached as Confidential Appendix “A” to the Monitor’s pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

[84] Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 211 D.L.R. (4th) 193 2 S.C.R. 522, I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix “A” to the Monitor’s pre-filing report.

[85] The Initial Order has been signed in the form presented.

Regional Senior Justice Morawetz

Date: January 16, 2015

Tab 34

COUR SUPÉRIEURE

Chambre commerciale

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE SAINT-FRANÇOIS

N° : 450-11-000167-134

DATE : 26 septembre 2014

SOUS LA PRÉSIDENCE DE : L'HONORABLE GAÉTAN DUMAS, J.C.S.

In the matter of the plan of arrangement with the creditors of:

**MONTREAL, MAINE & ATLANTIQUE CANADA CIE (MONTREAL, MAINE &
ATLANTIC CANADA CO.) (M.M.A.)**

Petitioner

And

**RICHTER ADVISORY GROUP INC.
(RICHTER GROUPE CONSEIL INC.)**

Monitor

And

**UNITED STATES OF AMERICA, represented by the Secretary of Transportation,
acting through the Federal Railroad Administration (FRA)**

**JUGEMENT SUR REQUÊTE POUR APPROBATION D'UNE DISTRIBUTION
PARTIELLE DU PRODUIT DE LA VENTE DES ACTIFS DE LA DÉBITRICE**

[1] Le tribunal est saisi d'une requête en approbation d'une distribution partielle du produit de la vente des actifs de la débitrice.

[2] En date du 8 août 2013, une ordonnance initiale est rendue en faveur de la débitrice.

[3] En vertu de l'ordonnance initiale, Richter Advisory Group inc. est nommée contrôleur de la débitrice.

[4] Les faits ayant donné lieu au dépôt d'une requête en vertu de la LACC découlent d'un accident ferroviaire survenu le 6 juillet 2013 en la ville de Mégantic.

[5] L'ordonnance initiale est rendue par l'honorable Martin Castonguay, j.c.s., dont le soussigné a pris la relève depuis plus d'un an puisque le dossier a été transféré dans le district de Saint-François.

[6] Le soussigné a déjà rendu plusieurs jugements sur lesquels il n'est pas nécessaire de revenir.

[7] Qu'il suffise de mentionner qu'en date du 14 mars 2014, le soussigné a rendu un jugement sur une requête pour augmentation de la charge administrative augmentant la charge administrative à la somme de 4 000 000 \$.

[8] Les motifs du jugement du 14 mars 2014 s'appliquent toujours et doivent être considérés comme faisant partie du présent jugement, d'autant plus que ce jugement implique les mêmes parties et les mêmes procureurs. De plus, ce jugement du 14 mars 2014 référait à un autre jugement rendu le 17 février 2014 par lequel le soussigné ordonnait une audition commune devant le tribunal de la faillite canadien et le tribunal de faillite américain.

[9] La trame factuelle décrite au jugement du 17 février 2014 s'applique également au présent jugement.

[10] Le procureur des États-Unis d'Amérique agissant par la *Federal Railroad Administration* (FRA) soumet à nouveau la même jurisprudence qu'il avait soumise au soussigné le 14 mars et à laquelle référait le soussigné dans son jugement.

[11] La requête demandant la distribution partielle du produit de la vente des actifs de MMA est la suite logique du jugement qui augmentait la charge administrative.

[12] Dans le jugement du 14 mars 2014, le soussigné mentionnait :

« [63] Le tribunal est d'accord avec la juge La Vigne⁴ lorsqu'elle affirme :

« [36] À mon sens, le tribunal doit prendre en considération les facteurs ci-dessous lorsqu'il se penche sur les honoraires d'avocat exigés dans le contexte de procédures engagées sous le régime de la Loi sur les arrangements avec les créanciers des compagnies :

- le temps consacré à l'affaire par l'avocat;
- la compétence dont l'avocat a fait montre;
- les frais et la conduite des procédures en général;
- les résultats du travail de l'avocat et la part de succès obtenue;
- la nature, l'importance et l'urgence des questions à régler;
- la taille et la complexité de l'entreprise à restructurer;
- les attentes raisonnables des diverses parties, notamment les estimations transmises au tribunal ou à d'autres intervenants;
- le fonds à partir duquel les honoraires doivent être payés;
- la situation et l'intérêt de la compagnie;
- la capacité de payer de la compagnie;
- les vues du contrôleur, des créanciers principaux et de la compagnie insolvable. »

⁴ *In re : Tepper Holdings inc.*, 2011 NBBR 311 »

[13] Le soussigné ajoutait que ce n'est pas au moment de l'augmentation ou de l'établissement d'une charge qu'il y a lieu d'appliquer ces critères mais plutôt au moment où les professionnels demandent le paiement de leurs honoraires.

[14] Au soutien de sa requête, les requérants produisent en liasse et sous scellé des factures totalisant un solde impayé de près de 2 000 000 \$. C'est pourquoi les requérants demandent qu'une somme de 1 373 156 \$ soit distribuée.

[15] Le procureur des États-Unis d'Amérique a parcouru les comptes d'honoraires et déclare admettre que les services professionnels qui sont mentionnés ont effectivement été rendus et que le total des sommes réclamées représente le travail effectué.

[16] Le procureur des États-Unis d'Amérique plaide que le soussigné étant le gardien du processus, il lui appartient de s'assurer de la raisonabilité des honoraires et de s'assurer que ceux-ci soient justes et raisonnables.

[17] De fait, le procureur ne plaide pas que les honoraires sont déraisonnables, mais indique qu'il est difficile d'expliquer à un client que les honoraires équivaldront au montant de la réalisation des actifs.

[18] Le tribunal peut difficilement refuser le paiement des honoraires des professionnels alors que ceux-ci répondent entièrement aux critères établis par la jurisprudence pour déterminer la raisonnable des honoraires.

[19] Tous les critères mentionnés dans la décision *Tepper Holdings*¹ sont rencontrés sauf, peut-être, les résultats du travail de l'avocat et la part de succès obtenus.

[20] Par contre, il est inutile de répéter ce que le soussigné mentionnait aux paragraphes 55 et suivants de la décision du 14 mars 2014.

[21] La Federal Railroad administration (FRA), qui représente les États-Unis d'Amérique, a toujours consenti au processus de réalisation des actifs de MMA. Tout laissait croire que la réalisation des actifs serait plus élevée en procédant avec une entreprise en opération. Les professionnels ont travaillé en ce sens. Les procureurs ont toujours agi de façon transparente pendant tout le processus et ont toujours avisé la FRA des honoraires encourus et des honoraires prévisibles. Le travail des professionnels ne consistait pas seulement à la réalisation des actifs, mais à la continuation des opérations.

[22] Les procureurs de la FRA ont été invité à transmettre tout commentaire concernant les honoraires des professionnels; invitation à laquelle ils n'ont pas répondu.

[23] Dans le jugement du 14 mars 2014, le soussigné mentionnait :

« [68] Il est d'ailleurs intéressant de noter que jamais la FRA ou ses procureurs n'ont indiqué aux professionnels impliqués en quoi les comptes qu'ils ont reçus à ce jour ne seraient pas raisonnables. »

[24] Nous n'avons pas encore eu de réponse à cette question.

[25] Comme déjà mentionné, ce n'est pas parce que les honoraires sont élevés qu'ils ne sont pas raisonnables. Le travail effectué dans le dossier était fort complexe et personne ne pouvait présager que la réalisation des actifs serait si faible.

[26] La FRA a participé au processus depuis le début. Elle a consenti à toutes les prolongations qui lui ont permis de réaliser les actifs et rien de permet de croire qu'un autre mode de réalisation aurait été plus avantageux pour elle.

[27] Il est de plus assez difficile de croire que les honoraires des professionnels canadiens seraient déraisonnables alors que la FRA considère raisonnables les honoraires américains qui s'élèvent actuellement à 4 500 000 \$ US.

¹ In re : *Tepper Holdings inc.*, 2011 NBBR 311

POUR CES MOTIFS, LE TRIBUNAL :

[28] **ACCUEILLE** la requête;

[29] **ORDERS** that the Motion is properly presentable on September 24, 2014;

[30] **ORDERS** the Monitor to distribute the amount of CAD\$1,373,156.00 from the Canadian Sale Proceeds as follows :

- a) CAD\$439,410.00 to the Monitor as partial payment for services rendered;
- b) CAD\$288,363.00 to the Monitor's counsel, Woods LLP as partial payment for services rendered;
- c) CAD\$645,383.00 to Petitioner's counsel, Gowling Lafleur Henderson LLP as partial payment for services rendered;

[31] **DECLARES** that the beneficiaries of the Administration Charge (as defined in the Initial Order, as amended) shall be entitled to no more than an aggregate amount of CAD\$4,000,000 from the Canadian Sale Proceeds and the Canadian Settlement Amount which said sum of CAD\$4,000,000 will have been paid in full with the execution of the present Order;

[32] **DECLARES**, without limiting the foregoing, that despite the said distribution, the rights of the parties and of all the creditors are expressly reserved, including those of the United States of America (Federal Railroad Administration) and of the Government of Quebec, to debate at a later date the sequence by which and extent to which the fees and disbursements guaranteed by the Administration Charge are to be allocated between or paid from the Property of the Debtor, including between the Canadian Settlement Amount and the Canadian Sale Proceeds, as if the Canadian Settlement Amount and the Canadian Sale Proceeds would still be available for distribution;

[33] **ORDERS** the provisional execution of the Order notwithstanding any appeal, without the necessity of furnishing any security;

[34] **THE WHOLE** without costs.

GAÉTAN DUMAS, J.C.S.

Me Patrice Benoit
Gowling Lafleur Henderson s.e.n.c.r.l
Procureurs de la débitrice

Me Sylvain Vauclair
Woods s.e.n.c.r.l.
Procureurs du contrôleur

Me Jacques Darche
Borden Ladner Gervais, s.e.n.c.r.l., s.r.l.
Procureurs des États-Unis d'Amérique

Service list

Date d'audience : 24 septembre 2014

Tab 35

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	THURSDAY, THE 24 th
	)	
MR. JUSTICE MCEWEN	)	DAY OF JANUARY, 2019

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF RELAY BLOCKER, LLC, THE RELAY GROUP HOLDINGS, LLC, RELAY 1-P HOLDINGS, RELAY INTERMEDIATE HOLDINGS, LLC, RELAY CLASS D, LLC, THE RELAY GROUP, LLC, THE RELAY SHOE COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC, AND RELAY OPCO CANADA ULC (THE "DEBTORS")

APPLICATION OF RELAY BLOCKER, LLC UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

ORDER

THIS MOTION, made by Richter Advisory Group Inc. ("**Richter**"), in its capacity as the Court-appointed information officer (the "**Information Officer**") in respect of these proceedings, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an order substantially in the form enclosed in the Motion Record seeking, among other things, approval of the fees and activities of the Information Officer and its counsel, the discharge of the Information Officer and the termination of the Part IV CCAA proceedings, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the sixth report of the Information Officer dated January 17, 2019 (the "**Sixth Report**"), and on hearing the submissions of counsel for the Debtors and the Information Officer, and those other parties present, no one appearing for any other person on the service list, although duly served as appears from the Affidavit of Service of Sanja Sopic sworn January 18, 2019, filed,

CAPITALIZED TERMS

1. **THIS COURT ORDERS** that capitalized terms not defined herein shall have the meanings ascribed thereto in the Sixth Report.

APPROVAL OF RICHTER'S ACTIVITIES AND REPORTS

2. **THIS COURTS ORDERS** that (i) the Pre-Filing Report and the activities of Richter in its capacity as the proposed Information Officer, as described in the Pre-Filing Report, and (ii) the reports of Richter in its capacity as Information Officer dated June 14, 2018 (the "**First Report**"), July 19, 2018 (the "**Second Report**"), July 27, 2018 (the "**Third Report**"), July 31, 2018 (the "**Fourth Report**"), December 21, 2018 (the "**Fifth Report**") and the activities of Richter in its capacity as the Information Officer, as described in the First Report, Second Report, Third Report, Fourth Report and Fifth Report respectively, be and are hereby approved; provided, however, that only the Information Officer, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

3. **THIS COURT ORDERS** that the Sixth Report and the activities of Richter in its capacity as the Information Officer, as described in the Sixth Report, be and are hereby approved; provided, however, that only the Information Officer, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

APPROVAL OF FEES

4. **THIS COURT ORDERS** that the fees and disbursements of the Information Officer as described in the Sixth Report and as set out in the affidavit of Adam Sherman sworn January 16, 2019 (the "**Sherman Affidavit**"), including the estimated fees and disbursements of the Information Officer up to its date of discharge, be and are hereby approved.

5. **THIS COURT ORDERS** that the fees and disbursements of the Information Officer's US legal counsel, Womble Bond Dickinson (US) LLP ("**Womble**"), as described in the Sixth Report and as set out in the affidavit of Ericka Johnson sworn January 16, 2019, (the "**Johnson Affidavit**"), including the estimated fees and disbursements of Womble in connection with

services to be provided to the Information Officer up to its date of discharge, be and are hereby approved.

6. **THIS COURT ORDERS** that the fees and disbursements of the Information Officer's legal counsel, Stikeman Elliott LLP ("**Stikeman**"), as described in the Sixth Report and as set out in the affidavit of Elizabeth Pillon sworn January 15, 2019, (the "**Pillon Affidavit**"), including the estimated fees and disbursements of Stikeman in connection with services to be provided to the Information Officer up to its date of discharge, be and are hereby approved.

TERMINATION OF THE PART IV CCAA PROCEEDINGS

7. **THIS COURT ORDERS** that, effective upon the Information Officer filing with the Court the Discharge Certificate in the form attached hereto as Schedule "A" certifying that it has attended to the Remaining Matters (the "**Discharge Certificate**"), the within proceedings commenced under Part IV of the CCAA will be terminated. For greater certainty, effective upon the filing of the Discharge Certificate by the Information Officer, the stay of proceedings, as provided for in the Supplemental Order and the Initial Recognition Order will be terminated.

DISCHARGE OF RICHTER AS INFORMATION OFFICER

8. **THIS COURT ORDERS** that upon the filing of the Discharge Certificate, the Information Officer shall be discharged as Information Officer, provided however that notwithstanding its discharge herein, (a) the Information Officer shall remain Information Officer for the performance of such incidental duties as may be required to complete the administration of these proceedings, and (b) the Information Officer shall continue to have the benefit of the provisions of all orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Richter in its capacity as Information Officer.

9. **THIS COURT ORDERS** that, effective upon the filing of the Discharge Certificate, the Information Officer shall be released and discharged from any and all liability that the Information Officer now has or may hereafter have by reason of, or in any way arising out of, these proceedings or the acts or omissions of the Information Officer while acting in its capacity as Information Officer in these proceedings, save and except for liability arising from its gross negligence or wilful misconduct. Without limiting the generality of the foregoing, the

Information Officer shall be forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, within these proceedings.

10. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against the Information Officer in any way arising from or related to its capacity or conduct as Information Officer in these proceedings, except with prior leave of this Court and on prior written notice to the Information Officer.

DISCHARGE OF THE COURT-ORDERED CHARGES

11. **THIS COURT ORDERS** that, effective upon the filing of the Discharge Certificate, (i) the Administration Charge, and (ii) the BLG Charge be and are hereby fully and finally terminated, discharged and released.

AID AND RECOGNITION

12. **THIS COURT ORDERS** that notwithstanding the termination of the within proceedings effective upon the filing of the Discharge Certificate, Richter or any interested person may return to this Court for advice and directions regarding (i) the steps necessary to facilitate Richter's role as Rockport Canada Plan Administrator, and (ii) distributions to Canadian creditors from the Rockport Canada Fund. Without limiting the foregoing, this Court orders that paragraph 7 of the December 21 Order shall survive and remain in full force and effect notwithstanding the discharge of the Information Officer and the termination of the within proceedings.

13. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative, the Debtors, the Information Officer, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Foreign Representative, the Debtors, the Information Officer and their respective agents in carrying out the terms of this Order.

14. **THIS COURT ORDERS** that each of the Foreign Representative, the Debtors, and the Information Officer be at liberty and is hereby authorized and empowered to apply to any court,

tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JAN 24 2019

PER / PAR:



SCHEDULE “A”

Court File No. CV-18-597987-00CL

**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 RELAY BLOCKER, LLC, THE RELAY GROUP
HOLDINGS, LLC, RELAY 1-P HOLDINGS, RELAY INTERMEDIATE HOLDINGS,
LLC, RELAY CLASS D, LLC, THE RELAY GROUP, LLC, THE RELAY SHOE
COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES
LLC, AND RELAY OPCO CANADA ULC (THE “DEBTORS”)**

**APPLICATION OF APPLICATION OF RELAY BLOCKER, LLC UNDER SECTION 46
OF THE *COMPANIES’ CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED**

INFORMATION OFFICER’S DISCHARGE CERTIFICATE

A. Pursuant to the Supplemental Order (Foreign Main Proceeding) of Mr. Justice McEwen of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated May 16, 2018, Richter Advisory Group Inc. (“**Richter**”) was appointed as the information officer (the “**Information Officer**”).

B. Pursuant to an Order of the Court dated January 24, 2019 (the “**Discharge Order**”), the Court ordered, *inter alia*, that the Information Officer be discharged, effective upon the filing of a certificate certifying the matters set out herein.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Discharge Order.

THE INFORMATION OFFICER HEREBY CERTIFIES the following:

1. The Information Officer is satisfied, in its discretion, that it has completed the Remaining Matters as set out in the Information Officer’s Sixth Report to the Court dated January 17, 2019.

2. This Certificate was delivered by the Information Officer at _____
(time) on _____ (date).

RICHTER ADVISORY GROUP INC.

in its capacity as Court-appointed Information Officer of Relay Blocker, LLC, The Relay Group Holdings, LLC, Relay 1-P Holdings, Relay Intermediate Holdings, LLC, Relay Class D, LLC, The Relay Group, LLC, The Relay Shoe Company, LLC, Drydock Footwear, LLC, DD Management Services LLC, and Relay Opco Canada ULC

Per: _____

Name:

Title:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF RELAY BLOCKER, LLC, THE RELAY GROUP HOLDINGS, LLC, RELAY 1-P HOLDINGS, RELAY INTERMEDIATE HOLDINGS, LLC, RELAY CLASS D, LLC, THE RELAY GROUP, LLC, THE RELAY SHOE COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC, AND RELAY OPCO CANADA ULC (THE "DEBTORS")

APPLICATION OF RELAY BLOCKER, LLC UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDINGS COMMENCED AT TORONTO

INFORMATION OFFICER'S DISCHARGE CERTIFICATE

STIKEMAN ELLIOTT LLP

5300 Commerce Court West

199 Bay Street

Toronto, ON M5L 1B9

Tel: 416-869-5500

Fax: 416-947-0866

Elizabeth Pillon – LSO No. 35638M

Tel: 416-869-5623

Email: epillon@stikeman.com

Sanja Sopic – LSO No. 66487P

Tel: 416-6825

Email: ssopic@stikeman.com

Fax: 416-947-0866

Lawyers for the Information Officer

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF RELAY BLOCKER, LLC, THE RELAY GROUP HOLDINGS, LLC, RELAY 1-P HOLDINGS, RELAY INTERMEDIATE HOLDINGS, LLC, RELAY CLASS D, LLC, THE RELAY GROUP, LLC, THE RELAY SHOE COMPANY, LLC, DRYDOCK FOOTWEAR, LLC, DD MANAGEMENT SERVICES LLC, AND RELAY OPCO CANADA ULC (THE "DEBTORS")

APPLICATION OF RELAY BLOCKER, LLC UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDINGS COMMENCED AT TORONTO

ORDER

(Termination and Discharge)

STIKEMAN ELLIOTT LLP

5300 Commerce Court West

199 Bay Street

Toronto, ON M5L 1B9

Tel: 416-869-5500

Fax: 416-947-0866

Elizabeth Pillon – LSO No. 35638M

Tel: 416-869-5623

Email: epillon@stikeman.com

Sanja Sopic – LSO No. 66487P

Tel: 416-6825

Email: ssopic@stikeman.com

Fax: 416-947-0866

Lawyers for the Information Officer

Tab 36

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.

)

THURSDAY, THE 19th

JUSTICE HAINEY

)

DAY OF SEPTEMBER, 2019

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C 36, AS AMENDED



AND IN THE MATTER OF SYNCREON GROUP B.V. AND SYNCREON
AUTOMOTIVE (UK) LTD.

APPLICATION OF CARINE VAN LANDSCHOOT
UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT

DISCHARGE AND TERMINATION ORDER

THIS MOTION, made by Carine Van Landschoot in her capacity as the foreign representative (in such capacity, the "**Foreign Representative**") of syncreon Group B.V. and syncreon Automotive (UK) Ltd. (collectively, the "**Debtors**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order, among other things: (i) terminating these CCAA recognition proceedings upon the filing of the Information Officer's Certificate (as defined below); (ii) approving the activities of the Information Officer as set out in the Pre-Filing Report and the First Report (each as defined below); (iii) discharging the Information Officer; and (iv) granting certain releases in favour of the Information Officer and its counsel, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the affidavit of Carine Van Landschoot sworn July 30, 2019, the affidavit of Andrew J. Wilkinson sworn July 30, 2019, the pre-filing report of PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as proposed information officer (the "**Information Officer**") dated August 6, 2019 (the "**Pre-Filing Report**"), the affidavit of

Carine Van Landschoot sworn September 12, 2019 and the First Report of the Information Officer dated September 13, 2019 (the “**First Report**”), each filed, and on hearing submissions of counsel for the Foreign Representative and the Information Officer, Canadian counsel for the ad-hoc group of Secured Lenders, Canadian counsel for the Unsecured Notes Trustee, Canadian counsel for the Agent of the Exit ABL Facility, no one else appearing although duly served as appears from the Affidavit of Service of Caitlin McIntyre sworn September 12, 2019, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

TERMINATION OF RECOGNITION PROCEEDINGS

2. **THIS COURT ORDERS** that upon the filing of a certificate of the Information Officer substantially in the form attached hereto as Schedule “A” (the “**Information Officer’s Certificate**”), certifying that, to the best of the knowledge of the Information Officer, the “Restructuring Effective Date” under the Schemes (as defined in the Sanction Order attached as Schedule “A” to the Scheme Sanction Recognition Order granted by this Court in these CCAA recognition proceedings on September 19, 2019) has occurred, the within CCAA recognition proceedings shall be terminated without any other act or formality.

INFORMATION OFFICER

3. **THIS COURT ORDERS** that the Pre-Filing Report and the First Report and the activities of the Information Officer described therein be and are hereby approved.
4. **THIS COURT ORDERS** that promptly following receipt of the notice described in paragraph 6 below and provided that the Information Officer and its counsel have been paid all amounts owing to them pursuant to the Initial Recognition Order, the Information Officer shall file the Information Officer’s Certificate.

5. **THIS COURT ORDERS** that upon the filing of the Information Officer's Certificate, PwC shall be discharged as Information Officer and relieved from any further obligations, liabilities, responsibilities and/or duties in its capacity as Information Officer.

6. **THIS COURT ORDERS** that the Information Officer may rely on written notice (which, for greater certainty, may be provided by way of e-mail) from the Foreign Representative or its counsel, advising that the "Restructuring Effective Date" under the Schemes has occurred, and the Information Officer shall incur no liability with respect to the delivery or filing of the Information Officer's Certificate, save and except for any gross negligence or wilful misconduct on its part.

7. **THIS COURT ORDERS AND DECLARES** that upon filing of the Information Officer's Certificate: (i) the Information Officer shall be deemed to have satisfied all of its duties and obligations pursuant to the Initial Recognition Order; and (ii) PwC and its counsel are hereby released and discharged from any and all liability that PwC or its counsel now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of PwC while acting in its capacity as Information Officer in the within CCAA recognition proceedings or its counsel while acting in its capacity as counsel to the Information Officer in the within CCAA recognition proceedings, save and except for any gross negligence or wilful misconduct on the Information Officer's or its counsel's part.

8. **THIS COURT ORDERS** that notwithstanding any provision of this Order and the termination of the CCAA recognition proceedings, nothing herein shall affect, vary, derogate from, limit or amend, and the Information Officer shall continue to have the benefit of, any of the protections in favour of the Information Officer at law, the Initial Recognition Order or otherwise.

AID AND ASSISTANCE

9. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction over the Debtors, including those in Canada, the United States or the United Kingdom, to give effect to this Order and to assist the Debtors, the Foreign Representative and the Information Officer and their

respective counsel and agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Foreign Representative and the Information Officer, the latter as an officer of this Court, as may be necessary or desirable to give effect to this Order, or to assist the Foreign Representative and the Information Officer and their respective agents in carrying out the terms of this Order.

10. **THIS COURT ORDERS** that each of the Foreign Representative and the Information Officer shall be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.



Schedule "A"
Form of Information Officer's Certificate

Court File No. CV-19-624659-00CL

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 SYNCREON GROUP B.V. AND SYNCREON
AUTOMOTIVE (UK) LTD.

APPLICATION OF CARINE VAN LANDSCHOOT
UNDER SECTION 46 OF THE
COMPANIES' CREDITORS ARRANGEMENT ACT

INFORMATION OFFICER'S CERTIFICATE

RECITALS

- A. Pursuant to the Initial Recognition Order of the Honourable Mr. Justice Hainey of the Ontario Superior Court of Justice [Commercial List] (the "**Court**") granted in these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**") recognition proceedings on August 8, 2019 (the "**Initial Recognition Order**"), PricewaterhouseCoopers Inc. was appointed as Information Officer (in such capacity, the "**Information Officer**").
- B. Pursuant to the Scheme Sanction Recognition Order granted by the Court in these proceedings on September 19, 2019 (the "**Scheme Sanction Recognition Order**"), the Sanction Order issued by the High Court of Justice of England and Wales on September 10, 2019, a copy of which is attached as Schedule "A" to the Scheme Sanction Recognition Order (the "**Sanction Order**"), was recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA.
- C. Pursuant to the Discharge and Termination Order also granted by the Court in these proceedings on September 19, 2019 (the "**Discharge and Termination Order**"),

upon receipt of the Restructuring Effective Date Notice (as defined below) and provided that the Information Officer and its counsel have been paid all amounts owing to them pursuant to the Initial Recognition Order, the Information Officer is required to file a certificate certifying that, to the best of its knowledge, the "Restructuring Effective Date" under the Schemes (as defined in the Sanction Order) has occurred.

- D.** Pursuant to the Discharge and Termination Order, the Information Officer is entitled to rely on written notice (which may be provided by way of e-mail) from the Foreign Representative or its counsel, advising that the "Restructuring Effective Date" under the Schemes has occurred (the "**Restructuring Effective Date Notice**"), and shall incur no liability with respect to the delivery or filing of the Information Officer's Certificate, save and except for any gross negligence or wilful misconduct on its part.

THE INFORMATION OFFICER, IN RELIANCE UPON THE RESTRUCTURING EFFECTIVE DATE NOTICE, HEREBY CERTIFIES THAT TO THE BEST OF ITS KNOWLEDGE:

1. The "Restructuring Effective Date" under the Schemes has occurred.

DATED at the City of Toronto, in the Province of Ontario this _____ day of _____, 2019.

PricewaterhouseCoopers Inc., LIT, solely in its capacity as Information Officer of syncreon Group B.V. and syncreon Automotive (UK) Ltd. and not in its personal capacity

Per: _____

Name:

Title:

Court File No.: CV-19-624659-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF SYNCREON GROUP B.V. AND SYNCREON AUTOMOTIVE (UK) LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding Commenced at Toronto

DISCHARGE AND TERMINATION ORDER

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Linc Rogers (LSO#: 43562N)
linc.rogers@blakes.com

Aryo Shalviri (LSO#: 63867A)
aryo.shalviri@blakes.com

Caitlin McIntyre (LSO#: 72306R)
Tel: 416.863.4174
Fax: 416.863.2653
caitlin.mcintyre@blakes.com

Lawyers for the Foreign Representative,
Carine Van Landschoot

Tab 37

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE
MR. JUSTICE MCEWEN

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TUESDAY, THE 3rd
DAY OF APRIL, 2019



**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 VARI-FORM INC.**

APPLICANT

CCAA TERMINATION ORDER

THIS MOTION, made by 1939243 Ontario Inc. (formerly known as Vari-Form Inc., the "**Applicant**") for an order, *inter alia*, (a) terminating these proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") effective upon the filing by PricewaterhouseCoopers Inc. ("**PwC**") as the Court-appointed monitor of the Applicant (in such capacity, the "**Monitor**") of a Discharge Certificate (as defined below) declaring these proceedings to be terminated and (b) discharging the Monitor effective upon the filing by the Monitor of the Discharge Certificate, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Pilar Tarry sworn March 28, 2019 (the "**Tarry Affidavit**"), the Third Report of PricewaterhouseCoopers Inc., in its capacity as monitor (the "**Monitor**") of the Applicant dated March 27, 2019 (the "**Third Report**"), the affidavit of Michael McTaggart sworn March 27, 2019 (the "**McTaggart Affidavit**"), and the affidavit of James D. Gage sworn March 27, 2019 (the "**Gage Affidavit**"), and on hearing the submissions of counsel for the Applicant, counsel for the Monitor, counsel for FCA USA, LLC, ("**FCA**"), Fiat Chrysler Automobiles N.V. and Vari-Form Manufacturing Inc. (formerly known as 11032569 Canada Inc.) (the "**Purchaser**"), counsel for the Term Lenders and those other parties

present, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Lucia Castellani sworn March 28, 2019 filed:

DEFINED TERMS

1. **THIS COURT ORDERS** that capitalized terms used but not otherwise defined herein shall have the meanings ascribed thereto in the Initial Order of this Court granted January 8, 2019 (the “**Initial Order**”).

SERVICE

2. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF ACTIVITIES

3. **THIS COURT ORDERS** that the activities and conduct of the Monitor prior to or on the date hereof in relation to the Applicant and the CCAA Proceedings are hereby ratified and approved and the activities and conduct of the Monitor required to complete all necessary steps to terminate the CCAA Proceedings, as described in the Third Report, are hereby approved without the need for further reporting or action on the part of the Monitor.

4. **THIS COURT ORDERS** that the report of PwC, in its capacity as proposed Monitor of the Applicant, dated January 8, 2019, the First Report of the Monitor dated January 23, 2019, the Second Report of the Monitor dated March 5, 2019 and the Third Report, and the actions, conduct and activities of the Monitor described therein be and are hereby approved, provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

APPROVAL OF FEES AND DISBURSEMENTS

5. **THIS COURT ORDERS** that the fees and disbursements of the Monitor in the amount of Cdn\$548,254.35 (for the period from January 8, 2019 to March 24, 2019 inclusive, and including Harmonized Sales Tax) and the Monitor’s fees and disbursements, estimated not to exceed Cdn\$41,500, to complete its remaining duties and the administration of the CCAA

Proceedings through to the date hereof, all as set out in the McTaggart Affidavit and the Third Report, are hereby approved.

6. **THIS COURT ORDERS** that the fees and disbursements of McCarthy Tétrault LLP, in its capacity as counsel to the Monitor ("**Monitor's Counsel**") in the amount of Cdn\$160,136.26 (for the period from January 8, 2019 to March 24, 2019 inclusive, and including Harmonized Sales Tax) and the Monitor's Counsel's fees and disbursements, estimated not to exceed Cdn\$30,000, in connection with the completion by the Monitor of its remaining duties and the administration of the CCAA Proceedings through to the date hereof, all as set out in the Gage Affidavit and the Third Report, are hereby approved.

TERMINATION OF CCAA PROCEEDINGS

7. **THIS COURT ORDERS** that, immediately upon the Monitor filing the certificate substantially in the form attached as Schedule A hereto (the "**Discharge Certificate**") with this Court (the "**Effective Time**"):

- (a) the CCAA Proceedings shall be and are hereby automatically terminated with effect as of the Effective Time without the need for any further action, provided that nothing herein impacts the validity of any Orders made in the CCAA Proceedings or any actions or steps taken by any Person; and
- (b) each of the Directors' Charge, the Seller Termination Fee Charge, the DIP Lender's Charge and the Administration Charge shall be and are hereby terminated, released and discharged with effect as of the Effective Time without the need for any further action.

8. **THIS COURT ORDERS** that the Monitor is hereby directed to post a copy of the Discharge Certificate, once filed, on the Case Website and provide a copy to the Service List by email.

9. **THIS COURT ORDERS** that, prior to the Effective Time, the Monitor may from time to time apply to this Court for advice and directions concerning any matter related to the administration of the Applicant's activities or remaining property, the completion of the CCAA Proceedings or the Monitor's powers and duties.

DISCHARGE OF MONITOR

10. **THIS COURT ORDERS AND DECLARES** that, as of the Effective Time, the Monitor shall have satisfied, discharged and performed all of its obligations, liabilities, responsibilities and duties pursuant to the CCAA and the CCAA Proceedings and shall have no further obligations, liabilities, responsibilities or duties as Monitor, and PwC shall be discharged as Monitor effective immediately as of the Effective Time.

11. **THIS COURT ORDERS** that, as of the Effective Time, the Monitor, Monitor's Counsel and each of their respective affiliates, and officers, directors, partners, employees and agents (collectively, the "**Released Parties**") are hereby released and discharged from any and all claims that any person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of this Order in any way relating to, arising out of or in respect of the CCAA Proceedings or with respect to their respective conduct in the CCAA Proceedings (collectively, the "**Released Claims**"), and any such Released Claims are hereby released, stayed, extinguished and forever barred, with prejudice, and the Released Parties shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or willful misconduct on the part of the Released Parties.

12. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against any of the Released Parties in any way arising from or related to the CCAA Proceedings, except with prior leave of this Court on at least seven (7) days' prior written notice to the applicable Released Parties and upon further Order securing, as security for costs, the full indemnity costs of the applicable Released Party in connection with any proposed action or proceeding as the Court hearing the motion for leave to proceed may deem just and appropriate.

13. **THIS COURT ORDERS** that, notwithstanding any provision of this Order and the termination of the CCAA Proceedings, nothing herein shall affect, vary, derogate from, limit or amend any of the rights, approvals and protections in favour of the Monitor or at law or pursuant to the CCAA, the Initial Order, any other Order of this Court in the CCAA Proceedings or otherwise, all of which are expressly continued and confirmed.

BANKRUPTCY APPLICATION

14. **THIS COURT ORDERS** that the Applicant is authorized and directed to file an assignment into bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), forthwith following the Effective Time and PwC is authorized to act as trustee in bankruptcy of the Applicant.

15. **THIS COURT ORDERS** that the Applicant shall pay PwC, in its capacity as proposed trustee in bankruptcy, a retainer of Cdn\$50,000 in connection with PwC’s anticipated fees and disbursements and the fees and disbursements of its counsel relating to such bankruptcy proceedings, which retainer shall be held by PwC free and clear of any secured claims against the Applicant (including, without limitation, the Term Loan Security).

16. **THIS COURT ORDERS** that PwC, in its capacity as trustee in bankruptcy of the Applicant if so appointed (the “**Trustee**”), is hereby authorized without the need for inspector or further Court authorization:

- (a) To transfer to the Purchaser all customer payments made to the Applicant or the Trustee (including, without limitation, customer payments deposited directly to the Applicant’s bank accounts) in respect of (i) customer accounts receivable of the Applicant purchased by the Buyer pursuant to the asset purchase agreement dated January 7, 2019 between the Purchaser and the Applicant (the “**APA**”), and (ii) customer accounts receivable of the Purchaser that are paid to the Applicant and the Trustee in error; and
- (b) To provide and receive services, at its discretion, on behalf of or in the place of the Applicant pursuant to the transition services agreement dated March 15, 2019 between the Purchaser and the Applicant (the “**TSA**”), without becoming a party thereto and without assuming the obligations of the Applicant thereunder, and to do such other acts and things as it considers desirable or appropriate to provide assistance in relation to the implementation of the transactions contemplated by the APA and TSA and the operation by the Purchaser of the purchased business, subject to satisfactory arrangements being concluded between the Trustee and the Purchaser for the compensation of such services.

AID AND RECOGNITION

17. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicant and the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Applicant and the Monitor and its agents in carrying out the terms of this Order.



ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 03 2019

PER / PAR: RW

Schedule A – Form of Discharge Certificate

Court File No. CV-19-612116-0000

**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 VARI-FORM INC.**

APPLICANT

MONITOR'S CERTIFICATE

(DISCHARGE OF MONITOR AND TERMINATION OF CCAA PROCEEDINGS)

RECITALS

- A. The Applicant obtained protection from its creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") pursuant to the Initial Order of the Honourable Justice McEwen of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated January 8, 2019 (the "**Initial Order**"). The Initial Order also appointed PricewaterhouseCoopers Inc. ("**PwC**") as the monitor (the "**Monitor**") of the business and financial affairs of the Applicant. The proceedings commenced by the Applicant under the CCAA will be referred to herein as the "**CCAA Proceedings**".
- B. Terms used but not otherwise defined herein shall have the meanings set out in the Initial Order.
- C. Pursuant to an Order of the Court dated [*], 2019 (the "**Discharge Order**"), the discharge of the Monitor and the termination of the CCAA Proceedings is to occur automatically and without further formality upon filing of this Monitor's Certificate with the Court.

- D. The CCAA Proceedings have been completed in accordance with the Orders of the Court and under the supervision of the Monitor.

THE MONITOR CERTIFIES THE FOLLOWING:

1. the fees and disbursements of the Monitor, the Monitor's counsel (McCarthy Tétrault LLP), Applicant's counsel (Osler, Hoskin & Harcourt LLP), FTI, AP Services and the Financial Advisor have been paid in full;
2. the Monitor has completed all matters incidental to the termination of the CCAA Proceedings or any other matters necessary to complete the CCAA Proceedings, as detailed in the Third Report or as requested by the Applicant and agreed to by the Monitor; and
3. the Monitor now considers it appropriate that the CCAA Proceedings be terminated.

This Certificate was executed by the Monitor at Toronto, Ontario on _____, and filed.

PRICEWATERHOUSECOOPERS INC., in
its capacity as Court-appointed Monitor of
Vari-Form Inc. and not in its personal or
corporate capacity

By: _____
Name:
Title:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Court File No: CV-19-612116-0000

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VARI-FORM INC.

Applicant

ONTARIO

**SUPERIOR COURT OF JUSTICE
(Commercial List)**

PROCEEDING COMMENCED AT TORONTO

CCAA TERMINATION ORDER

OSLER, HOSKIN & HARCOURT LLP

100 King Street West
1 First Canadian Place
Suite 6200, P.O. Box 50
Toronto, ON M5X 1B8

Tracy Sandler LSO# 32443N
Email: tsandler@osler.com

John MacDonald LSO# 25884R
Email: jmacdonald@osler.com

Robert Carson LSO# 57364H
Email: rcarson@osler.com

Tel: (416) 362-2111
Fax: (416) 862-6666
Lawyers for the Applicant

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 VARI-FORM INC.

APR 3/19.

Applicant

Court File No. CV-19-612116-0000

3 April 19
CCAA Termination Order as per draft filed & signed. It is unopposed. I have reviewed it with counsel and I am satisfied with the terms of the order. I have agreed to remain seated with respect to any further issues that may arise in the bankruptcy.
M. S. K.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD

(Motion for CCAA Termination Order)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8

Tracy Sandler (LSUC #: 32443N)
John MacDonald (LSUC #: 25884R)
Robert Carson (LSUC #: 57364H)

Tel: (416) 362-2111

Fax: (416) 862-6666

Lawyers for the Applicant



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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

THE HONOURABLE MR.

JUSTICE WILTON-SIEGEL

WEDNESDAY, THE 23rd

DAY OF JUNE, 2021

**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
PHARMHOUSE INC.**



Applicant

CCAA TERMINATION ORDER

THIS MOTION, made by PharmHouse Inc. (the "**Applicant**"), for an Order, *inter alia*:
(i) terminating the Applicant's proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") upon the filing of the Monitor's Certificate (as defined below); (ii) approving the Sixth Report of Ernst & Young Inc. ("EY") in its capacity as the monitor of the Applicant (in such capacity, the "**Monitor**") dated April 29, 2021 (the "**Sixth Report**"), the Seventh Report of the Monitor dated June 19, 2021 (the "**Seventh Report**"), and the fees and activities of the Monitor and its counsel referred to therein; (iii) approving the Fee Accrual (as defined in the Seventh Report) of the Monitor and its counsel for the completion of the remaining activities in the CCAA Proceedings; (iv) discharging Edge Financial Consulting Services Corp. ("Edge") as chief restructuring organization of the Applicant (in such capacity, the "**CRO**"); (v) authorizing the Applicant to transfer the CCAA Reserve (as defined below) to Bennett Jones LLP ("**Bennett Jones**") in trust, and authorizing and directing Bennett Jones to transfer any available remainder from the CCAA Reserve to RIV Capital Corporation (f/k/a Canopy Rivers Corporation); (vi) authorizing and directing the Applicant to

transfer the Bankruptcy Reserve (as defined below) to EY and authorizing and directing EY to transfer any available remainder from the Bankruptcy Reserve to RIV Capital Corporation; (vii) immediately prior to the CCAA Termination Time (as defined below), authorizing and directing the Applicant to transfer all of its remaining cash on hand to RIV Capital Corporation; (viii) authorizing the Applicant or the Monitor on behalf of the Applicant to file an assignment in bankruptcy; and (ix) discharging EY as Monitor, was heard this day by videoconference due to the COVID-19 pandemic.

ON READING the affidavit of Peter Kampian sworn June 14, 2021 (the "Kampian Affidavit"), and the Seventh Report, and on hearing the submissions of counsel for the Applicant, the Monitor and those other parties listed on the counsel slip, no one appearing for any other person on the service list, although properly served as appears from the affidavit of service of Joshua Foster sworn June 14, 2021:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Applicant's Notice of Motion, the Motion Record and the Seventh Report be and are hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined have the meaning ascribed to them in (i) the Initial Order of this Court in the CCAA Proceedings dated September 15, 2020, as amended and restated (the "Initial Order"), or (ii) the Kampian Affidavit, as applicable.

APPROVAL OF THE MONITOR'S REPORTS, ACTIVITIES AND FEES

3. **THIS COURT ORDERS** that the Sixth Report, the Seventh Report and the activities of the Monitor and its counsel referred to therein be and are hereby approved; provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

4. **THIS COURT ORDERS** that the fees and disbursements of the Monitor and its counsel, as set out in the Seventh Report, be and are hereby approved.

5. **THIS COURT ORDERS** that the Fee Accrual of the Monitor and its counsel incurred in connection with the completion by the Monitor of its remaining duties and the administration of the CCAA Proceedings, is hereby approved without further Order of the Court.

DISTRIBUTIONS AND RESERVES

6. **THIS COURT ORDERS** that the Applicant is hereby authorized to transfer \$100,000 (plus HST) to Bennett Jones in trust (the "**CCAA Reserve**"), to fund the fees and expenses to be incurred by the Monitor and its agents in retaining and preserving certain of the Applicant's books and records in accordance with the CCAA and applicable cannabis laws.

7. **THIS COURT ORDERS** that the Applicant is hereby authorized and directed to transfer \$30,000 (plus HST) to EY for the fees and disbursements of the Trustee and its counsel (the "**Bankruptcy Reserve**") incurred in connection with the Applicant's intended assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**").

8. **THIS COURT ORDERS** that immediately prior to the CCAA Termination Time, the Applicant is hereby authorized and directed to transfer the remainder of all of its available cash on hand to RIV Capital Corporation. For greater certainty, Bennett Jones is hereby authorized and directed to transfer any available remainder from the CCAA Reserve to RIV Capital Corporation.

9. **THIS COURT ORDERS** that, following completion of the Applicant's bankruptcy pursuant to the BIA, the Trustee is hereby authorized and directed to pay any available remainder from the Bankruptcy Reserve to RIV Capital Corporation.

DISCHARGE OF THE MONITOR

10. **THIS COURT ORDERS** that upon the Monitor filing a certificate substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**") certifying that all matters described in the Seventh Report to be attended to in connection with the CCAA Proceedings have

been completed to the satisfaction of the Monitor. EY shall be discharged as Monitor effective immediately and shall have no further duties, obligations, or responsibilities as Monitor.

11. **THIS COURT ORDERS** that, notwithstanding any provision of this Order and the termination of the CCAA Proceedings, nothing herein shall affect, vary, derogate from, limit or amend any of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order or any other Order of this Court in the CCAA Proceedings, all of which are expressly continued and confirmed.

TERMINATION OF THE CCAA PROCEEDINGS AND CHARGES

12. **THIS COURT ORDERS** that the SISP Advisor Charge (as defined in the SISP Approval Order of this Court in the CCAA Proceedings dated October 29, 2020) shall be and is hereby terminated, released and discharged.

13. **THIS COURT ORDERS** that upon the Monitor filing the Monitor's Certificate (the "CCAA Termination Time"), the CCAA Proceedings shall be immediately terminated without any other act or formality.

14. **THIS COURT ORDERS** that each of the Administration Charge and the Director's Charge shall be and are hereby terminated, released and discharged at the CCAA Termination Time.

15. **THIS COURT ORDERS** that, notwithstanding the discharge of EY as Monitor and the termination of the CCAA Proceedings, EY shall have the authority from and after the CCAA Termination Time to complete any matters that may be incidental to the termination of the CCAA Proceedings. In completing any incidental matters, EY shall continue to have the benefit of the provisions of all Orders made in the CCAA Proceedings, including all approvals, protections and stays of proceedings in favour of EY in its capacity as Monitor, and nothing in this Order shall affect, vary, derogate from, limit or amend any of the protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order or any other Order issued in the CCAA Proceedings.

DISCHARGE OF THE CRO

16. **THIS COURT ORDERS** that effective at the CCAA Termination Time, Peter Kampian shall be deemed to have resigned as director of the Applicant and Edge shall be discharged from its duties as CRO and shall have no further duties, obligations or responsibilities as CRO of the Applicant from and after the CCAA Termination Time, provided that, notwithstanding its discharge as CRO, Edge shall have the authority to carry out, complete or address any matters in its role as CRO that are ancillary or incidental to the CCAA Proceedings following the CCAA Termination Time, as may be required.

17. **THIS COURT ORDERS** that, notwithstanding any provision of this Order, the CRO's discharge or the termination of the CCAA Proceedings, nothing herein shall affect, vary, derogate from, limit or amend any of the rights, approvals and protections in favour of the CRO at law or pursuant to the Initial Order or any other Order of this Court in the CCAA Proceedings, all of which are expressly continued and confirmed.

CLAIMS BARRED AND EXTINGUISHED

18. **THIS COURT ORDERS** that, notwithstanding the termination of the CCAA Proceedings, the Claims Identification Order of this Court in the CCAA Proceedings dated October 29, 2020 (the "Claims Identification Order"), including the bar dates set forth therein shall remain in full force and effect.

19. **THIS COURT ORDERS** that any Proof of Claim filed in the Claims Identification Process (each as defined in the Claims Identification Order) shall constitute a claim in the Applicant's future bankruptcy proceedings.

RELEASES

20. **THIS COURT ORDERS** that upon the CCAA Termination Time, Peter Kampian (in both his personal capacity and in his capacity as a director, officer and employee of each of Edge and the Applicant, as applicable), Edge, as well as EY, counsel to the Monitor ("BLG"), and EY's and BLG's respective affiliates, officers, directors, partners, employees and agents (collectively, the "Released Parties" and each a "Released Party") shall be and are hereby forever irrevocably

released and discharged from any and all present and future claims, liabilities, indebtedness, demands, actions, causes of action, suits, damages, judgments and obligations of whatever nature that any person may have or be entitled to assert against the Released Parties, whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the CCAA Termination Time in any way relating to, arising out of, or in respect of, the CCAA Proceedings or with respect to their respective conduct in the CCAA Proceedings (collectively, the "Released Claims"), and any such Released Claims are hereby released, stayed, extinguished and forever barred, and the Released Parties shall have no liability in respect thereof, provided that the Released Claims shall not include any claim or liability arising out of any gross negligence or wilful misconduct on the part of the applicable Released Party or any claim against Peter Kampian that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

21. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against any of the Released Parties in any way arising from or related to the CCAA Proceedings, except with prior leave of this Court on at least seven (7) days' prior written notice to the applicable Released Party.

EXTENSION OF THE STAY PERIOD

22. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including the CCAA Termination Time.

BANKRUPTCY

23. **THIS COURT ORDERS** that (i) the Applicant is hereby authorized to make an assignment in bankruptcy pursuant to the BIA immediately prior to the CCAA Termination Time, (ii) the Monitor is hereby empowered and authorized to file an assignment in bankruptcy on behalf of the Applicant, and (iii) EY is hereby empowered and authorized to act as the trustee in bankruptcy in relation to the bankruptcy of the Applicant (in such capacity, the "Trustee").

GENERAL

24. **THIS COURT ORDERS** that the Applicant, the Monitor or the Trustee may apply to this Court as necessary to seek further orders and directions to give effect to this Order.

25. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, and elsewhere to give effect to this Order and to assist the Monitor, the Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor and the Trustee, as officers of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor or the Trustee (as applicable) in any foreign proceeding, or to assist the Monitor and the Trustee and their respective agents in carrying out the terms of this Order.

26. **THIS COURT ORDERS** that that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Daylight Time on the date of this Order and is enforceable without the need for entry and filing.

W. J. M. J.

SCHEDULE "A"

Court File No.: CV-20-006477(04-00CL

**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
PHARMHOUSE INC.**

Applicant

MONITOR'S DISCHARGE CERTIFICATE

RECITALS

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated September 15, 2020, Ernst & Young Inc. ("EY") was appointed as the Monitor (in such capacity, the "Monitor") of PharmHouse Inc. (the "Applicant") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").
2. Pursuant to an order of the Court dated June 23, 2021 (the "CCAA Termination Order"), EY was to be discharged as Monitor of the Applicant effective upon the filing by the Monitor with the Court of a certificate confirming that all matters to be attended to in connection with the CCAA Proceedings have been completed to the satisfaction of the Monitor (the "Monitor's Certificate").
3. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the CCAA Termination Order.

THE MONITOR CERTIFIES the following:

1. All matters described in the Seventh Report to be attended to in connection with the CCAA Proceedings have been completed to the satisfaction of the Monitor.

2. Accordingly, the Monitor's Certificate is filed as of the date set forth below.

DATED at Toronto, Ontario this ____ day of _____, 2021.

ERNST & YOUNG INC., solely in its
capacity as the Monitor of the Applicant and
not in its personal or corporate capacity

Per: _____
Name: Alex Morrison
Title: Senior Vice President

**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 PHARMHOUSE INC.**

Court File No.: CV-20-00647704-Q0CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings Commenced in Toronto

CCAA TERMINATION ORDER

BENNETT JONES LLP

One First Canadian Place
Suite 3400, P.O. Box 130
Toronto, Ontario
M5X 1A4

Sean Zweig (LSO# 573071)

Mike Shukra (LSO# 64604K)

Joshua Foster (LSO# 79447K)

Tel: 416-863-1200

Fax: 416-863-1716

Lawyers for the Applicant

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF ARMSTRONG FLOORING, INC., AFI LICENSING LLC, ARMSTRONG FLOORING LATIN AMERICA, INC. AND ARMSTRONG
FLOORING CANADA LTD. (THE "DEBTORS")

APPLICATION OF ARMSTRONG FLOORING CANADA LTD. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS
AMENDED

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C
Tel: 416-367-6266
rjaipargas@blg.com

Lawyers for Armstrong Flooring, Inc., AFI Licensing LLC,
Armstrong Flooring Latin America, Inc. and Armstrong
Flooring Canada Ltd.