File No. CI-12-01-76323

THE QUEEN'S BENCH
Winnipeg Centre

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 ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO

(collectively, the "**APPLICANTS**"),

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

MOTION BRIEF of DESERT MOUNTAIN ICE, LLC

HEARING DATE: March 1, 2013 at 10:00 a.m.
Before the Honourable Madam Justice Spivak

FILLMORE RILEY LLP
Barristers, Solicitors & Trade-Mark Agents
1700 - 360 Main Street
Winnipeg, MB R3C 3Z3

Telephone: 204-957-8321
Facsimile: 204-954-0321

D. WAYNE LESLIE
File No. 423611-1

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INDEX:

PART I

LIST OF DOCUMENTS TO BE RELIED UPON OR REFERRED TO:

1. Notice of motion of Desert Mountain Ice, LLC ("Desert Mountain") dated and filed October 15, 2012;

2. Affidavit of Robert Nagy sworn October 9, 2012;

3. Supplementary affidavit of Robert Nagy sworn November 7, 2012;

4. Transcript of the cross-examination of Robert Nagy conducted December 19, 2012 and exhibits thereto;

5. Notice of motion of the Applicants ("Sale Approval Motion") dated June 14, 2012, with appended proposed Sale Approval Order, returnable June 21, 2012;

6. Affidavit of Keith McMahon sworn June 13, 2012 ("McMahon Affidavit");

7. Affidavit of Service of Kelly Peters sworn June 20, 2012;

8. Affidavit of Service of Kelly Peters sworn June 29, 2012;

9. Fourth Report of the Monitor, Alvarez & Marsal Canada Inc. (the "Monitor"), dated June 15, 2012;

10. Confidential Appendix to the Fourth Report of the Monitor dated June 18, 2012 (subject to Sealing Order of June 21, 2012);

11. Motion Brief of the Applicants for hearing dated June 21, 2012;

12. Transcript of proceedings (Sale Approval Motion) conducted June 21, 2012 before the Honourable Madam Justice Spivak;

13. Canadian Vesting and Approval Order dated June 21, 2012;

14. Assignment, Assumption and Amending Agreement dated July 26, 2012;

15. Affidavit of Bruce Robertson sworn October 31, 2012 ("Robertson Affidavit");

16. Transcript of the cross-examination of Bruce Robertson ("Robertson") conducted December 18, 2012 and exhibits thereto;

17. Affidavit of Brian McMullen ("McMullen") sworn November 7, 2012 ("McMullen Affidavit");

18. Affidavit of McMullen sworn November 28, 2012;

19. Transcript of the cross-examination of Brian McMullen conducted February 5, 2013 and exhibits thereto;

20. Such further and other materials as counsel may advise and this Honourable Court may permit.

PART II

STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON:

Tab

1. *The Companies' Creditors Arrangement Act* (the "CCAA"), R.S.C.,c. C-36, as amended, ss. 11.3 and 36 (3);

2. Queen's Bench Rules 37.05, 37.07(1), 39.01(6) and 59.06;

3. *Nexient Learning Inc., Re*, (2009) 62 C.B.R. (5th) 248 (O.S.C.J.) and s. 11(4) of the CCAA, as then applicable;

4. *Doman Industries Ltd., Re,* (2003) Carswell BC 538 (B.C.S.C.);

5. *221 Corp. v. C & N Enterprises Co. Ltd.*, (1999) Can LII 18800 (MBCA);

6. *Board of Education of St. Vital School Division No. 6 v. Trnka,* 2001 MBCA 164;

7. *215 Holdings Ltd. v. 2668921 Manitoba Ltd. et al*, (2008) MBCA 3;

8. Canadian Standard Form Sale Approval Order.

PART III

LIST OF POINTS TO BE ARGUED:

Motion/Relief Sought

1. This is a motion by Desert Mountain for:

   (a) An order granting leave to Desert Mountain to file and proceed to a hearing of this motion, to the extent required under the Initial Order of this Honourable Court dated February 22, 2012;

   (b) An order compelling the Applicants and Arctic Glacier U.S.A., Inc., Arctic Glacier Canada Inc., and Arctic Glacier, LLC, formerly H.I.G. Zamboni, LLC (collectively the "Purchaser") to pay to Desert Mountain the Purchase Option Amount of $12,500,000.00 U.S. funds, together with interest and financing charges of Roynat Business Capital Inc. ("Roynat") (collectively the "Purchase Option Amount") as required pursuant to s. 24 of a Lease and Option Agreement (the "Purchase Option") made between Desert Mountain and Arctic Glacier California Inc. ("Arctic California"), one of the Applicants, dated May 25, 2006 (the "Lease"), monetary default in the Purchase Option Amount, and pursuant to the Sale Approval Order of June 21, 2012, approving the Asset Purchase Agreement (the "APA"), which agreement expressly included therein the purchase of the Arizona Facility for the Purchase Option Amount;

   (c) In the alternative, an order to amend or vary the Sale Approval Order as may be necessary to:

(i) specifically require immediate payment by the Purchaser and the Applicants to Desert Mountain of the Purchase Option Amount;

(ii) delete any provision therein which purports to remove the Purchase Option from the Lease or otherwise amend or modify the Lease in respect thereto to the prejudice of Desert Mountain;

(iii) delete any provision therein which purports to remove the ability of Desert Mountain to immediately enforce the Purchase Option as against the Applicants and/or the Purchaser;

(d) In the further alternative, an order for advice and directions relative to addressing the failure of the Applicants and the Purchaser to purchase the Arizona Facility for the Purchase Option Amount pursuant to the court-approved APA and to satisfy said outstanding monetary default and to otherwise honour written and oral representations made at the hearing of the Sale Approval Motion on June 21, 2012 including, without limitation, that there would be a sale of the Arizona Facility and no prejudice to any counter-party to an Assigned Contract and that all monetary default under any Assigned Contracts would be cured by payment on or before Closing by the Applicants and/or the Purchaser through the proposed form of Sale Approval Order, as amended, without exception;

(e) Costs on a solicitor and client basis;

(f) Such further and other relief as this Honourable Court may deem just.

Grounds

2. The grounds for the motion are, *inter alia*:

(a) The Applicants and the Purchaser are jointly and severally bound by the Asset Purchase Agreement (the "APA"), as presented and approved by the Sale Approval Order dated June 21, 2012, which included therein the agreement at Articles 2.05 and 2.06 and Schedule 2.06 to purchase the Arizona Facility, the subject of the Lease, for the Purchase Option Amount and to pay to Desert Mountain the full Purchase Option Amount on or before the Closing of the APA, with no other agreement or relief sought or disclosed in respect to the Arizona Facility;

(b) Desert Mountain, as a party to an agreement (the "Lease") was not served with notice of the Sale Approval Motion prior to June 21, 2012 as expressly required under **CCAA, s. 11.3(1)** and as required under **Queen's Bench Rule 37.07(1)**, requiring at least 4 days notice before the hearing date;

(c) The rights and obligations under the Lease were not assignable to the Purchaser (**CCAA, s. 11.3(2)**), due to the nature of the Lease, particularly s.24 of the Lease and the deemed automatic exercise of the Purchase Option prescribed therein pursuant to the "Disability" of Robert Nagy effective February 20, 2012 and pursuant to the "Change of Control" on the sale of greater than 50% of the world wide operations of Arctic Glacier

Inc., requiring payment of the Purchase Option Amount and, in consequence, the Court had no jurisdiction to assign the Lease to the Purchaser unless it was expressly provided in the Sale Approval Order that Desert Mountain was paid the full Purchase Option Amount on or before the Closing of the APA in return for transfer of the Arizona Facility;

(d) Given the Purchase Option and said deemed automatic exercise thereof, it was not appropriate for the Court (**CCAA, s. 11.3(3)(c)**) to assign the rights and obligations thereunder, unless it was expressly provided in the Sale Approval Order that the Purchaser would pay the agreed Purchase Option Amount, payable on or before the Closing of the APA;

(e) The deemed automatic exercise of the Purchase Option occurred due to the "Disability" of Robert Nagy on February 20, 2012, and also occurred due to the agreed sale by Arctic of greater than 50% of the world wide operations of Arctic Glacier Inc. pursuant to the APA dated June 7, 2012, such sale approved by the Sale Approval Order dated June 21, 2012, each of which constituted monetary default under the Lease, and the Court had no jurisdiction to assign the Lease without a mandatory requirement in the Sale Approval Order for payment of the Purchase Option Amount on or before the Closing of the APA (**CCAA, s. 11.3(4)**), the exceptions therein not applicable to the facts of this case;

(f) On June 21, 2012, the Court approved a sale of the business and assets of the Applicants (the "Transaction") for the aggregate sum of $434,500,000.00, including pursuant to Articles 2.05 and 2.06 and

Schedule 2.06 of the APA, the agreement of the Applicants to purchase the Arizona Facility for the Purchase Option Amount (not an assignment of the Lease) and the agreement of the Purchaser to purchase the Arizona Facility for the equivalent amount, and the Applicants and the Purchaser had no ability to vary or amend the APA in writing or otherwise to seek, in the alternative, an assignment of the Lease and the vesting out, release or extinguishment of the Purchase Option without full and proper notice and full and frank disclosure of all material facts and intentions in respect thereto, both to Desert Mountain and to the Court;

(Q.B. Rule 39.01(6))

(g) The Applicants and the Purchaser failed to make full and frank disclosure of all material facts related to the Lease at the time of the Sale Approval Order or thereafter, including, without limitation:

(i) failure to make full disclosure of the Lease and the applicable Purchase Option provisions and the ongoing dialogue as hereinafter particularized on the issues concerning same;

(ii) failure to make full disclosure of any intention on the part of the Applicants or the Purchaser on the Sale Approval Motion, or thereafter, to unilaterally abandon the purchase of the Arizona Facility, as aforesaid, and in the alternative, seek an assignment of the Lease under the general terms of the Sale Approval Order, and vest out, extinguish and release the deemed automatically

exercised Purchase Option, to the prejudice of Desert Mountain (CCAA, s. 36(3)(d) and (e));

(iii) failure to make disclosure of the Bid Letter of the Purchaser and "kick-back" arrangement therein;

(iv) failure to make full disclosure of the agreement of the Vendors and the Purchaser, reached before Closing of the APA, that the Applicants could not buy the Arizona Facility or settle with Desert Mountain without the consent of the Purchaser or disclose the details of the Bid Letter;

(h) The Applicants failed to consult with Desert Mountain or otherwise explain to Desert Mountain, as an interested party, the full ramifications of the APA and the undisclosed intent of the Applicants and/or the Purchaser to seek an assignment of the Lease without payment of the Purchase Option Amount (**CCAA, s. 36(3)(d) and (e)**);

(i) Without the express written agreement of Desert Mountain and Roynat, never sought or obtained, coupled with the monetary default aforesaid, the Court had no jurisdiction under s. 11.3(4) or s. 11.3 generally to assign the Lease to the Purchaser;

(j) In breach of the Sale Approval Order, including paragraph 9 thereof, the Applicants and the Purchaser failed to pay to Desert Mountain the Purchase Option Amount on or before the Closing of the APA on July 27, 2012, either as a term of the APA pursuant to articles 2.05 and 2.06 and

Appendix 2.06 thereof or, in the alternative, as monetary default under any assignment of the Lease and s. 11.3(4) of the CCAA, as aforesaid;

(k) The draft proposed Sale Approval Order appended to the Sale Approval Motion was materially amended by the Applicants and the Purchaser on June 21, 2012, to the prejudice of Desert Mountain, including deletion of the last sentence of paragraph 4 thereof, without any notice or disclosure to Desert Mountain or notice or disclosure to the Court of the intent of such amendments, then or prior to the Closing of the APA, to prejudice Desert Mountain by such amendments.

Material Facts

3. Robert Nagy is the President of Desert Mountain, was the founder of and employed with the Arctic Group of Companies (hereafter collectively "Arctic" as they evolved over time) commencing in 1971 and worked his way up the corporate ladder to acquire Arctic in 1986, was involved in all major acquisitions, including 6 entities comprising the leading packaged ice manufacturer and distributor in California (the "California Acquisition"). He was directly involved in management of Arctic as President and CEO until 2006, resigning his employment that year. He served on the Board of Trustees and the Board of Directors of Arctic until his resignation from said boards and from all involvement in Arctic on August 20, 2011. **(Ex. 1, Cross-Ex. Of Robert Nagy)**

4. On May 25, 2006, Desert Mountain, as Landlord, entered into the Lease with Arctic California, as Tenant, as an integral part of the California Acquisition, for the land, building and specialized ice making equipment (the "Arizona Facility"), all located at 600

South 80th Avenue, Tolleson, Arizona. At all material times, the Arizona Facility was critical to the business of Arctic.

(Ex. A, Aff. of Robert Nagy sworn October 9, 2012)

5. The Arizona Facility was built in 1999/2000 and was one of the largest and most modern ice making plants in the world.

6. To facilitate the California Acquisition by Arctic for $190,000,000.00 and, at the same time, have Arctic take possession of the Arizona Facility, a key asset for expansion and the competitiveness of Arctic, Robert Nagy worked with the management of Arctic, its lenders and advisors, including one of its financiers, Roynat, and with the approval of the Board of Directors of Arctic, put together a plan to acquire the Arizona Facility through his indirect acquisition of Desert Mountain for $10,000,000.00. The financing for the Arizona Facility was arranged separately through Roynat, concurrent with the Lease of the Arizona Facility to Arctic California. Arctic was not in a position at that time to acquire the Arizona Facility.

(Aff. of Robert Nagy sworn November 7, 2012, Ex. 2, Cross-Ex. of Robertson)

7. The Roynat financing to Desert Mountain (the "Loan") was for the full purchase price of $10,000,000.00, with an initial loan term of 3 years expiring in May, 2009 and ultimately extended in December, 2009 for a further 3 years, expiring June 15, 2012, with the balance of the Loan payable in full at that time. The Lease was the only source of funds for Desert Mountain to repay said financing.

8. As additional security for the Loan, beyond a direct mortgage charge by Deed of Trust in favour of Roynat on the Arizona Facility and the Lease, including assignment of

all rents, Roynat required and Robert Nagy provided his personal guarantee for $500,000.00 and a related company, RBN Investments Inc., provided its guarantee and a collateral pledge of 245,980 trust units held by it in the Arctic Glacier Income Fund. Such pledge preventing any dealings with said trust units, valued in excess of $3,000,000.00 at that time (2006), until full payment of the Loan.

(Ex. B & C, Aff. of Robert Nagy sworn November 7, 2012)

9. The Deed of Trust in favour of Roynat, expressly provided at p. 12, para. 13(b) thereof:

> Without the Beneficiary's [Roynat's] prior written consent, the Trustor [Desert Mountain] will not . . .
>
> (ii) consent to an assignment of any tenant's interest in any Lease . . . (emphasis by underline added)

(Ex. B, Aff. of Robert Nagy sworn November 7, 2012)

10. At no time did Arctic or the Purchaser provide or seek the consent of Roynat or Desert Mountain to any assignment of the Lease to the Purchaser nor did Roynat or Desert Mountain agree to any such assignment.

11. At all material times, Hugh Adams, General Legal Counsel to Arctic, was also the legal counsel for Desert Mountain, Robert Nagy and RBN Investments Inc. in respect to the Arizona Facility acquisition, the Loan and the Lease and, as such, Arctic and its legal counsel were fully familiar with the Lease and all its terms, including the Purchase Option, and were fully familiar with said Roynat financing and all its terms.

(Affidavit of Robert Nagy of October 9, 2012)

12. The Arizona Facility was the only ice making plant of Arctic in Arizona, with Arctic's main competitor, Reddy Ice Holdings Inc. ("Reddy Ice"), owning an ice making plant in Arizona. As such, the Arizona Facility was critical to the business and competitive operations of Arctic in the Arizona and California region.

13. The Lease had an initial 3 year term, with an option granted to Arctic California to renew for 2 further terms of 3 years, with the expectation by Robert Nagy that prior to final term end in 2015, Arctic would purchase the Arizona Property outright from Desert Mountain. All leases of real property in the California Acquisition expired in 2021. The Lease, by election of Arctic dated July 26, 2010, almost 2 years prior to expiry of the second term, was renewed by Arctic for the final further period of 3 years to May 25, 2015, evidencing the critical importance of the Arizona Facility to Arctic.

14. Given said relationship of Robert Nagy with Arctic and his assistance in the acquisition and the Lease of the Arizona Facility (otherwise not available to Arctic) to enhance Arctic's operations in the U.S. and strengthen the competitive advantage in that area, the Purchase Option was expressly included in the Lease at s. 24, which provided that Desert Mountain granted to Arctic California an option to purchase the Arizona Facility during the 2nd extension term of the Lease for the Purchase Option Amount. S. 24.3 specifically provided for an automatic deemed exercise of the Purchase Option at p. 14 as follows:

> "Automatic Exercise of the Purchase Option. The Purchase Option will be deemed to be automatically exercised by Tenant [Arctic California] upon the occurrence of any one or more of the following events: . . .
>
> b) The Disability of Robert Nagy. For the purposes of this section, "**Disability**" shall mean the inability of Robert Nagy to participate in the business of Arctic Glacier Inc. on a full time basis

> for more than six (6) months out of any nine (9) consecutive month period;
>
> c) a change in control of Arctic Glacier Inc. For the purposes of this section, a Change of Control ("**Change of Control**") with Arctic Glacier Inc. means any of the following events: . . .
>
> v) Arctic Glacier Inc. sells greater than 50% of its world wide operations on a consolidated basis within any six (6) month period."

(Ex. A, Aff. of Robert Nagy sworn October 9, 2012)

15. The 2006 and 2010 Year End Reports of Arctic described the lease terms and Purchase Option as being commercially reasonable.

(Ex. 3, Cross-Ex. of Robertson, Ex. 5, Cross-Ex. of Nagy)

16. Following said resignation of Robert Nagy from the Board of Trustees and the Board of Directors of Arctic on August 20, 2011, he was unable to participate in the business of Arctic Glacier Inc. on a full time basis thereafter, with the six month period expressly provided for in paragraph 24.3(b) of the Lease, expiring on February 20, 2012, thereby triggering the automatic deemed exercise of the Purchase Option due to the Disability of Robert Nagy.

17. Following said resignation, Robert Nagy's full expectation was that Arctic would honour all its obligations to Desert Mountain under the Lease, including the Purchase Option. There was no obligation, in fact or at law, on Desert Mountain to amend the Purchase Option.

18. On February 22, 2012, Arctic sought creditor protection under the CCAA, with an Initial Order granted by this Honourable Court, including a stay of all proceedings against Arctic without leave of the Court, including, without any express reference therein, a stay

of any proceedings by Desert Mountain to enforce the deemed automatic exercise of the Purchase Option. The stay continues to this date.

19. As part of the CCAA proceedings, Arctic offered its world wide operations for sale to all qualified bidders under an intricate SISP managed on a day to day basis by TD Securities Inc. ("TD"), which included a requirement, as explained by TD, that all bidders submit proposals that assumed the purchase of the Arizona Facility at the contracted price in the Lease, i.e. the Purchase Option Amount **(Ex. 4, Cross-Ex. of Robertson)**.

20. On May 1, 2012, Robert Nagy had a telephone discussion with Hugh Adams, wherein they discussed the Arizona Facility, including its materially reduced value, and what options may be available, without any specifics.

(Ex. 6, Cross-Ex. of Robertson)

21. On May 16, 2012, Robert Nagy received a written Memorandum from Hugh Adams suggesting in very strong (and threatening) language that Desert Mountain should agree to an amendment to the Purchase Option, failing which Desert Mountain's interest would be in jeopardy due to, among other things, disclaimer of the Lease by Arctic and mortgage foreclosure by Roynat. The Memorandum was copied to the Toronto lawyers for Arctic and to the Monitor and to TD.

(Ex. "B", Aff. of Robert Nagy sworn October 9, 2012).

22. The Memorandum provided in part:

> ". . . The Lease, as you are aware, and for sound historical reasons, was entered into on terms which are now non-economic from a market perspective combined <u>with a Put purchase price option being significantly above reasonable market values</u>. . . .

As a consequence of the SISP and closing of the transaction contemplated, it is inevitable that a Change of Control as defined in the Lease will occur. Without amendment of the Lease, the Company will incur an obligation (post May 25, 2012) to purchase the Property for the sum of US $12.5M.

Potential buyers considering purchase of the Company's business must view the economics of the fact situation. Access to the Arizona market may be viewed desirable by a potential buyer and could be accomplished by an outright acquisition of the existing facility, taking an assignment of the Lease, construction of a new facility or disclaiming the Lease expecting that Roynat will foreclose on the Property and sell it to the buyer to recover some or all of its loan.

Clearly there are advantages in the first two instances in that the business would continue un-interrupted, and the buyer would avoid additional capital costs to be incurred in acquiring and constructing a new manufacturing and distribution facility. The disadvantage to a buyer is that the cost of acquisition is significantly above market which could very well result in potential buyers viewing the costs of a new facility at market rates from a leasing and construction cost perspective to be preferable. Further, certain buyers may not require the facility at all, and/or decline to acquire the Property by assignment of Lease or otherwise. This would discount the purchase price of the business and create an unfunded and unsecured liability in the Fund immediately following the Change of Control.

It is conceivable that a potential buyer might exclude the Property from the proposed transaction with the expectation that rejection of the Lease will cause Roynat to foreclose and offer the Property at market rates to third parties in an attempt to recover its mortgage debt. The potential buyer could then acquire the Property from Roynat following a temporary disruption in services in that market but avoiding additional capital costs of commissioning a new manufacturing and distribution facility. As noted above, it may very well be that a potential buyer will determine that the Arizona facility is not required in any event, and will not take an assignment of the Lease and will not acquire the Property on a Change of Control.

The Company takes seriously its obligations to you as landlord of the Property and recognizes that its inability to fulfill the Put

> purchase option will give rise to a claim on an unsecured basis in the insolvency process. It must be remembered that the transaction will proceed even though proceeds may not be sufficient to pay all creditors in full. **While the SISP provides that secured creditors will be paid in full, there are no guarantees that unsecured creditors will receive full or any payment.** While the Company remains hopeful that it will generate sufficient proceeds from a qualified bidder to pay all creditors in full, it is far from certain that the price will be sufficient. In any event, there are a number of unresolved litigation claims against the Company and some of its subsidiaries and resolving those claims among others will cause delays in distribution to any creditor."
>
> (emphasis by underline added)

23. At no time was it indicated in the Memorandum or otherwise by Arctic or Hugh Adams to Robert Nagy, that Arctic might attempt to assign the Lease by court order to a purchaser with a concurrent vesting order to vest out, extinguish and release the Purchase Option, without recognizing or paying the Purchase Option Amount. However, it was expressly acknowledged therein and relied upon by Robert Nagy that, without any amendment, the full Purchase Option Amount was payable post May 25, 2012. The Memorandum was never disclosed to the Court nor was the dialogue that ensued surrounding the issues on the Lease.

24. On May 25, 2012, Robert Nagy received a telephone call from Hugh Adams, Kevin McElcheran ("McElcheran"), one of the Toronto lawyers for Arctic in the CCAA proceedings, and Richard Morawetz, principal of the Monitor, wherein it was indicated, amongst other things:

(a) McElcheran: Given the Initial Order, there was a stay of proceedings in effect and any Notice of Default (under the Lease) by Desert Mountain was not allowed without a court order;

(b) McElcheran: Outlined the "law" in relation thereto;

(c) McElcheran: There was an issue as to whether the obligations under the Lease would be performed (alleged "likely not"), with prior claims [secured claims] to be paid first;

(d) Robert Nagy: Indicated that the Purchase Option was clear, all he had heard was "veiled threats" [reference to the May 16 Memorandum], he needed a specific proposal from Arctic before he could comment further on any changes to the Purchase Option, and he did not have legal counsel.

(Ex. 7, Cross- Ex. of Robertson)

25. It was never disclosed by Arctic or the Purchaser to Desert Mountain at that time or thereafter that the SISP contained a mandatory term, as indicated by TD aforesaid, that all bidders must assume the purchase of the Arizona Facility at the contracted price [$12,500,000]. **(Ex. 4, Cross-Ex. of Robertson)**

26. Given said call of May 25, 2012, it was clearly known by Arctic and the Monitor that Desert Mountain had no legal counsel and was not prepared to amend the Purchase Option but fully expected a specific proposal to come forward from Arctic. Desert Mountain further expected that the Purchase Option would be fully honoured for the Purchase Option Amount as expressly referenced as payable in the Memorandum, without exception.

27. No proposal was forthcoming thereafter from Arctic nor did Arctic have any other dialogue with Robert Nagy.

28. Totally unbeknownst to Desert Mountain/Robert Nagy at any time, by the deadline of June 4, 2012, Arctic received 3 qualified bids, each of which specifically included, as required, an offer to purchase the Arizona Facility for the Purchase Option Amount of $12,500,000.00. As such, there should have been no issue whatsoever with payment in full of the Purchase Option Amount to Desert Mountain, and Robert Nagy should have been made aware of that fact by Arctic.

(Confidential Appendix of Monitor)

29. The highest and best offer was from the Purchaser through a bid letter (the "Bid Letter") dated June 4, 2012, with various attachments, including a signed Asset Purchase Agreement (the "APA"). **(Ex. 5, Cross-Ex. of Robertson)**

30. The Bid Letter provided for an offer to purchase the world wide assets of Arctic (greater than 50% of Arctic's world wide assets), subject to minor Excluded Assets and Excluded Liabilities (none applicable to Desert Mountain), for $434,500,000.00, expressly including the purchase of the Arizona Facility for $12,500,000.00, pursuant to the mandatory requirement of the SISP and the Purchase Option requirement in the Lease. Said Bid Letter was essentially absolutely unconditional, with all due diligence complete and all required financing fully committed, subject only to court approval and the terms and conditions of the APA. The Bid Letter specifically referred to the intent of the Purchaser to purchase the Arizona Facility and more in particular:

> Page 2
>
> "H.I.G. has executed a Definitive Agreement which provides maximum certainty and flexibility to the Company. Highlights of our executed Definitive Agreement include the following:

> i. We will bear the full cost of the required put option (currently estimated at U.S. $12.5M). H.I.G. will further increase its purchase price if the cost related to the put option is reduced post-signing (please refer to the proposal below for further details). . . .
>
> Page 3
>
> 2. Purchase Price and Form of Consideration. H.I.G. has offered to acquire the assets of Arctic Glacier for an enterprise value of U.S. $434.5M, on a debt-free, cash-free basis. Our purchase price contemplates the following . . .
>
> c) The purchase price includes an amount of U.S. $12.5M representing the price of the Tolleson facility, based on the deemed exercise of the put option set out in Tolleson Lease. Should the property be acquired for a lower price, the amount will be adjusted accordingly with no negative impact to the Vendors, subject to the potential upside described below.
>
> While H.I.G. is prepared to purchase the Tolleson facility for the full put price of U.S. $12.5M, H.I.G. proposes to share in any purchase price reduction negotiated with the Tolleson landlord prior to closing. Specifically, H.I.G. will increase its purchase price by an amount corresponding to 25% of the amount of any reduction in the required payment for the put. For example, if the landlord agrees to reduce the required payment by U.S. $4M (i.e. an U.S $8.5M put option, H.I.G. will increase its purchase price by an additional U.S. $1.M (in addition to bearing 100% of the required payment of U.S. $8.5M). If no savings are negotiated, H.I.G. will bear the full cost of the required payment (U.S. $12.5M). . . . "
>
> (emphasis by underline added)

31. The Bid Letter was never disclosed. It was partially summarized by the Monitor in the Monitor's Confidential Appendix (sealed) dated June 18, 2012, including as to said potential increase in recovery by Arctic (the "kick-back"), totally unbeknownst to Desert Mountain.

32. Clearly, the Purchaser's unequivocal declared intent was to purchase the Arizona Facility based on the Bid Letter and the APA which followed. No other intent was disclosed.

33. Arctic, with the recommendation of the Monitor and approval of a Special Committee of Arctic, accepted the Purchaser' offer with an APA executed June 7, 2012. Arctic brought forward the Sale Approval Motion to the Court on June 21, 2012, seeking approval of the Transaction contemplated in the APA.

34. The APA expressly included the following provision related to Desert Mountain/the Arizona Facility and said Bid Letter:

> 2.05 **Purchase Price**
>
> The purchase price payable to the Vendors for the Assets (such amount being hereinafter referred to as the "**Purchase Price**") will be [$422,000,000] plus the dollar value of
>
> i) the price paid by the Vendors for the purchase of the land and building at 600 South 80th Avenue, Tolleson, Arizona; and
>
> ii) the Assumed Liabilities, subject to adjustment as provided in Section 2.07
>
> 2.06 **Allocation of Purchase Price**
>
> The Purchase Price will be allocated among the Assets as set out in Schedule 2.06, which schedule shall be updated to reflect the adjustments pursuant to Section 2.07. . . .
>
> Schedule 2.06
>
> Purchase Price Allocation
>
> . . .
> Assumptions: . . .
>
> (d) Purchase price allocation assumes an estimated payment of $12,500,000 in connection with the Arizona lease. . . .
>
> **(McMahon Affidavit, Ex. A, p. 17 and Schedule 2.06)**

35. No other relief was sought respecting the Arizona Facility. Since the Purchaser was purchasing the Arizona Facility, logically the Lease would not be included as a lease to be assigned under "Assigned Contracts" nor would any vesting language in regard to real property leases be relevant to the Arizona Facility.

36. Also undisclosed to the Court and Desert Mountain was an undocumented agreement between Arctic and the Purchaser that Desert Mountain was not to be made aware of the terms of the Bid Letter, to allow the Purchaser to negotiate a reduction of the Purchase Option Amount (or amendment of the Lease) right up to the date of Closing, notwithstanding that within the Bid Letter, the Purchaser expressly agreed: "If no savings are negotiated, H.I.G. [the Purchaser] will bear the full cost of the required payment (U.S. $12.5million)". **(Cross –Ex. of Robertson and McMullen)**

37. The Sale Approval Motion was supported by:

(a) the McMahon Affidavit;

(b) the Monitor's Fourth Report;

(c) Arctic's Motion Brief;

(d) the grounds outlined in the Sale Approval Motion, which had appended a proposed form of Sale Approval Order;

(e) the Confidential Appendix to the Monitor's Fourth Report dated June 18, 2012, filed but not publicly disclosed, except to Arctic and the Court, through a sealing order concurrently obtained, but no disclosure of the Bid Letter.

Service

38. Service of the Sale Approval Motion was purported to be effected on Desert Mountain on June 14, 2012 by a deposit in a mailbox in California of a parcel with a stamp thereon ("first class mail") containing the Sale Approval Motion and the McMahon Affidavit. The parcel was simply forwarded by such deposit addressed to Robert Nagy's home residence at suite 1102D – 500 Eau Claire Avenue S.W, Calgary, Alberta, the address referenced at p. 8, s. 12 of the Lease, notwithstanding said section expressly provided, in part:

> "All notices and other communications required or permitted hereunder will be in writing and, unless otherwise provided in this Lease, will be deemed to have been duly given when delivered in person or when dispatched by telegram or electronic facsimile transfer (confirmed in writing by mail simultaneously dispatched) or one business day after having been dispatched by a nationally recognized overnight courier service to the appropriate party at the address specified below . . . "
>
> (emphasis by underline added)
>
> **(Ex. A, Aff. of Robert Nagy sworn October 9, 2012)**

39. Notwithstanding said explicit notice provision, the very close relationship of Desert Mountain/Robert Nagy with Arctic, the fact that Desert Mountain was the only leased property of Arctic singled out in the APA for purchase due to the deemed automatic exercise of the Purchase Option, and that the Arizona Facility was the subject of significant dialogue by Arctic and the Monitor with Robert Nagy throughout May, 2012, as aforesaid, no attempt whatsoever was made by Arctic to send the Sale Approval Motion by personal service, courier, e-mail or facsimile to Desert Mountain or to explain the APA directly to Desert Mountain or Robert Nagy (**CCAA, s. 36(3)(d)(e)**).

40. As indicated, on May 25,2012, Robert Nagy specifically requested a proposal from Arctic. That request was ignored.

41. Desert Mountain did not receive said package until after June 21, 2012, (between June 28 and July 3, 2012, **(Aff. of Robert Nagy sworn November 7, 2012, Cross-Ex. of Robert Nagy)**. Therefore, Desert Mountain was not served with the Sale Approval Motion as required under **Queen's Bench Rule 37.07(1)** (minimum 4 days notice required) or under the **CCAA, s. 11.3(1)**, at any time before June 21, 2012. Service by mail is not an approved form of service under the Queen's Bench Rules.

42. In the case of "first class mail" for international destinations, the U.S. Postal Service specifically provides that such method of mail service contemplates "when time is not a major concern", i.e. the slowest possible service, with likely international receipt by the addressee being 2 weeks or more. Therefore, a mailing on June 14, 2012 in California for destination in Calgary was not capable of reaching its destination prior to June 21, 2012 or prior to said Q.B. Rule deadline. Arctic knew or ought to have known that Desert Mountain could not possibly receive the package prior to the hearing date.

(Ex. "D", Aff. of Robert Nagy sworn November 7, 2012).

43. The submission that service was effected on the date of deposit is not evidence of service in compliance with said statutory requirements.

44. By admission of Robertson, Desert Mountain was not served with the "come-back" notice of hearing for July 12, 2012, due to the alleged prior service, which service did not occur. **(Aff. of Robertson sworn October 31, 2012, para. 11)**

Knowledge of Desert Mountain/Robert Nagy/the Court

45. Robert Nagy became aware generally through word of mouth or Press Releases of Arctic that Arctic had reached an agreement to sell substantially all its assets, but he had no awareness of the hearing date of June 21, 2012 or of the contents of the materials put before the Court on June 21, 2012 (the Sale Approval Motion and McMahon Affidavit reaching his residence between June 28 and July 3, 2012).

46. However, the contents of all materials before the Court and representations made to the Court on June 21, 2012 revealed no intention whatsoever regarding Desert Mountain except a purchase of the Arizona Facility for $12,500,000, with no counter-party to a lease to be prejudiced.

47. Since Robert Nagy had not agreed to any amendment to the Lease and particularly the Purchase Option, he assumed that on any purchase of Arctic's assets, Desert Mountain would be paid in full in accordance with the Purchase Option. He advised Roynat accordingly. In such circumstances, in his mind he had no need to retain a lawyer (his efforts otherwise being fruitless due to conflicts), and, as indicated, on May 25, 2012, he specifically advised the Monitor, and legal counsel for Arctic, including Hugh Adams that he had no lawyer and as such, they were fully aware of same. **(Cross-Ex. of Robert Nagy)**

48. The APA expressly provided pursuant to Articles 2.05 and 2.06 and Schedule 2.06 that the Applicants would purchase the Arizona Facility for $12,500,000.00 (the "Purchase Option Amount") and the Purchaser in turn would purchase the Arizona Facility from the Applicants for the same amount, increasing the Purchase Price under the APA by the same amount to arrive at an aggregate purchase price of

$434,500,000.00 (i.e. a full flow through of monies without any prejudice whatsoever to any creditors of Arctic).

49. To the extent Schedule 2.06 refers to an "estimated" payment of $12,500,000, that logically would refer to the potential for any additional charges by Roynat, as required under the Purchase Option, or, undisclosed to Robert Nagy a negotiated reduction in the Purchase Option Amount.

50. Otherwise, it was expressly represented to the Court on June 21, 2012 that:

(a) Through the APA, the Purchaser will purchase the Arizona Facility for the estimated amount of $12,500,000;

(b) The Purchaser will purchase all assets and liabilities of the Applicants, including all rights and obligations under Assigned Contracts (which included all leases), save and except for Excluded Assets and Excluded Liabilities; (the Lease and the Purchase Option were not an Excluded Asset nor an Excluded Liability under the APA, each as expressly defined therein);

(c) The Purchase Price was sufficient to satisfy all known creditor claims;

(d) All liabilities under Assigned Contracts would be assumed and satisfied by the Purchaser or, to the extent of any monetary default thereunder, paid by either the Applicants, or the Purchaser on or before the Closing of the APA pursuant to CCAA, s. 11.3(4);

(e) The Transaction was good for all stakeholders, no prejudice to any counter-party, with a distinct possibility of funds available to unit holders.

51. The McMahon Affidavit goes to great lengths to explain that the Transaction contemplated by the APA was a "win-win" for all stakeholders, with no prejudice whatsoever to any counter-party to an Assigned Contract.

52. The only transaction related to Desert Mountain in the APA, approved by the Court, was said purchase and sale for the Purchase Option Amount, singled out in Articles 2.05 and 2.06 and Schedule 2.06. No other leased real property was singled out in the APA. No disclosure was made to the Court as to why the Arizona Facility was singled out, particularly the Lease and the Purchase Option therein, including most importantly the deemed automatic exercise thereof triggered by the Disability and/or sale of greater than 50% of world wide operations, as aforesaid.

Public Disclosure

53. The Press Release of June 8, 2012 **(Ex. "C" to the McMahon Affidavit)** publicly announced that Arctic had entered into a binding agreement for the sale of substantially all of its business and assets to the Purchaser, subject to court approval, and provided, in part, that the Purchaser will assume Arctic's current trade payables, its leases and certain contractual obligations, with proceeds sufficient to pay all remaining known creditors.

54. Subsequent Press Releases, before July 17, 2012. repeated the aforementioned. Anyone reading the APA would recognize that it contemplated that Desert Mountain would be paid in full, with no reference whatsoever therein or, in any other materials filed in court, that, as an alternative, the Lease would be assigned and concurrently the Purchase Option vested out, without payment.

55. The Press Release of June 28, 2012 publicly announced the sale price of $434,500,000.00, i.e. the aggregate Purchase Price, (which clearly included the $12,500,000, referenced in Article 2.05 and Schedule 2.06) which was well in excess of the outstanding secured claims. Therefore, in Bob Nagy's mind, that alleviated any of the threats by Hugh Adams in his May 16, 2012 Memorandum or on the May 25, 2012 phone call, that the sale price would not be sufficient to cover secured creditors and Desert Mountain. **(Ex. 15, Cross-Ex. of Robertson)**

Sale Approval Motion – Required Disclosure

56. Through the Sale Approval Motion, the McMahon Affidavit, the Applicants' Motion Brief, the Monitor's Fourth Report, the Sealed Monitor's Confidential Appendix and through oral submissions by legal counsel for Arctic, the Purchaser and the Monitor, it was expressly represented to the Court on June 21, 2012 that:

(a) All owned real property and all leased property, without exception, were essential to the Arctic business being purchased as a going concern and would be acquired by the Purchaser (p. 41);

(b) Arctic was going to all landlords and asking for their consent (p. 25 and 37);

(c) The Purchaser was responsible for all Assumed Liabilities, including all Assigned Contracts and the rights and obligations thereunder, including all leases of real property, or breach thereof. (No differentiation of Assumed Liabilities was disclosed as it may relate to Desert Mountain. The alleged Vendor Disclosure Letter and Working Capital Statement as

to divided responsibilities between Arctic and the Purchaser, were never disclosed to the Court or Desert Mountain) (p. 40 and 42);

(d) Pursuant to s. 11.3(4) of the CCAA, all monetary default under any Assigned Contract must be paid and would be paid, without exception, as a term of and on or before Closing, either by the Purchaser or by the Applicants (pp. 41 - 44);

(e) There was no known prejudice or adverse effect to any counter-party to the Assigned Contracts if the court ordered an assignment of the Assigned Contracts to the Purchaser (pp. 35 – 38);

(f) The Court had jurisdiction to vest title to all Assets free and clear of all Claims as defined in the proposed Sale Approval Order, but such vesting of title would be without any monetary prejudice to any counter-party (pp. 35 – 38);

(g) There were no claims not to be paid under Excluded Liabilities or otherwise known that would affect anyone's rights, if the order as requested was granted, including any rights of counter-parties under Assigned Contracts (pp. 26 – 30);

(h) There were no issues, including any lack of jurisdiction, in granting the order sought and the "last minute" amendments to the proposed Sale Approval Order appended to the Sale Approval Motion (the amendments made at the hearing without any notice to any interested party including Desert Mountain) were merely "more words" and did not represent any

material change to the substance of said draft court order or constitute prejudice to any counter-parties (p. 77 and 86);

(i) That, in response to a specific indication that Justice Spivak was relying heavily on counsel, no disclosure was made of the specific issues surrounding Desert Mountain (p. 85).

(Transcript of proceedings on June 21, 2012)

57. In consequence, whether there was a purchase and sale of the Arizona Property for the Purchase Option Amount, the only transaction contemplated in the APA relating to Desert Mountain, and the only such transaction approved by the Court or, in the alternative, but never disclosed, an assignment of the Lease, it was unequivocally represented to the Court that no counter-party would be prejudiced. Therefore, whether or not expressly known by the Court, Desert Mountain as a counter-party to an Assigned Contract, would not be prejudiced.

58. At least the following material facts were not disclosed by Arctic, the Purchaser or the Monitor to the Court on June 21, 2012 or, in any event, prior to Closing of the approved Transaction (the APA), which occurred on July 27, 2012:

(a) the veiled threats to Desert Mountain and Robert Nagy in the May 16, 2012 Memorandum;

(b) Desert Mountain had expressly indicated that it would not agree to amend the Purchase Option in any respect, including expressly by telephone call on May 25, 2012, at which time Desert Mountain indicated to Arctic and the Monitor it had not retained any legal counsel but was relying entirely

on the Purchase Option; in other words, there were material issues with Desert Mountain;

(c) on May 25, 2012, Desert Mountain requested a specific proposal form Arctic, such request ignored;

(d) in Desert Mountain's view, the Purchase Option was automatically deemed to have been exercised for the Purchase Option Amount, and Desert Mountain was expressly relying upon same for payment;

(e) the decision or agreement of Arctic and/or the Purchaser not to pay the Purchase Option Amount to Desert Mountain on Closing due to the Disability of Robert Nagy, aforesaid, or due to the sale by Arctic of more than 50% of its world wide assets, did cause a monetary default under the Lease in effect prior to or on the Closing of the APA;

(f) the express agreement of Arctic and the Purchaser that Desert Mountain was not to be advised of the contents of the Bid Letter;

(g) critically, the Purchaser from the outset of the Transaction and Arctic, at some point, intended to have an assignment of the Lease and rely on the Vesting Order to vest out or otherwise release or extinguish the Purchase Option, whereby Desert Mountain would not be paid the Purchase Option Amount on Closing, or at any time thereafter, i.e. a material monetary prejudice to be worked upon Desert Mountain;

(Cross-Ex. of McMullen, pp. 24, 28, 30-31, 35-36 and 84)

(h) the Bid Letter of the Purchaser included a "kick-back" to Arctic of 25% of any price reduction from $12,500,000.00 and the Purchaser alone was delegated by Arctic to negotiate with Desert Mountain that reduction (and Desert Mountain expressly was not to be made aware of that arrangement as between Arctic and the Purchaser);

(Ex. 20 and Ex.21, Cross-Ex. of Robertson)

(i) notwithstanding the express representation orally and in paragraph 35 of the McMahon Affidavit that Arctic would contact each landlord to advise them of the Transaction and seek their consent to the assignment of their lease, Arctic had no intention of contacting Desert Mountain or Robert Nagy (or Roynat– express consent required per Deed of Trust) to advise them of or explain the Transaction as it related to the Arizona Facility or to seek their consent to the assignment of the Lease. Arctic delegated that contact entirely to the Purchaser to permit the Purchaser to try to negotiate a reduced price and thereby have Arctic gain a monetary advantage of 25% of the reduction to the prejudice of Desert Mountain; all notwithstanding that Arctic otherwise sought the consent of all other landlords, provided a standard form of consent for said landlords to sign and contacted such landlords to explain the Transaction as it effected them;

(Cross-Ex. of Robertson, para. 35, Aff. of Robertson, Cross-Ex. of McMullen)

(j) there was an undisclosed agreement of Arctic and the Purchaser ultimately reached on or about July 24, 2012 that Arctic was not to buy

the Arizona Facility or otherwise settle with Desert Mountain without the consent of the Purchaser, such consent never given;

(Ex. 6, Cross-Ex. of McMullen)

(k) Desert Mountain would be prejudiced by amendments made to the proposed Sale Approval Order appended to the Sale Approval Motion, including paragraph 4 thereof, to expressly delete the last sentence thereof which otherwise provided, for the protection of at least Desert Mountain as follows:

> "However, notwithstanding anything contained in this Order, nothing shall derogate from the obligations of the Purchaser (or such other person(s) as the Purchaser may direct and the Monitor may agree) to assume the Assumed Liabilities, including the Assumed Accounts Payable, and to perform its obligations under the Assigned Contracts, which Assigned Contracts shall not be or be deemed to be amended or modified by the terms of this Order.",
>
> (emphasis added)

59. The McMahon Affidavit expressly represented:

(l) at paragraph 37 that he was not aware of any prejudice to the counter-parties to Assigned Contracts in assigning such contracts to the Purchaser;

(m) at paragraph 38 that all existing monetary defaults in relation to the Assigned Contracts must and would be paid in accordance with the APA;

however, as it transpired, neither of those representations were accurate with respect to Desert Mountain.

60. Clearly all material facts were not disclosed, all driven by the undisclosed intent of the Purchaser and Arctic to have the Lease assigned without any payment of the Purchase Option Amount.

61. As of June 11, 2012, Atif Zia of TD was clearly of the view and expressed same to Arctic and to its legal counsel that Arctic was not in a position to force an arrangement on Desert Mountain that will "kick-up" a claim against the Estate. As such, any solution had to be consensual with Robert Nagy at the table with the Purchaser.

(Ex. 4, Cross-Ex. of Robertson).

62. The standard Sale Approval Order for use throughout Canada requires specific identification in filed motion materials of specific rights intended to be vested out, extinguished or released. The Sale Approval Motion and supporting materials, in no fashion point out, expressly or impliedly, that the Purchase Option would be vested out, extinguished and released, without any payment thereunder to Desert Mountain. The materials filed in court and representations made to the Court simply disclose a purchase of the Arizona Facility for the full Purchase Option Amount and no other transaction related to Desert Mountain. **(Tab 8, p. 2, footnote 5)**

63. The issues of the requirement for proper notice and separately the requirement to make full and frank disclosure of the actual intentions of the applicant debtor and the purchaser on a sale approval motion were fully canvassed by the Ontario Superior Court of Justice in *Nexient Learning Inc., Re.* **(Tab 3)**

64. Therein, the record (materials) before the court contradicted the undisclosed intention of the applicant debtor and the purchaser to obtain a permanent stay of any attempt by a critical Licensor to terminate its license agreement due to the sale of the business to the purchaser. In addition, notice of the court application and notice of such specific intent were not served on the Licensor. As such, the request for such stay under then s.11(4) of the CCAA seeking an exercise of discretion of the court, was dismissed, permitting the Licensor to terminate the license agreement.

65. Said case is instructive in terms of the overriding obligation on a sale approval motion to make full and frank disclosure of the specific relief sought against an interested party, and insure that notice of the specific relief sought is given to the interested party, where any prejudice may result to that party.

66. The earlier decision of the B.C. Supreme Court in *Doman Industries Ltd.* **(Tab 4)** similarly provides that s. 11(4) of the CCAA, as then framed, does not give the courts power to grant permanent injunctions as a means to permit a debtor company to unilaterally vary the terms of a contract to which it is a party.

67. Due to amendments in 2009, S. 11.3 of the CCAA is now the complete code for dealing with such issues, with no compliance by Arctic or the Purchaser with such code. There is no judicial authority to vest out a deemed exercised Purchase Option, especially on the facts of this case.

<u>Amendment to Sale Approval Order, Notice Requirements</u>

68. Paragraph 4 of the draft Sale Approval Order, appended to the Sale Approval Motion, refers generally to, *inter alia*, vesting out of "puts" or "forced sale provisions

exercisable to the date of Closing", without specific reference to Desert Mountain. However, the materials filed in court make no disclosure whatsoever of the intent on the part of Arctic and the Purchaser to specifically vest out the Purchase Option as an alternative to the purchase of the Arizona Facility, especially where the only transaction with Desert Mountain disclosed therein is the purchase for the Purchase Option Amount in Articles 2.05 and 2.06 and Schedule 2.06.

69. Said references in paragraph 4 cannot apply to Desert Mountain when the APA (the Transaction) did not contemplate an assignment of the Lease, nor was there any notice given of any intention to specifically vest out the Purchase Option.

70. In addition to the requirements under the **CCAA** for required consultation with interested parties **s. 36(3)(d) and (e),** and notice, **s. 11.3(1), Queen's Bench Rule 39.01(6)** expressly provides that:

> "Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so in itself is sufficient ground for setting aside any order obtained on the motion or application."

71. Given the court supervised public process, and the failure of Arctic to serve the Sale Approval Motion on Desert Mountain before June 21, 2012, as required, and given the absence of any notice of the unilateral undisclosed intent to assign the Lease or to amend the draft Sale Approval Order, the motion must be treated as an *ex parte* motion, with a mandatory requirement for full and frank disclosure to the Court of all material facts. However, said material facts and said undisclosed alternative intention of Arctic and the Purchaser were left out of the court materials, both at the hearing on June 21,

2012, and subsequently through to and beyond the date of the Closing, in flagrant breach of said Rule.

72. No disclosure whatsoever was made in the materials of any intent of Arctic or the Purchaser in respect to Desert Mountain other than the purchase of the Arizona Facility for the Purchase Option Amount.

CCAA Requirement Re: Leases

73. As indicated, s. 11.3 of the CCAA constitutes a complete code regarding any proposed assignment of leases. Paragraphs 2(b) to (d) at p. 7 hereof outline the failure of Arctic to comply with ss. 11.3(1) to (3), regarding notice, the nature of the Lease and the appropriateness of an assignment.

74. S. 11.3(4) of the CCAA expressly provides:

> The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.
>
> (emphasis added)

75. To the extent an assignment of the Lease was intended, although not disclosed, the requirement to pay the Purchase Option Amount in all respects constitutes a monetary default under the Lease, due to the deemed automatic exercise of the Purchase Option aforesaid, occurring February 20, 2012 for the Disability and June 21, 2012, for the Sale Approval Order, known to Arctic, the Purchaser and the Monitor. It is

not an exception under s. 11.3(4). The Memorandum of Hugh Adams clearly sets out that knowledge as of May 16, 2012, but otherwise was known to all parties.

76. The Lease was the only lease of Arctic that contained a deemed automatic exercise of a Purchase Option. The Lease was the only lease singled out in the APA and it was only singled out in Articles 2.05, 2.06 and Appendix 2.06 to indicate that, on approval by the Court, there would be a purchase of the Arizona Facility for $12,500,000.00, with no prejudice to any creditors arising therefrom due to the complete flow-through of monies. No other intent in respect to the Arizona Facility was expressed in the APA or could be implied on a fair reading thereof.

77. Arctic did not provide a form of consent to assignment to Desert Mountain or Roynat or contact them to advise of the Transaction and seek their consent. No assignment was contemplated in the Bid Letter or the APA, just a purchase and sale.

78. All other landlords were contacted by Arctic and provided with forms of consent for assignment.

79. On June 21, 2012, the Court approved the Transaction at a sale price of $434,500,000.00, expressly including purchase of the Arizona Facility for $12,500,000.00. The Court was not made aware of all material facts, including the express intent to keep Desert Mountain in the dark, as aforementioned, including a unilateral switch to an assignment.

80. By all public records, Desert Mountain and Robert Nagy were lead to believe that the Arizona Facility would be purchased for the Purchase Option Amount. They only discovered on July 19, 2012, after the U.S. court order, through a short conversation

with McMullen, that his lawyers said to him in effect that the Purchaser did not have to buy the Arizona Facility or change the Lease. McMullen had received a written proposal from Robert Nagy on June 22, 2012 in lieu of an outright purchase. McMullen replied by email on the same day that he would get back to him, but then never replied until July 19, 2012.

(Ex. 10, Cross-Ex. of Robert Nagy, Ex. 3, Cross-Ex of McMullen)

81. Such proposal of June 22, 2012 was only made by Robert Nagy to find a different method of dealing with the Lease, including therein a $4,000,000 pay down and a new 14 year lease, given the dialogue of May with Arctic, but without any knowledge that the Bid Letter unequivocally confirmed the intent to buy the Arizona Facility for $12,500,000.00. There was no need for Robert Nagy to negotiate, if he had been properly advised of the successful Bid Letter.

82. That short response of July 19 by McMullen to Robert Nagy, led to a demand letter sent on behalf of Desert Mountain by U.S. counsel by email/facsimile on July 23, 2012, to Hugh Adams, Richard Morawetz of the Monitor, Brett Wiener and McMullen of the Purchaser and Jeffrey Singer and Martin Langois of Stikeman Elliott LLP, lawyers for the Purchaser, demanding payment of the Purchase Option Amount prior to the Closing of the APA. Said U.S. counsel was retained by Robert Nagy in response to the July 19 McMullen call.

(Ex. "G", Aff. of Robert Nagy sworn November 7, 2012)

83. Arctic and the Purchaser ignored said demand and proceeded to a Closing on July 27, 2012, without payment of the Purchase Option Amount and without any

disclosure to the Court of said demand and that the Purchase Option was not being paid, and would not be paid.

84. Furthermore, without disclosure, on July 23, 2012, the Purchaser issued an ultimatum to Arctic that unless the purchase price was reduced by $13,800,000 through amendments, without consideration (reduced obligations of the Purchaser) and Arctic otherwise agreed that it would not buy Arizona Facility nor settle with Robert Nagy, the Purchaser would walk from the Transaction.

(Ex. 17, Cross-Ex. of Robertson, p. 193, Ex. 6, Cross-Ex. of McMullen, p. 76)

85. A letter was sent by email by the Monitor's counsel to the Court on July 24, 2012, indicating, *inter alia*, that "the Lease will be assumed by the Purchaser on Closing meaning that the $12,500,000.00 payment referred to in the APA will not be paid at this time as contemplated by the APA, and that the assumption of the Arizona Lease has no economic effect on the Estate as the corresponding $12,500,000.00 liability will not be realized prior to Closing". However, said letter was not made public nor made known to Desert Mountain nor any explanation given by the Monitor to the Court of said demand, and all material facts related thereto.

(Ex. H, Aff. of Robert Nagy sworn November 7, 2012)

86. In fact, the failure to pay the Purchase Option Amount to Desert Mountain had a material prejudicial effect on the Arctic Estate in that:

(a) Desert Mountain has engaged the Estate in this litigation seeking immediate payment of the Purchase Option Amount (the very concern raised by Atif Zia of TD at paragraph 61 hereof) and has filed a notice of

appeal in the U.S. Court, seeking, as necessary, to overturn the U.S. order as it relates to Desert Mountain;

Desert Mountain has filed a claim in the Claims Process seeking payment of the Purchase Option Amount based upon, *inter alia*, breach of contract, inducing breach of contract, wrongful interference with economic relations and conspiracy. **(Ex. 13 and 14 Cross-Ex. of Robertson)**

(b) To the extent that Arctic alone is required to pay the Purchase Option Amount, as alleged by McMullen (the Purchaser), the Estate and the creditors of the Estate have suffered a prejudice equal to the Purchase Option Amount, without any contribution by the Purchaser, notwithstanding the complete flow through and no prejudice to creditors if the APA was followed as expressly prescribed at Articles 2.05 and 2.06 and Schedule 2.06.

87. Desert Mountain, Robert Nagy and RBN Investments Inc. have been materially prejudiced by the non-disclosure, misrepresentations and actions of Arctic and the Purchaser, and in particular:

(a) Desert Mountain has not received payment of the Purchase Option Amount;

(b) To the extent an assignment of the Lease was otherwise available to Arctic and the Purchaser, which is not admitted, but expressly denied, the monetary default under the Purchase Option was not paid on or before Closing pursuant to the Disability and Change of Control provisions under

the Purchase Option, the deemed automatic exercise thereof prior to the Closing of the APA, and s. 11.3(4) of the CCAA and paragraph 9 of the Sale Approval Order;

(c) The Roynat Capital financing, currently outstanding approximately $8,500,000.00, has been in default since maturity date of June 15, 2012, with extended dates for payment granted by Roynat in good faith in favour of Desert Mountain to accommodate the CCAA proceedings, but only to October 15, 2012, putting Desert Mountain in continuing jeopardy of foreclosure proceedings/litigation and putting Robert Nagy and RBN Investments Inc. in jeopardy under their guarantees;

(d) Desert Mountain has been forced to incur significant legal costs to enforce the Purchase Option, all notwithstanding that on June 21, 2012, the Court was assured generally that all monetary default under all Assigned Contracts would be paid, without exception and no counter-party would be prejudiced;

(e) The major competitor of the Arctic business is Reddy Ice, who has a plant, in Phoenix, Arizona. On expiry of the Lease in May, 2015, if the assignment of the Lease is otherwise allowed to stand, as assigned, without the payment of the Purchase Option Amount, that will return the property to Desert Mountain but without a ready or willing buyer;

(f) The Purchaser, through McMullen, attempted to buy the Roynat financing to better leverage their position against Desert Mountain.

(Aff. of Robert Nagy sworn October 9, 2012, para. 32)

88. Arctic and the Purchaser knew or ought to have known throughout of said prejudice and had an ongoing obligation to make full disclosure to Desert Mountain and to the Court of said prejudice, if there was any intention not to pay the Purchase Option Amount on or before the Closing of the APA, but failed to do so.

89. Hugh Adams, as original legal counsel for Desert Mountain, Robert Nagy and RBN Investments Inc. on the acquisition of the Arizona Facility, the Roynat financing and the Lease, owed an express or implied ongoing duty of care to Desert Mountain to warn it of any intent to change the Transaction from a purchase of the Arizona Facility to an assignment of the Lease and the prejudicial ramifications thereof.

Relief

90. Desert Mountain does not seek to unravel the entire Transaction, as alleged by Arctic and the Purchaser. It simply asks the Court to enforce the APA as approved by it on June 21, 2012, including the agreed purchase of the Arizona Facility for the Purchase Option Amount, as provided for at Articles 2.05 and 2.06, and Schedule 2.06 of the APA, or the payment of the monetary default, in the same amount, as was assured to the Court unequivocally for any Assigned Contracts and monetary default, albeit only a purchase of the Arizona Facility was approved.

91. Pursuant to the Bid Letter, the Purchaser arranged for financing of $454,500,000.00 to complete the purchase at an aggregate purchase price of $434,500,000.00, including the Arizona Facility for $12,500,000.00 and $20,000,000.00

was set aside for expenses. In consequence, if required to pay the Purchase Option Amount, the Purchaser suffers no prejudice whatsoever, based on its original intent in the Bid Letter and the APA, and Arctic and its creditors suffer no prejudice if the Purchaser is obliged to carry through with that intent and pay the Purchase Option Amount, a complete flow through. **(Ex. 1, Cross-Ex. of McMullen)**

92. On Closing, the Purchaser only paid $413,500,000.00 for the assets due to:

(a) The unilateral undisclosed deletion of the purchase price of $12,500,000.00 for the Arizona Facility, without Court approval or notice to the Court or Desert Mountain of all material facts surrounding same;

(b) A reduction of aggregate $13,800,000.00 from the agreed purchase price of $422,000,000 in the APA, exclusive of the Purchase Option Amount, without any consideration whatsoever provided to Arctic beyond threats by the Purchaser, undisclosed, to walk away from the unconditional approved APA unless such concessions (reduction in the purchase price and agreement re: Desert Mountain) were granted; representing:

(i) the first $5,000,000.00 in expenses incurred by the Purchaser, such expenses otherwise payable by the Purchaser pursuant to the APA;

(ii) transfer fees of $3,800,000 to be paid by Arctic on transfer of all real property, otherwise agreed in the APA to be paid by the Purchaser;

(iii) entitlement to the Purchaser to $5,000,000.00 of the first working capital in excess over estimates, otherwise agreed in the APA to be paid entirely to Arctic.

(Cross-Ex. of Robertson p. 193, and McMullen p. 76)

93. In fact, there were no issues (obstacles) raised by the Purchaser to the Closing of the Transaction other than its refusal to purchase the Arizona Facility or consent to Arctic making that purchase, as required, and its demand for said reductions on price, none of which were terms of the APA nor gave rise to a unilateral contractual right to entitlement.

94. The sale of the Arctic assets was a court-approved public process, not a private process. Notwithstanding, the Purchaser treated the Transaction throughout as if it was a private transaction, to purchase and obtain possession assets of Arctic at a reduced price, to the clear prejudice of Desert Mountain and the creditors and unit-holders of Arctic.

95. In summary:

(a) Pursuant to the court approved APA, without any disclosed alternative intent as it related to Desert Mountain, the Purchaser agreed to purchase the Arizona Facility, and close the Transaction accordingly, and therefore is bound to pay the Purchase Option Amount;

(b) Without any notice to the Court or to Desert Mountain of the intent to assign the Lease and extinguish the Purchase Option, neither Arctic or the Purchaser were entitled to an assignment of the Lease;

(c) If, in the alternative, the Lease is to be assigned (the Purchaser having taken possession without the consent of Desert Mountain or Roynat), it is strictly subject to the Purchase Option and the Purchaser and Arctic are bound jointly and severally to pay the Purchase Option Amount, deemed to have been automatically exercised on February 20, 2012 and June 21, 2012, pursuant to the CCAA s. 11.3, (all as outlined herein) and the Sale Approval Order; otherwise, the Lease is not assignable;

(d) Given the clear admission by McMullen throughout his cross-examination that it always was the intention of the Purchaser just to take an assignment of the Lease and vest out the Purchase Option, without payment, but no disclosure thereof, its ultimatum aforesaid, and all other actions, the Purchaser should be found firstly fully responsible for immediate payment of the Purchase Option Amount;

(e) To the extent it otherwise cannot be determined at this time which of the Purchaser or Arctic is obliged to pay said amount, notwithstanding their undisclosed intentions and actions, said Purchase Option Amount must be paid, in any event. They can take their own proceedings hereafter, against each other, to resolve that issue, created by their own conduct, all as aforesaid. Arctic and the Purchaser knew or ought to have known of that consequence.

96. Given the actions of Arctic and the Purchaser herein outlined, including the blatant non-disclosure and/or misrepresentations made, or allowed to stand, Desert

Mountain is entitled to full indemnity, including solicitor and client costs against the Purchaser and Arctic **(Tabs 5, 6, and 7, Mb C.A.)**.

All of which is respectfully submitted.

DATED at Winnipeg this 13th day of February, 2013.

FILLMORE RILEY LLP

Per: _____
D. Wayne Leslie
Lawyers for Desert Mountain Ice, LLC

1

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Marginal note:Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (*a*) an agreement entered into on or after the day on which proceedings commence under this Act;
- (*b*) an eligible financial contract; or
- (*c*) a collective agreement.

Marginal note:Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (*a*) whether the monitor approved the proposed assignment;
- (*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.

Marginal note:Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Marginal note:Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124;
2005, c. 47, s. 128;
2007, c. 29, s. 107, c. 36, ss. 65, 112.

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

OBLIGATIONS AND PROHIBITIONS

Restriction on disposition of business assets

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

Marginal note:Notice to creditors

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

Marginal note:Factors to be considered

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

- (*a*) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (*b*) whether the monitor approved the process leading to the proposed sale or disposition;
- (*c*) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (*d*) the extent to which the creditors were consulted;
- (*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (*f*) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Marginal note:Additional factors — related persons

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

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

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

Marginal note:Related persons

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

- (*a*) a director or officer of the company;

- (*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

- (*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

Marginal note:Assets may be disposed of free and clear

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

Marginal note:Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131;
2007, c. 36, s. 78.

PREFERENCES AND TRANSFERS AT UNDERVALUE

Marginal note:Application of sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Marginal note:Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

Manitoba Regulation 553/88

Court of Queen's Bench Rules

PLACE AND DATE OF HEARING

Place

37.05(1) The moving party shall name in the notice of motion as the place of hearing,

(a) where the court file is located in a judicial centre, that judicial centre; or

(b) where the court file is located in an administrative centre which is not a judicial centre, the judicial centre nearest that administrative centre.

Hearing date

37.05(2) The moving party shall name in the notice of motion as the date of hearing

(a) where the motion is to a master or other officer, such date as may be obtained from the master or other officer.

(b) where the motion is to a judge, and

(i) is not to be contested, or

(ii) the moving party is uncertain as to whether it will be contested, or

(iii) is to be contested and is urgent,

any date on which the court sits to hear motions;

(c) where the motion is to a judge and is to be contested, such date as may be obtained from the registrar.

Manitoba Regulation 553/88

Court of Queen's Bench Rules

TIME FOR SERVICE

Where to master or other officer or uncontested

37.07(1) Where a motion is made on notice in any of the cases mentioned in clauses 37.05(2)(a) and (b), the notice of motion shall be served at least four days before the date on which the motion is to be heard.

Manitoba Regulation 553/88

Court of Queen's Bench Rules

RULE 39

EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

Generally

39.01(1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise.

Affidavits in support

39.01(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served within the time for service of the motion or application, and shall be filed in the court office where the motion or application is to be heard not later than 2 p.m. on the day before the hearing.

Affidavits in opposition

39.01(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed in the court office where the motion or application is to be heard not later than 2 p.m. on the day before the hearing.

Contents — motions

39.01(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

Contents — applications

39.01(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

Full and fair disclosure on motion or application without notice

39.01(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

Affidavits on intended proceedings

39.01(7) An affidavit for use on an intended application or preliminary motion may be sworn before the application or preliminary motion is filed.

Manitoba Regulation 553/88

Court of Queen's Bench Rules

AMENDING, SETTING ASIDE OR VARYING ORDER

Amending

59.06(1) An order that,

(a) contains an error arising from an accidental slip or omission; or

(b) requires amendment in any particular on which the court did not adjudicate;

may be amended on a motion in the proceeding.

Setting aside or varying

59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain relief other than that originally awarded;

may make a motion in the proceeding for the relief claimed.

3

[Indexed as: **Nexient Learning Inc., 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 Nexient Learning Inc. and Nexient Learning Canada Inc.

Ontario Superior Court of Justice

H.J Wilton-Siegel J.

Heard: November 30, 2009

Judgment: December 23, 2009

Docket: CV-09-8257-00CL

George Benchetrit for Nexient Learning Inc., Nexient Learning Canada Inc.
Margaret Sims, Arthi Sambasivan for Global Knowledge Network (Canada) Inc.
Catherine Francis, David T. Ullman, Melissa McCready for ESI International Inc.
Lynne O'Brien for Monitor

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights — Debtor obtained certain materials from licensor pursuant to license agreement — License agreement granted debtor exclusive and perpetual use of materials on royalty-free basis subject to certain conditions — Agreement was not assignable on stand-alone basis but could be assigned in context of major changes in ownership — Licensor was entitled to terminate agreement on basis of insolvency of debtor — Debtor successfully applied for protection under Companies' Creditors Arrangement Act ("CCAA") — Licensor unsuccessfully tried to terminate license agreement — All of debtor's assets were sold to proposed assignee — License agreement was not listed among debtor's assets but assignee wished to assume it — Debtor brought motion for order permanently staying licensor's right of termination and authorizing assignment of license agreement to proposed assignee — Motion dismissed — Court had authority to grant requested relief but only when doing so was important to reorganization process — Such relief had only been granted when sale of debtor's assets could not otherwise proceed — Underlying considerations included purpose and spirit of CCAA proceedings and effect on parties' contractual rights — In this case, asset sale had proceeded without regard to whether agreement would be assigned or not and without notice to licensor — Requested relief would currently have no impact on CCAA proceedings — Another factor was proposed assignee's decision not to assume companion agreement that debtor had with licensor — Granting requested relief at this point would amount to unfair interference with licensor's contractual rights.

Cases considered by *H.J Wilton-Siegel J.*:

Playdium Entertainment Corp., Re (2001), [2001] O.T.C. 828, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309, [2001] O.J. No. 4459 (Ont. S.C.J. [Commercial List]) — followed

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530, [1993] B.C.J. No. 42 (B.C. S.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered
s. 11(4) — referred to
s. 11(4)(c) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01(6) — referred to

MOTION by debtor for order permanently staying licensor's right to terminate license agreement and authorizing assignment of license agreement to proposed assignee.

H.J Wilton-Siegel J.:

1 On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination
>
> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> . . . . .
>
> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.

> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings under the CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by

the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

> **2.7 Purchaser's Rights to Exclude**
>
> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor

and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge

on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have com-

menced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?
2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (Ont. S.C.J. [Commercial List]).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Woodward's Ltd., Re*, [1993] B.C.J. No. 42 (B.C. S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the

same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the In-

solvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium*illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers – the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction – in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets – it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on

the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is

nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowl-

edge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms

of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Motion dismissed.

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

PART II - JURISDICTION OF COURTS

Powers of court

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

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

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

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

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Notice of orders

(5) Except as otherwise ordered by the court, the monitor appointed under section 11.7 shall send a copy of any order made under subsection (3), within ten days after the order is made, to every known creditor who has a claim against the company of more than two hundred and fifty dollars.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

- (*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Section 11 as it read before amendments made on September 18, 2009

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2003 CarswellBC 538, 2003 BCSC 376, 41 C.B.R. (4th) 29, 14 B.C.L.R. (4th) 153

Doman Industries Ltd., Re

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

AND IN THE MATTER OF THE COMPANY ACT R.S.B.C. 1996, c. 62

AND IN THE MATTER OF THE CANADA BUSINESS CORPORATIONS ACT R.S.C. 1985, c. C-44

AND IN THE MATTER OF THE PARTNERSHIP ACT R.S.B.C. 1996, c. 348

AND IN THE MATTER OF DOMAN INDUSTRIES LIMITED, ALPINE PROJECTS LIMITED, DIAMOND LUMBER SALES LIMITED, DOMAN FOREST PRODUCTS LIMITED, DOMAN'S FREIGHTWAYS LTD., DOMAN HOLDINGS LIMITED, DOMAN INVESTMENTS LIMITED, DOMAN LOG SUPPLY LTD., DOMAN — WESTERN LUMBER LTD., EACOM TIMBER SALES LTD., WESTERN FOREST PRODUCTS LIMITED, WESTERN PULP INC., WESTERN PULP LIMITED PARTNERSHIP, and QUATSINO NAVIGATION COMPANY LIMITED (PETITIONERS)

British Columbia Supreme Court [In Chambers]

Tysoe J.

Heard: March 7, 2003
Judgment: March 7, 2003
Docket: Vancouver L023489

Counsel: M.A. Fitch, Q.C., S. Martin, R. Millar for Petitioners

G. Morawetz, R. Chadwick, J.J.L. Hunter, Q.C. for Ad Hoc Committee of Senior Secured Noteholders

J.F. Dixon for Wells, Fargo, National Association

G.K. Macintosh, Q.C., R.P. Sloman for Herb Doman

R.D. Leong for Attorney General of Canada

W.C. Kaplan, Q.C., P.L. Rubin for CIT Business Credit Canada Inc.

J.I. McLean for Monitor, KPMG Inc.

D.I. Knowles, Q.C., M. Buttery, I. Nordholm for Brascan Financial, Merrill Lynch, Oppenheimer Funds

D.J. Hatter, R. Butler for Her Majesty the Queen in Right of British Columbia

P. Macdonald, G. Gehlen for Toronto Dominion Asset Management Inc., TD Securities Inc., Tordom Co.

K. Zimmer for Petro-Canada

W. Skelly for Pulp, Paper & Woodworkers of Canada, Locals 3 & 8

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Section 11(4) of Companies' Creditors Arrangement Act does not authorize courts to stay proceedings in respect of defaults or breaches which occur after implementation of reorganization or restructuring plan, even if they arise as result of implementation of plan — Words "staying", "restraining" and "prohibiting" in s. 11(4) of Act are not intended to relieve debtor company from performance of affirmative obligations which arise subsequent to implementation of plan of compromise or arrangement — Section 11(4) of Act does not give courts power to grant permanent injunctions as means to permit debtor company to unilaterally and prospectively vary terms of contract to which it is party.

Cases considered by *Tysoe J.*:

Dylex Ltd., Re, 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Menegon v. Philip Services Corp., 1999 CarswellOnt 3240, 11 C.B.R. (4th) 262, 39 C.P.C. (4th) 287 (Ont. S.C.J. [Commercial List]) — referred to

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., 63 Alta. L.R. (2d) 361, 92 A.R. 81, 72 C.B.R. (N.S.) 1, 1988 CarswellAlta 318 (Alta. Q.B.) — considered

Playdium Entertainment Corp., Re, 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — distinguished

Playdium Entertainment Corp., Re, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — followed

Smoky River Coal Ltd., Re, 1999 CarswellAlta 491, 175 D.L.R. (4th) 703, 237 A.R. 326, 197 W.A.C. 326, 71 Alta. L.R. (3d) 1, [1999] 11 W.W.R. 734, 12 C.B.R. (4th) 94, 1999 ABCA 179 (Alta. C.A.) — considered

T. Eaton Co., Re, 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — considered

Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331, 1992 CarswellBC 508 (B.C. S.C.) — referred to

Woodward's Ltd., Re, 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — con-

sidered

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

s. 11.2 [en. 1997, c. 12, s. 124] — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

Words and phrases considered:

staying, restraining and prohibiting

[The words "staying", "restraining" and "prohibiting" in s. 11(4) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 are] not intended . . . to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement.

APPLICATION by debtor group of companies for order authorizing calling of creditor meetings to consider plan of arrangement; APPLICATION by group of secured creditors for order allowing them to vote on plan, order authorizing them to file own plan and other orders relating to invalidity of plan.

***Tysoe J.*:**

1 There are two competing motions before the Court in these proceedings under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"). The first is a motion of the Petitioners (the "Doman Group") for an order authorizing the calling of creditor meetings to consider a plan of compromise or arrangement prepared by the Doman Group (the "Reorganization Plan" or the "Plan"). The second motion is an application by a group of secured creditors called the Ad Hoc Committee of Senior Secured Noteholders (the "Senior Secured Noteholders Committee") for numerous orders, including orders relating to the invalidity of the Reorganization Plan, allowing the Senior Secured Noteholders to vote on the Plan and authorizing the Senior Secured Noteholders Committee to file its own secured creditor Plan.

2 One of the arguments which the Senior Secured Noteholders Committee wished to advance related to the constitutionality of the Court varying the terms of a contract in the absence of enabling provincial legislation. The Senior Secured Noteholders Committee applied to adjourn all of the applications so that the necessary notice for constitutional questions to the Attorneys General of British Columbia and Canada could expire. I refused the adjournment on the basis that the constitutional question can be argued upon the expiry of the notice periods if it is still necessary to do so. Accordingly, my rulings at this stage are subject to the constitutional challenge by

the Senior Secured Noteholders Committee and nothing I say in these Reasons for Judgment should be construed as a determination of the constitutional validity of such rulings.

3 The Doman Group has the following four principal types of creditors:

(a) the Senior Secured Noteholders which are owed US$160 million and who hold security over most, but not all, of the fixed assets of the Doman Group;

(b) the Unsecured Noteholders which are owed US$513 million;

(c) the lender which provides the Doman Group with an operating line of credit and which holds security against its current assets; and

(d) unsecured trade creditors which are owed in the range of $20 to $25 million.

4 The Reorganization Plan seeks to compromise only the indebtedness of the Unsecured Noteholders and the unsecured trade creditors. It is proposed that the unsecured trade creditors will be paid in full up to an aggregate ceiling or cap amount of $23.5 million. The Reorganization Plan provides that the Unsecured Noteholders are to receive US$112,860,000 Junior Secured Notes plus 85% of the shares in the Doman Group (with the existing shareholders retaining the remaining 15% of the shares). The Junior Secured Notes are to be secured in second position against the assets subject to the security of the Senior Secured Noteholders.

5 The Senior Secured Notes were issued pursuant to a Trust Indenture dated as of June 18, 1999 (the "Trust Indenture"). The principal amount of the Senior Secured Notes is due on July 1, 2004. The Doman Group is in default of the payment of the interest due on the Senior Secured Notes but it is intended that the overdue interest be paid upon implementation of the Reorganization Plan. The Trust Indenture has the usual types of events of default, including the commencement of proceedings under the *CCAA*, non-payment of principal or interest on indebtedness owed by the Doman Group to the Senior Secured Noteholders or to other parties and the failure to remedy a breach of any of the provisions of the Trust Indenture within 30 days after notice of the breach has been given to the Doman Group. It also has the usual provision enabling the Trustee under the Trust Indenture or a specified percentage of the holders of the Senior Secured Notes to accelerate payment of the indebtedness upon the occurrence of an event of default and to thereby make all monies owing on the notes to be immediately due and payable.

6 Sections 4.13 and 4.16 of the Trust Indenture are also relevant to the present applications. Section 4.13 reads as follows:

(a) The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired, or any income or profits therefrom or assign or convey any right to receive income therefrom, except Permitted Liens (provided that Liens on Note Collateral or any portion thereof shall be governed by clause (b) of this Section 4.13) unless (i) in the case of Liens securing Indebtedness which is subordinated to the Notes and the Guarantees, the Notes and the Guarantees are secured by a Lien on such property, assets, income, profits or rights that is senior in priority to such Liens and (ii) in all other cases, the Notes and the Guarantees are equally and ratably secured.

(b) The Company shall not, and shall not permit of its Restricted Subsidiaries to, directly or indirectly, create, incur, assume or suffer to exist any Lien on any property or asset now owned or hereafter acquired that constitutes Note Collateral, any income or profits from any Note Collateral or to assign or convey any right to receive income from any Note Collateral, except for Permitted Note Collateral Liens.

Section 4.16 reads, in part, as follows:

Upon the occurrence of a Change of Control, each Holder of Notes shall have the right to require the Company to repurchase all or any part (equal to U.S. $1,000 or an integral multiple thereof) of such Holder's Notes pursuant to the offer described below (the "Change of Control offer") at an offer price in cash equal to 101% of the aggregate principal amount thereof plus accrued and unpaid interest, if any, and Liquidated Damages, if any, to the date of purchase (the "Change of Control Payment"). Within 10 days following any Change of Control, the Company shall mail a notice to each Holder stating: (1) that the Change of Control offer is being made pursuant to the covenant entitled "Change of Control" and that all Notes tendered will be accepted for payment; (2) the purchase price and the purchase date, which will be no earlier than 30 days nor later than 40 days from the date such notice is mailed and which shall be the same date as the Change of Control Payment Date with respect to the 1994 Notes and the 1997 Notes (the "Change of Control Payment Date"); ...

On the Change of Control Payment Date, the Company shall, to the extent lawful, (1) accept for payment Notes or portions thereof tendered pursuant to the Change of Control Offer, (2) deposit with the Paying Agent an amount equal to the Change of Control Payment in respect of all Notes or portions thereof so tendered and (3) deliver or cause to be delivered to the Trustee the Notes so accepted ...

7 The Reorganization Plan does not seek to compromise the indebtedness owed to the Senior Secured Noteholders. However, the Senior Secured Noteholders maintain that they are affected or prejudiced by the Reorganization Plan. They point to sections 4.12, 6.2 and 6.3 of the Reorganization Plan, the relevant portions of which read as follows:

4.12 Waiver of Defaults and Permanent Injunction

From and after the Effective Date:

(a) all Creditors and other Persons (including Unaffected Creditors) shall be deemed to have waived any and all defaults of the Doman Entities then existing or previously committed by the Doman Entities or caused by the Doman Entities, or non-compliance with any covenant, warranty, representation, term, provision, condition or obligation, express or implied, in any contract, credit document, agreement for sale, lease or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Doman Entities, including a default under a covenant relating to any other affiliated or subsidiary company of Doman other than the Doman Entities, and any and all notices of default and demands for payment under any instrument, including any guarantee, shall be deemed to have been rescinded;

(b) a permanent injunction shall be pronounced on the terms of the Final Order against Creditors and all other Persons (including Unaffected Creditors) having contractual relationships with any of the Doman Entities with respect to the exercise of any right or remedy contained in the instruments evidencing such

contractual relationships or at law generally, which might otherwise be available to such Creditors or other Persons as a result of the filing of the CCAA Proceedings, the content of the Plan, implementation of the Plan, any action taken by the Doman Entities or any third party pursuant to the Plan or the Final Order either before or after the Plan Implementation Date, or any other matter whatsoever relating to the CCAA Proceedings, the Plan, or the transactions contemplated by the Plan; and

(c) the Doman Entities may in all respects carry on as if the defaults, non-compliance, rights and remedies referred to in this section 4.12 had not occurred.

6.2 Effect of Final Order:

In addition to sanctioning the Plan, the Final Order shall, among other things:

. . . . .

(f) confirm that all executory contracts, security agreements and other contractual relationships to which the Doman Entities are parties are in full force and effect notwithstanding the CCAA Proceeding or this Plan and its attendant compromises, and that no Person party to such an executory contract, security agreement or other contractual relationship shall be entitled to terminate or repudiate its obligation under such contract or agreement, or to the benefit of any right or remedy, by reason of the commencement of the CCAA Proceeding or the content of the Plan, the Change of control of Doman resulting from the Plan, the compromises extended under the Plan, the issuance of the Junior Secured Notes, or any other matter contemplated under the Plan or the Final Order; and

(g) confirm and give effect to the waivers, permanent injunctions and other provisions contemplated by section 4.12 of the Plan.

6.3 Conditions Precedent to Implementation of Plan:

The implementation of this Plan shall be conditional upon the fulfilment of the following conditions:

(a) Court Approval

Pronouncement of the Final Order by the Court on the terms contemplated by Section 6.2 and otherwise acceptable to the Doman Entities.

The term "Unaffected Creditors" used in Section 4.12 includes the Senior Secured Noteholders.

8 The application of the Doman Group is relatively limited in scope because it simply seeks authorization to hold creditor meetings to consider the Reorganization Plan. However, it is common ground that I should not authorize the holding of the creditor meetings if the Reorganization Plan cannot be sanctioned by the Court following the holding of the creditor meetings or if the implementation of the Reorganization Plan is contingent on the Court granting an order which it has no jurisdiction to make or would not otherwise make.

9 Counsel for the Doman Group submitted that the sole issue is whether the Court has the jurisdiction to grant a stay under s. 11(4) of the *CCAA* in the form of the permanent injunction specified under clause (b) of the Section 4.12 of the Reorganization Plan. I do not agree. In particular, clause (a) of Section 4.12 purports to bind

Unaffected Creditors, which include the Senior Secured Noteholders, by deeming them to have waived all defaults under instruments between them and the Doman Group. I agree with the counsel for the Senior Secured Noteholders Committee that creditors of debtor company under the *CCAA* cannot be bound by the provisions of a plan of compromise or arrangement if they have not been given the opportunity to vote on it: see *Menegon v. Philip Services Corp.*, [1999] O.J. No. 4080 (Ont. S.C.J. [Commercial List]) at para. 38. It would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan when I know that this Court would refuse to sanction it on the basis that it purports to bind parties who were not given the opportunity to vote on it.

10 However, my conclusion in this regard does not mean that I should accede to the request of the Senior Secured Noteholders Committee for the right to vote on the Reorganization Plan. In view of the submission made by the counsel for the Doman Group that the Plan was not intended to affect the rights of the Senior Secured Noteholders, I believe that the Doman Group should first be given the opportunity to propose a revised Reorganization Plan which does not include reference to Unaffected Creditors in clause (a) of Section 4.12 or any other provision which purports to bind parties who are not given the opportunity to vote on the Plan.

11 I next turn my attention to clause (b) of Section 4.12, which is the provision upon which I believe counsel for the Doman Group is relying to prevent Senior Secured Noteholders from acting on their security following the implementation of the Reorganization Plan. Although the permanent injunction contemplated in this clause is mentioned in the Reorganization Plan, it is not, strictly speaking, part of the Plan. Rather, the granting of the injunction is a condition precedent in the implementation of the Plan. The result of this distinction is that the Plan itself does not purport to bind the Senior Secured Noteholders in this regard and they are not entitled to vote on the Plan. Thus, the question becomes whether the Court has the jurisdiction to grant such an injunction because, if it does not have the jurisdiction, there would be no point in convening creditor meetings to consider a plan containing a condition precedent which cannot be fulfilled.

12 The Court is given the power to grant stays of proceedings by s. 11(4) of the *CCAA*, which reads as follows:

> (4) A court may, on an application in respect of a company other than an initial application, make an order on such term as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

13 Since the re-emergence of the *CCAA* in the 1980s, the Courts have utilized the stay provisions of the *CCAA* in a variety of situations for a purpose other than staying creditors from enforcing their security or otherwise preventing creditors from attempting to gain an advantage over other creditors. One of the seminal decisions is *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.), where the Court stayed the ability of a joint venture partner of a debtor company from relying on the insolvency

of the debtor company to replace it as the operator under a petroleum operating agreement.

14 Two other prominent examples are *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.) and *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]), as supplemented at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]). In the *T. Eaton Co.* case, tenants in shopping centres in which Eaton's was also a tenant were prevented during the restructuring period from terminating their leases on the basis of co-tenancy clauses in their leases requiring anchor stores such as Eaton's to stay open. In the *Playdium Entertainment Corp.* decision, the Court approved an assignment of an agreement in conjunction with a sale in a failed *CCAA* proceeding where the other party to the agreement, which had a contractual right to consent to an assignment, was objecting to the assignment. As the Court in the *Playdium Entertainment Corp.* case relied on s. 11(4) of the *CCAA*, I assume that the Order prevented the other party to the agreement from terminating the assigned agreement as a result of the failure to obtain its consent to the assignment. I was also referred to my decision in *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.), where I relied on the inherent jurisdiction of the court to stay the calling on letters of credit issued by third parties at the instance of the debtor company.

15 The law is clear that the court has the jurisdiction under the *CCAA* to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring. In this regard, I agree with the following reasoning of Spence J. at para. 32 of the supplementary reasons in *Playdium Entertainment Corp.* :

> In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the Court should not take such a restrictive view of the s. 11(4) jurisdiction.

16 Spence J. made the above comments in the context of a third party which had a contract with the debtor company. In my opinion, the reasoning applies equally to a creditor of the debtor company in circumstances where the debtor company has chosen not to compromise the indebtedness owed to it. The decision in *Smoky River Coal Ltd., Re*, 1999 ABCA 179 (Alta. C.A.) is an example of a permanent stay being granted in respect of a creditor of the restructuring company.

17 Accordingly, it is my view that the court does have the jurisdiction to grant a permanent stay preventing the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on events of default existing prior to or during the restructuring period to accelerate the repayment of the indebtedness owing under the Notes. It may be that the court would decline to exercise its jurisdiction in respect of monetary defaults but this point is academic in the present case because the Doman Group does intend to pay the overdue interest on the

Notes upon implementation of the Reorganization Plan.

18 The second issue is whether the court has the jurisdiction to grant a permanent stay to prevent the Senior Secured Noteholders and the Trustee under the Trust Indenture from relying on a breach of Section 4.13 of the Trust Indenture to accelerate payment of the indebtedness owed on the Notes. The potential breach under Section 4.13 would be occasioned by the Doman Group granting second ranking security to the Unsecured Noteholders upon the implementation of the Reorganization Plan. I use the term "potential breach" because counsel for the Doman Group takes the position that the granting of this security would not contravene the provisions of Section 4.13.

19 I have decided that I should decline to make a determination of this issue because I did not receive the benefit of detailed submissions on the interpretation of Section 4.13 and the defined terms used in that Section. Counsel for the Doman Group simply argued that the wording was circular or ambiguous and noted that the definition of Permitted Indebtedness could include a refinancing of the Unsecured Notes. Counsel for the Senior Secured Noteholders Committee took the position, without elaboration, that Section 4.13 would be breached if the proposed security were to be granted. If the granting of the security would not contravene Section 4.13, then it would not be necessary for the court to grant a permanent stay preventing the acceleration of the indebtedness owing on the Notes as a result of the granting of the security and the issue would be academic. In my opinion, it is not appropriate for me to decide a potentially academic issue and I decline to do so.

20 The third issue is whether the court has the jurisdiction to effectively stay the operation of Section 4.16 of the Trust Indenture. Although I understand that there is an issue as to whether the giving of 85% of the equity in the Doman Group to the Unsecured Noteholders as part of the reorganization would constitute a change of control for the purposes of the current version of the provincial forestry legislation, counsel for the Doman Group conceded that it would constitute a Change of Control within the meaning of Section 4.16.

21 The language of s. 11(4) of the *CCAA*, on a literal interpretation, is very broad and the case authorities have held that it should receive a liberal interpretation in view of the remedial nature of the *CCAA*. However, in my opinion, a liberal interpretation of s. 11(4) does not permit the court to excuse the debtor company from fulfilling its contractual obligations arising after the implementation of a plan of compromise or arrangement.

22 In my view, there are numerous purposes of stays under s. 11 of the *CCAA*. One of the purposes is to maintain the status quo among creditors while a debtor company endeavours to reorganize or restructure its financial affairs. Another purpose is to prevent creditors and other parties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the ability of the debtor company to reorganize or restructure its financial affairs. An additional purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it may focus on restructuring its financial affairs. As I have observed above, a further purpose is to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period. All of these purposes are to facilitate a debtor company in restructuring its financial affairs. On the other hand, it is my opinion that Parliament did not intend s. 11(4) to authorize courts to stay proceedings in respect of defaults or breaches which occur after the implementation of the reorganization or restructuring plan, even if they arise as a result of the implementation of the plan.

23 In the present case, the obligation of the Doman Group to make an offer under Section 4.16 of the Trust

Indenture does not arise until ten days after the Change of Control. The Change of Control will occur upon the implementation of the Reorganization Plan, with the result that the obligation of the Doman Group to make the offer does not arise until a point in time after the Reorganization Plan has been implemented. This is a critical difference in my view between this case and the authorities relied upon by the counsel for the Doman Group.

24 Section 11(4) utilizes the verbs "staying", "Restraining" and "prohibiting". These verbs evince an intention of protecting the debtor company from the actions of others, including creditors and non-creditors, while it is endeavouring to reorganize its financial affairs. This wording is not intended, in my view, to relieve the debtor company from the performance of affirmative obligations which arise subsequent to the implementation of the plan of compromise or arrangement. In the context of this case, the Doman Group is endeavouring to rely on s. 11(4) to relieve itself of the obligation to make an offer to repurchase the Senior Secured Notes upon a Change of Control. In my opinion, this goes beyond any liberal interpretation of s. 11(4).

25 Counsel for Doman Group submitted that the proposed injunction is no more than a restriction upon an acceleration clause. Even if that is the case, it is an acceleration clause which does not become operative until after the restructuring has been completed. It is not a provision which the Senior Secured Noteholders are entitled to enforce as a result of an event of a default or breach occurring or existing prior to or during the restructuring period.

26 There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.

27 Counsel for the Doman Group also submitted that the court has the inherent jurisdiction to restrain the Doman Group from making the offer under Section 4.16 of the Trust Indenture, much in the same way as I exercised the court's inherent jurisdiction in *Woodward's Ltd.*, prior to the enactment of s. 11.2 of the *CCAA* to restrain third parties from calling on letters of credit issued by a financial institution at the instance of the debtor company. The court has the inherent jurisdiction during the restructuring period to "fill in gaps" in the *CCAA* or to "flesh out the bare bones" of the *CCAA* in order to give effect to its objects: see *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) at p. 93 and *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) at p. 110. In my view, the Doman Group is not asking the court to fill in gaps in the *CCAA* during the restructuring period. Rather, it is asking the court to go beyond the type of stay contemplated by Parliament when it enacted s. 11(4) of the *CCAA*.

28 In the event that I am mistaken and the court does have the jurisdiction to grant a stay in respect of the operation of Section 4.16 of the Trust Indenture, I would exercise my discretion against the granting of such a stay on the basis of the current circumstances. The absence of a permanent injunction in relation to Section 4.16 will not necessarily frustrate the restructuring efforts of the Doman Group. Apart from any compromise which may be negotiated between the Doman Group and the Senior Secured Noteholders, it is far from a certainty that the Senior Secured Noteholders will accept an offer made by the Doman Group under Section 4.16 to purchase the Notes at 101% of their face value. Indeed, counsel for the Doman Group suggested that in light of the 12% interest rate applicable to the Notes and prevailing interest rates, the Noteholders would not want to accept the offer of a 1% premium because they would not be able to reinvest the funds at an interest rate as high as 11%. Counsel went so far as to characterize the right of repurchase and associated premium as "illusory benefits". In addition, it may be possible for the Doman Group to restructure its financial affairs in a fashion which does not

involve a Change of Control while the Senior Secured Notes are outstanding. Finally, the Doman Group has not made any effort to negotiate an accommodation with the Senior Secured Noteholders.

29 Although I have agreed with the reasoning of Spence J. at para. 32 of the *Playdium Entertainment Corp.* decision, I should not be interpreted as agreeing with the correctness of the conclusion in *Playdium Entertainment Corp.*. I have some reservations with respect to its conclusion but, as *Playdium Entertainment Corp.* is clearly distinguishable from the present case, it is not necessary for me to decide whether or not it should be followed.

30 For these reasons, I conclude that the court does not have the jurisdiction to grant the permanent injunction contemplated by Section 4.12 (b) of the Reorganization Plan, at least as it relates to Section 4.16 of the Trust Indenture. Hence, it would be inappropriate for me to authorize the calling of creditor meetings to consider the Reorganization Plan in its present form because the condition precedent contained in section 6.3(a) of the Plan cannot be satisfied. I dismiss the application of the Doman Group, with liberty to re-apply in respect of a revised Reorganization Plan.

31 In addition to seeking an order allowing them to vote on the Reorganization Plan, the Senior Secured Noteholder Committee applied for an order authorizing it to file a secured creditor plan of arrangement or compromise and an order directing the Doman Group to pay all of its costs.

32 The form of the proposed secured creditor plan was attached to one of the affidavits. In essence, it includes the terms upon which the Senior Secured Noteholders represented by the Committee are prepared to waive breaches of the Trust Indenture occasioned by the restructuring of the Doman Group and to amend the Trust Indenture to allow the restructuring. One of these terms is the payment of a fee equal to 3% of the face value of the Senior Secured Notes (approximately US$5 million).

33 I am not prepared to allow the Senior Secured Noteholders Committee to file its own plan. If such a plan were filed and approved by the Senior Secured Noteholders, they would accomplish the same thing which they are complaining that the Doman Group was endeavouring to achieve through the permanent injunction; namely, a unilateral variation of the terms of the Trust Indenture without the agreement of the other party to the Trust Indenture. Such a plan may also have the effect of giving the Senior Secured Noteholders a veto power in respect of the Doman Group's restructuring.

34 The Senior Secured Noteholders Committee has not demonstrated a basis for the requested order that the Doman Group should pay all of its costs. The committee was presumably formed so that the Noteholders could act to protect or advance their own interests. It is not a committee requested by the Doman Group or constituted by the Court. The Noteholders may be entitled to some or all of such costs pursuant to the provisions of the Trust Indenture but that issue is not before me. As to the costs of these applications in the context of the *Rules of Court*, there has been divided success and I direct that each party bear own costs.

35 I dismiss the applications of the Committee for an order in relation to a secured creditor plan and an order in relation to its costs.

36 If the Senior Secured Noteholders Committee still wishes to pursue the constitutional question, arrangements for a hearing may be made through Trial Division. However, as I am not granting the application of the Doman Group for an order authorizing the calling of creditor meetings to consider the Reorganization Plan in its present form, it would seem to me that any such hearing should await the issuance of a revised form of the Plan.

Order accordingly.

END OF DOCUMENT

5

Citation: 215 Holdings Ltd. v. 2668921 Manitoba Ltd. et al., 2008 MBCA 3
Date: 20080117
Docket: AI07-30-06737

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Richard J. Chartier
Mr. Justice Alan D. MacInnes

B E T W E E N:

215 HOLDINGS LTD.	)	***J. A. Kagan***
	)	*for the Appellant*
(Plaintiff) Appellant	)	
	)	***R. D. Buchwald*** *and*
- and -	)	***N. D. M. Wray***
	)	*for the Respondents*
	)	
2668921 MANITOBA LTD., 158339 CANADA INC., HUNTINGTON REAL ESTATE INVESTMENT TRUST and ARNI THORSTEINSON	)	*Appeal heard and Decision pronounced:* ***January 10, 2008***
	)	
	)	*Written reasons:*
(Defendants) Respondents	)	***January 17, 2008***

CHARTIER J.A.

1 The plaintiff had appealed the decision of the motions judge dismissing its appeal from a master's order discharging a pending litigation order it had previously obtained on an *ex parte* hearing before that master. We dismissed the appeal with brief reasons to follow. These are those reasons.

2 The principal issue on this appeal was whether the motions judge erred in finding that the plaintiff had failed to disclose all material facts in a reasonable manner at the *ex parte* motion.

3 This matter first came before the master on the uncontested list. The supporting affidavit, which included over 50 pages of exhibits, was not tendered in advance of the *ex parte* hearing but at the commencement of the hearing. After review, the master granted the pending litigation order. A motion to discharge that order was made shortly thereafter. After hearing both parties, the pending litigation order was discharged.

4 In her reasons, the master found that there had not been full and fair disclosure because certain provisions relating to the conditional nature of an important agreement were neither set out in the body of the affidavit, nor specifically brought to her attention.

5 In oral reasons, 28 June 2007 (CI 07-01-51680), the motions judge agreed with the master stating:

> ... The plaintiff should have indicated at the initial hearing the existence of the void clauses in the two contracts, and pointed them out, and highlighted them, even though they were buried in the 50 exhibits. With respect, to indicate to the Master that the contracts are going to be disputed is not disclosing in a reasonable manner, but disclosing in the most minimalist manner. It should have been followed up by drawing to her attention the void clauses. ...

6 On an *ex parte* application, the moving party has to make full and fair disclosure of all material facts. Failure to do so constitutes material non-disclosure.

7 The plaintiff claimed that the provisions in question were not material facts, and in any event had been disclosed by reason of their inclusion in the documents attached as exhibits to the supporting affidavit.

8 We disagree. The provisions in question, which evidence the conditional nature of the agreement that forms the basis of the plaintiff's claim in this matter, were material facts relative to the *ex parte* motion. In the circumstances here present, they should have been set out in the body of the affidavit or at least brought to the specific attention of the master.

9 In our view, the plaintiff neither demonstrated any error in principle by the motions judge, nor any palpable or overriding error with respect to his findings. We therefore dismissed this appeal. It will be with costs.

_____ J.A.

I agree:

_____ J.A.

I agree:

_____ J.A.

6

Citation: Board of Education of St. Vital School Division No. 6 v. Trnka, 2001 MBCA 164

Date: 20011018
Docket: AI01-30-04883

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Twaddle and Steel JJ.A.

B E T W E E N:

THE ST. VITAL SCHOOL DIVISION NO. 6 *(Applicant) Appellant*	)	***E. B. Eva*** *for the Appellant*
	)	***M. G. Finlayson*** *for the Respondent*
- and -	)	*Appeal heard and Decision pronounced:* ***October 12, 2001***
JEFFREY OLIVER TRNKA *(Respondent) Respondent*	)	*Written reasons:* ***October 18, 2001***

STEEL J.A.

1 This is an appeal from an order of Justice Darichuk where he set aside his own previous order extending time under Part II of *The Limitation of Actions Act*, R.S.M. 1987, c. L150.

2 The previous order had been obtained by the applicant without notice. Applying for an order without notice places upon an applicant a heavy onus for full, frank and complete disclosure of all material facts. Failure to do so is in itself sufficient ground for the setting aside of any order so obtained regardless of the merits of the matter (Q.B. Rule 39.01(6)).

Appeal from (2000), 143 Man.R. (2d) 300
See (1998), 135 Man.R. (2d) 99

3 This principle has been applied many times by our court. See, for example, *Griffin Steel Foundries Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers et al.* (1977), 80 D.L.R. (3d) 634, and *Pulse Microsystems Ltd. et al. v. Safesoft Systems Inc. et al.* (1996), 110 Man.R. (2d) 163.

4 Upon production of the adjuster's file, it appeared that, in the motions judge's opinion, a material fact was not disclosed by the applicant on the original application. He found that there was merit to the argument of the respondent that given the document subsequently produced, it appeared that the evidence contained in the adjuster's original affidavit was either "deliberately or recklessly untruthful." Consequently, the motions judge set aside his own order. In so doing, he exercised his discretion and we see no grounds to interfere with the proper exercise of that discretion.

5 As well, he awarded solicitor-client costs. The award of such costs is an unusual occurrence. However, it is important to emphasize the need for complete disclosure of material facts on a without-notice application. As noted by Justice Philp in the case of *Pulse Microsystems Ltd.*, among other purposes served, an award of solicitor-client costs will act "as a reminder to other plaintiffs of the complete candour which must accompany such an application" (at para. 41).

6 Clearly, the judge who made and set aside the original order is in the best position to assess the proper scale of costs applicable with respect to the efforts to set aside that order. His decision to award solicitor-client costs was within his discretion and we see no justification for interference.

Indeed, in the circumstances, we are of the opinion that our order of costs should follow those of the motions judge and be awarded on a solicitor-client basis as well.

7 The appeal is dismissed.

_____ J.A.

I Agree:

_____ C.J.M.

I Agree:

_____ J.A.

7

Court of Appeal of Manitoba
221 Corp. v. C & N Enterprises Co. Ltd.
Date: 1999-12-01

R.A.L. Nugent, Q.C., and M.L. Grande, for the appellant;

M.G. Tadman, for the respondents.

(AI 99-30-04175)

[1] **Monnin, J.A.**: This is an appeal from an order setting aside an ex parte garnishing order given prior to judgment as well as an award of costs on a solicitor-client basis.

[2] At the conclusion of the hearing, the appeal was dismissed with costs on a solicitor-client basis, with reasons to follow. These are the reasons.

[3] The dispute between the parties arises from the purchase by the respondent from the appellant of a large apartment complex and a vacant adjacent parcel that closed on October 1, 1997. The parties have been embroiled in a multi-faceted dispute almost from the date of closing. It is the extent of that dispute which lies at the centre of the issue before us.

[4] The parties were embroiled in a dispute dealing with the assumption of the mortgage that was registered against the property being purchased; the parties were also disputing whether the appellant was obliged to provide a postponement to a caveat that had been registered to protect its interest in two suites which were being retained by the appellant; the parties were disputing whether the appellant was obliged to provide "as built drawings" to the respondent and the cost of providing replacement drawings; and the parties were also disputing whether the actions of the appellant had interfered or delayed with the condominiumization of the premises and what damages, if any, flowed from that situation.

[5] The respondents had commenced proceedings to establish their right to refinance the premises without having to deal with the appellant's caveat. That application had been rejected on December 9, 1997.

[6] The monies that the garnishment order attached represent the amount owing on two mortgage payments which the appellant maintains were taken from its bank account by a mortgagee when the respondents failed to make them. In an affidavit filed in support of the motion, sworn on February 9, 1998, an officer of the appellant stated that "he was not aware of any credit, set-off or counterclaim that the defendants (respondents) may have to this claim."

[7] The claim by an officer of the appellant that he was not aware of any claim that the respondents might have was made in the face of a letter from counsel for the respondents dated November 28, 1997, and never replied to by the appellant, in which the respondents were seeking a set-off in the amount of $355,000.

[8] The appellant took the position before this court that the dispute between the parties centered wholly on whether or not the respondents were entitled to a postponement of the caveat. The appellant further says that since this matter had been dealt with by the court on December 9, 1997, there were no further matters in dispute between the parties when the ex parte request for a garnishment order before judgment was made.

[9] The motions court judge in setting aside the garnishment order which had originally been granted by the Master saw the matter very differently. He stated at paras. 17-20:

> "Counsel for the plaintiff contends that there was no legal basis for the claims made by the defendants and that Mr. Halter was, therefore, entitled to say that he was not aware of any set-off or counter-claim that the defendants had to the plaintiff's claim.
>
> "I disagree with this contention. I think it amounts to an argument that if a plaintiff decides that a claim made by a defendant is without merit -- as alleged by counsel for the plaintiff in this case -- then the plaintiff is entitled not to disclose such a claim. In my opinion, it was not for Mr. Halter to decide that the defendants' claims were without merit and that he could ignore them. I think Mr. Halter should have disclosed to the Master the defendants' claims. He could, if he chose to do so, have argued that the claims were without merit. The Master could then have decided whether he would issue the garnishing order. The failure to disclose is compounded by the fact that Mr. Halter has a law degree.
>
> "Rule 39.01(6) provides that the failure to make full and fair disclosure of all material facts 'is in itself sufficient ground for setting aside any order' made without notice.
>
> "I have no doubt that Mr. Halter failed to make full and fair disclosure of all material facts. He knew, or ought to have known, that what he said in his affidavit was untrue, and in swearing his affidavit he was, in my opinion, deliberately or recklessly untruthful. I order that the garnishing order be set aside with costs to the defendants on a solicitor and client basis."

[10] Notwithstanding a forceful argument from Mr. Nugent, on behalf of the appellant, the facts remain that the issues between these parties are far from being as clear-cut as the appellant wishes to make them. The statement made by Mr. Halter in his affidavit in support of the garnishment order is inaccurate, misleading and clearly insufficient to ground the order that the appellant was seeking.

[11] A garnishing order prior to judgment is a powerful tool in the hands of a litigant, especially since to be effective - as permitted by the **Rules** - it is often granted ex parte. It

should only be made when the facts clearly demonstrate the applicant's entitlement to the order. There must therefore be full, frank and complete disclosure of all relevant facts to enable the court to decide whether the applicant's entitlement to the order can be reasonably disputed. An applicant cannot usurp the court's function by unilaterally declaring, as in this case, that there is no legitimate dispute. That is the very question that the court must answer on the basis of the sworn facts in the supporting affidavit.

[12] The motions court judge did not err in emphasizing the integrity of the procedure to be followed in applications of this kind. I would therefore dismiss the appeal.

[13] I am further satisfied that the circumstances of this case justified the imposition of solicitor-client costs. The trial judge was fully justified in granting such an order based on his conclusion that the failure on the part of the applicant to make full disclosure was not inadvertent. The position taken at trial by the applicant was maintained before this court. In these circumstances, solicitor-client costs are awarded in this court as well. To do otherwise would send the wrong message to appellants who choose to appeal from decisions where solicitor-client costs were awarded.

Appeal dismissed.

8

Revised: May 11, 2010

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE _____	)	_____DAY, THE___DAY
	)	
JUSTICE _____	)	OF _____, 20__

B E T W E E N:

PLAINTIFF

Plaintiff

- and –

DEFENDANT

Defendant

APPROVAL AND VESTING ORDER

THIS MOTION, made by [RECEIVER'S NAME] in its capacity as the Court-appointed receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and [NAME OF PURCHASER] (the "Purchaser") dated [DATE] and appended to the Report of the Receiver dated [DATE] (the "Report"), and vesting in the Purchaser the Debtor's right, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and on hearing the submissions of counsel for the Receiver, [NAMES OF OTHER PARTIES APPEARING], no one appearing for any other person on the

service list, although properly served as appears from the affidavit of [NAME] sworn [DATE] filed[1]:

1. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved,[2] and the execution of the Sale Agreement by the Receiver[3] is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is 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 Transaction and for the conveyance of the Purchased Assets to the Purchaser.

2. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "Receiver's Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement [and listed on Schedule B hereto][4] shall vest absolutely in 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"[5]) including, without limiting the generality of

---

[1] This model order assumes that the time for service does not need to be abridged. The motion seeking a vesting order should be served on all persons having an economic interest in the Purchased Assets, unless circumstances warrant a different approach. Counsel should consider attaching the affidavit of service to this Order.

[2] In some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary. Evidence should be filed to support such a finding, which finding may then be included in the Court's endorsement.

[3] In some cases, the Debtor will be the vendor under the Sale Agreement, or otherwise actively involved in the Transaction. In those cases, care should be taken to ensure that this Order authorizes either or both of the Debtor and the Receiver to execute and deliver documents, and take other steps.

[4] To allow this Order to be free-standing (and not require reference to the Court record and/or the Sale Agreement), it may be preferable that the Purchased Assets be specifically described in a Schedule.

[5] The "Claims" being vested out may, in some cases, include ownership claims, where ownership is disputed and the dispute is brought to the attention of the Court. Such ownership claims would, in that case, still continue as against the net proceeds from the sale of the claimed asset. Similarly, other rights, titles or interests could also be vested out, if the Court is advised what rights are being affected, and the appropriate persons are served. It is the Subcommittee's view that a non-specific vesting out of "rights, titles and interests" is vague and therefore undesirable.

the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice [NAME] dated [DATE]; (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; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) 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.

3. THIS COURT ORDERS that upon the registration in the Land Registry Office for the [Registry Division of {LOCATION} of a Transfer/Deed of Land in the form prescribed by the *Land Registration Reform Act* duly executed by the Receiver][Land Titles Division of {LOCATION} of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*][6], the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "Real Property") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule C hereto.

4. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds[7] from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's 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[8], as if the Purchased 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.

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[6] Elect the language appropriate to the land registry system (Registry vs. Land Titles).

[7] The Report should identify the disposition costs and any other costs which should be paid from the gross sale proceeds, to arrive at "net proceeds".

[8] This provision crystallizes the date as of which the Claims will be determined. If a sale occurs early in the insolvency process, or potentially secured claimants may not have had the time or the ability to register or perfect proper claims prior to the sale, this provision may not be appropriate, and should be amended to remove this crystallization concept.

5. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

6. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees, including personal information of those employees listed on Schedule "●" to the Sale Agreement. 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 Debtor.

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 the Debtor and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtor;

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 the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, 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.

8. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

9. 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 Receiver 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Revised: May 11, 2010

Schedule A – Form of Receiver's Certificate

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

B E T W E E N:

PLAINTIFF

Plaintiff

- and –

DEFENDANT

Defendant

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable [NAME OF JUDGE] of the Ontario Superior Court of Justice (the "Court") dated [DATE OF ORDER], [NAME OF RECEIVER] was appointed as the receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor").

B. Pursuant to an Order of the Court dated [DATE], the Court approved the agreement of purchase and sale made as of [DATE OF AGREEMENT] (the "Sale Agreement") between the Receiver [Debtor] and [NAME OF PURCHASER] (the "Purchaser") and provided for the vesting in the Purchaser of the Debtor'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 Receiver 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 section ●

of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in section ● of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at _____ [TIME] on _____ [DATE].

[NAME OF RECEIVER], in its capacity as Receiver of the undertaking, property and assets of [DEBTOR], and not in its personal capacity

Per: _____

Name:

Title:

Revised: May 11, 2010

Schedule B – Purchased Assets

Schedule C – Claims to be deleted and expunged from title to Real Property

Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(unaffected by the Vesting Order)