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. AND 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

RESPONDING BRIEF OF THE PURCHASERS

DATE OF HEARING: MARCH 1, 2013 AT 10 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon LSUC#: 35638M
Tel: (416) 869-5623
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Fax: (416) 947-0866

Lawyers for HIG Zamboni, LLC

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PART I LIST OF DOCUMENTS TO BE RELIED UPON

1. Notice of Motion of the Applicants dated June 14, 2012, with appended proposed Sale Approval Order, returnable June 21, 2012

2. Affidavit of Keith McMahon sworn June 13, 3012;

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

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

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

6. Confidential Appendix to the Fourth Report of the Monitor dated June 18, 2012;

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

8. Transcript of the proceedings conducted June 21, 2012 before the Honourable Madam Justice Spivak;

9. Canadian Vesting and Approval Order dated June 21, 2012 as amended on July 12, 2012;

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

11. Affidavit of Bruce Robertson sworn October 31, 2012;

12. Document Brief of the Applicant, Volume 1 at Tabs 1, 5 and 26;

13. Document Brief of the Applicant, Volume 2 at Tab 62;

14. Undertakings Brief of the Applicant from Cross Examination of Bruce Robertson;

15. Transcript of the Cross Examination of Bruce Robertson conducted December 18, 2012 and exhibits thereto;

16. Affidavit of Brian McMullen sworn November 7, 2012;

17. Affidavit of Brian McMullen sworn November 28, 2012;

18. Transcript of the Cross Examination of Brian McMullen conducted February 5, 2013 and exhibits thereto;

19. Notice of Motion of Desert Mountain Inc., LLC dated and filed October 15, 2012;

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

21. Supplementary Affidavit of Robert Nagy sworn November 7, 2012;

22. Transcript of the Cross Examination of Robert Nagy conducted December 19, 2012 and exhibits thereto;

23. Initial Order dated February 22, 2012;

24. Answers to Undertakings from the Cross Examination of Robert Nagy;

25. 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

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2. *Brown v. Dunn* (1893), 6 R. 67 (H.L.)
3. *In Re American Community Newspapers LLC*, 2009 WL 7215682 (U.S. Bankruptcy Court, D. Delaware)
4. *In Re Ames Holding Corp.*, 2010 WL 2822030 (U.S. Bankruptcy Court, D. Delaware)
5. *In Re Telogy LLC*, 2010 WL 2822092 (U.S. Bankruptcy Court, D. Delaware)
6. *In Re Westcliff Medical Laboratories, Inc.*, 2010 WL 5167554 (U.S. Bankruptcy Court, C.D. California, Santa Ana Division
7. *In Re Champion Motor Group Inc.*, 2010 WL 5053964 (U.S. Bankruptcy Court, E.D. New York)
8. *Re Timminco Limited*, Ont. S.C.J., May 22, 2012 (12-CL-9539-00CL)
9. *National Bank of Canada v. Hillsburgh Stock Farm (1997) Ltd.*, Sask. Q.B., December 19, 2012 (QBG No. 1562 of 2012
10. Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause Analysis: http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01985.html#a70
11. *Re Doman Industries Ltd.*, [2003] B.C.J. No. 562 (S.C.)
12. *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. (Comm. List)
13. *Clemmer Steelcraft Technologies Inc. v. Bangor Metals Corp.*, 2009 ONCA 534
14. *Extreme Retail (Canada) Inc. v. Bank of Montreal*, [2007] O.J. No. 3304
15. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
16. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6
17. *National Bank of Canada v. Stomp Pork Farm Ltd.*, 2008 SKCA 73
18. *Re Blue Range Resources Corp.*, 2000 ABCA 285
19. *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C.S.C.)

20. *Garland v. Consumers' Gas Co.* 2004 SCC 25

21. *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 743

22. *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (S.C.J.)

23. John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012)

24. *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Col. Ltd.*, [1915] AC 847 at 853

25. *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992] 3 S.C.R. 299

26. *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] S.C.J. No. 59

27. *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6

28. *Dumbrell v. The Regional Group of Companies, Inc.* (2007), 85 O.R. (3d) 616 (C.A.)

29. *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888

30. *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12

PART III LIST OF POINTS TO BE ARGUED[1]

1. Arctic Glacier U.S.A., Inc. ("**Arctic U.S.A.**"), Arctic Glacier Canada Inc. ("**Arctic Canada**") and Arctic Glacier, LLC (collectively, the "**Purchasers**") submit that the Landlord's, Desert Mountain Ice, LLC, motion (the "**Motion**") should be dismissed as against the Purchasers for, among others, the following reasons:

(a) The Sale Approval Order vests out any obligations associated with the Arizona Lease Put (as defined below) and should not be amended or varied because:

(i) The Court had jurisdiction and properly granted the Sale Approval Order containing the term vesting out any obligations associated with the Arizona Lease Put;

(ii) It would be unprecedented, inappropriate and completely impractical to overturn the Sale Approval Order and unravel the transaction subsequent to the extensive actions and investments that have occurred during the over seven months since its closing;

(iii) The Landlord had the opportunity to participate generally in both the CCAA proceedings and US proceedings, including the three motions for the Sale Approval Order in both Canada and the US. The Landlord chose to decline to participate in any of the Court proceedings and should now be prohibited from raising objections to the final Sale Approval Orders;

---

[1] All capitalized terms used in this Brief but not otherwise defined shall have the meaning attributed to them in the Affidavits of Brian McMullen sworn November 7, 2012 and November 28, 2012.

(iv) The Landlord initially argued that the Canadian Court had no jurisdiction to determine the Landlord's rights under the Arizona lease, but nevertheless now seeks the Court's assistance in reversing a final Order;

(v) The Canadian Sale Approval Order is a final Order, appropriately sought and granted and no appeal has been sought by the Landlord; and

(vi) The Landlord's motion is an inappropriate collateral attack on the Sale Approval Order.

(b) Even if the Sale Approval Order would be amended or varied, the Purchasers would not be responsible for payment of the Arizona Lease Put under the Asset Purchase Agreement because:

(i) The payment obligation of the Purchaser was the Purchase Price, as defined in the Asset Purchase Agreement, which has been paid in full by the Purchasers;

(ii) Even if the liability to pay the Arizona Lease Put was triggered (which is denied), such liability would have been triggered at the time of closing (not subsequent to closing) and thus would not fall within the definition of the Assumed Liabilities that were assumed by the Purchasers;

(iii) The Arizona Lease Put is not a "Cure Cost" or a monetary default within the meaning of the Asset Purchase Agreement, or Sale Approval Order, and is therefore not payable by the Purchasers. Furthermore, even if the Arizona Lease Put fit within the definition of "Cure Cost" (which is denied), the Purchaser would only have been responsible for such cost to the extent it was reflected in the

Working Capital Statement as an assumed liability, which is clearly not the case; and

(iv) There is no privity of contract between the Landlord and the Purchasers under the Asset Purchase Agreement.

2. The Purchasers acquired certain assets from the Applicants pursuant to a Court-supervised and approved process and in accordance with the June 21, 2012 Sale Approval Order granted by the Winnipeg Court. The Sale Approval Order was recognized by the US Bankruptcy Court on July 17, 2012.

3. The Asset Purchase Agreement was entered into between the Applicants (as Vendors) and the Purchasers. The Landlord is not a party to, or a third-party beneficiary under, the Asset Purchase Agreement.

4. Many steps were taken, investors retained, financing obtained, purchase price paid, employees hired and operations restructured on the reliance upon the Sale Approval Order and with the expectation that the closing of the Asset Sale Agreement and the obligations thereunder would be final and certain. The Landlord's attempts to seek to be named as a direct or indirect beneficiary of the deal, and to retroactively change the terms of this transaction - which closed over seven months ago - causes undue confusion and uncertainty to the process. As a purchaser of assets through a Canadian Court supervised process, the Purchasers were entitled to expect that the vesting Orders and the certificates issued by the Monitor in this process, without concern that the transaction could retroactively be altered.

5. The Court should be aware that the Landlord has filed separate (secured) claims into the estates of the Vendors and their directors and officers, relating to its US$12.5 million claim. The timing of the determination of those claims may influence the timing of the release of the Court's decision relating to this motion.

(Exhibits 13 and 14 to the Cross Examination of Bruce Robertson (the "Robertson Cross Examination")

Introduction

6. The Purchasers file this Brief in opposition of the Motion by the Landlord, for an Order compelling the Applicants and the Purchasers to pay the amount of $12,500,000.00 U.S. funds, together with such interest, charges and costs as required (the "**Arizona Lease Put**"), pursuant to s. 24 of a Lease and Option Agreement made between Desert Mountain and Arctic Glacier California Inc. dated May 25, 2006 or, in the alternative, an Order amending or varying the Sale Approval Order.

7. When reviewing the Landlord's written and oral submissions, the Court is encouraged to note the following general observations, further details of which will be outlined below and in the Purchasers' counsel's oral submissions:

- The Landlord's submissions fail on numerous occasions to reference an evidentiary basis for various statements;
- The Landlord cross examined the Vendors' and Purchasers' representatives, yet the Landlord, in its Motion, fails to reference evidence derived in the course of these examinations in respect of various assertions set forth in its Motion;
- The Landlord asserts allegations, without having given the witness an opportunity to address the allegation during cross examinations, as is required in *Brown v. Dunn*;

(*Brown v. Dunn* (1893), 6 R. 67 (H.L.) at Tab 2)

- There is significant deviation between the Landlord's evidence set forth in his first affidavit sworn October 9, 2012 and in his second affidavit sworn to on November 7, 2012 relating to, *inter alia*, notice of the sales approval

motion, steps taken in respect of the motion, quantum of personal guarantees, and basis for claim triggering the Arizona Lease Put;

- During cross examinations, the Landlord acknowledged that much of its evidence relating to the Sale Approval Order, the submissions made at the sales approval hearing and the interpretation of the Asset Purchase Agreement were prepared with the assistance of counsel after the closing of the sales transaction and are not based on understanding it held contemporaneously with the sales approval motion or receipt of information; and

(Transcripts from the Cross Examination of Robert Nagy conducted December 19, 2012 (the "Nagy Cross Examination") page 186-187)

- There is a general confusion throughout the Landlord's submissions regarding leased property interests and real property interests in the Arizona Facility. A triggering of the Arizona Lease Put results in a transfer of the real property. The Landlord's submissions ignore this reality and attempt to maintain both real property and leasehold interests and entitlements.

Arizona Facility

8. The Arizona Facility was acquired through Mr. Nagy in 2006, when the Vendors were not able to complete the transaction directly as financing was not available to the Corporation. Despite Mr. Nagy's suggestions that the Arizona Facility was "critical to the business of Arctic," the facility was in fact shuttered at the time of acquisition and remained shuttered for 3-4 years thereafter, only commencing operations in 2009 or 2010.

(Nagy Cross Examination page 31)

9. The purchase of the property was completely financed by Roynat. Mr. Nagy was not required to post any of the $10 million purchase price nor pay any of the financing

costs since the date of purchase. In addition to financing costs flowing through to the tenant, Mr. Nagy received a premium of 25 basis points in the first 3 year term and 100 basis points in the second 3 year term of lease, from rental payments. On one occasion known to the parties, Mr. Nagy redirected the Vendors' lease payments for other personal loan obligations in lieu of paying down the Roynat loan facility.

(Exhibit 14 to Nagy Cross Examination)

(Nagy Cross Examination pages 26, 28, 32, 34, 56, 65)

10. In nearly 7 years since he has owned the Arizona Facility, Mr. Nagy has visited the property only four or five times. By Mr. Nagy's own evidence, current market values are less than the $12.5 million Arizona Lease Put and, as a result, if Mr. Nagy receives the Arizona Lease Put from the Vendors or the Purchasers, he will receive a windfall of at least $4 million, in addition to premiums received to date, referred to above.

(Nagy Cross Examination pages 42, 99, 58, 60 and 88)

11. Other potential purchasers of the Vendors' assets that participated in the Vendors' SISP (as defined below) also expressed concern about the Arizona Lease and the Arizona Lease Put.

(Robertson Cross Examination pages 59, 132)

Roynat Debt

12. The Roynat debt with respect to the Arizona Facility, totalling approximately $8.5 million, was due on June 15, 2012 prior to the closing of the sale to the Purchasers. The obligation to repay falls entirely on the Landlord and Mr. Nagy as borrower and guarantor.

(Exhibit 17 to Nagy Cross Examination)

(Nagy Cross Examination page 154, 160)

13. No attempts have been made to re-sell or refinance the property. Roynat has not sought to enforce on the Landlord's debt or Mr. Nagy's personal guarantee.

(Nagy Cross Examination)

14. The Purchasers have been in possession of and operating the Property since closing in July 2012, without objection until the Notice of Motion raised improper allegations of trespassing. As a result only of the Purchasers' ongoing rent payments of $108,000 per month (or $756,000 to March 2013), the Landlord has been able to maintain the Property and keep its lender at bay.

(Nagy Cross Examination page 211)

Sales Process and the Purchasers' Bid Letter

15. On June 4, 2012, some of the Purchasers (or entities related thereto) submitted a bid (the "**Bid Letter**") to purchase essentially all of the assets of the Vendors pursuant to a Court-approved Sales and Investor Solicitation Process ("**SISP**").

(Exhibit 5 to Robertson Cross Examination)

16. The Bid Letter was merely an initial proposal and there were many things with many stakeholders that remained to be negotiated, including a solution to the Arizona Lease.

(Cross Examination of Brian McMullen conducted on February 5, 2013 (the "McMullen Cross Examination") page 16-17, 34-35)

17. Many of the concepts in the Bid Letter, including the concept of sharing 25% of any reduction with respect to the Arizona Lease Put (if paid) with the estate of the Vendors, did not last very long past the Bid Letter stage and never made their way into the Asset Purchase Agreement. Despite the Landlord's description of a "kick back" scheme continuing through the Asset Purchase Agreement and Sale Approval motion, the evidence is clear – no such provision existed at those dates.

(McMullen Cross Examination page 35-37, 47, 50, 104)

(Robertson Cross Examination page 45)

18. Brian McMullen, a representative of the Purchasers, stated at his re-examination in connection with this motion as follows in respect of the Bid Letter:

> *232 Q Just a couple of questions. Mr. Leslie took you to the HIG Bid Letter, which was June 4th, and spoke to you about this concept of the 25/75 percent with respect to the $12.5 million put.*
>
> *A Yes.*
>
> *233 Q The potential of sharing 25 percent with the estate. Can you tell me is it your understanding did that condition make its way into the agreement on June 7th that was signed?*
>
> *A No, it did not.*
>
> *234 Q And did that condition make its way into the Amending Agreement that was signed in July?*
>
> *A No, it did not.*
>
> *235 Q And so if the Monitor were to suggest if they believe the 25 percent condition was still on the table, what's your reaction?*
>
> *A Almost as soon as we introduced the concept by virtue of the Bid Letter I had a conversation with the Monitor where I was told that that construct was not going to work, was not going to be acceptable, so we quickly stopped talking about it.*

(McMullen Cross Examination page 104-105)

19. Similarly, Bruce Robertson, the Court-appointed Chief Process Supervisor and Court officer in such capacity, stated the following in his cross examination in connection with this motion with respect to the Bid Letter and its contents:

> *102 A Yes, that is what it says. I think it is helpful, probably, as part of this process, again, just to try and put this in context. And HIG was a very keen bidder. They devoted a lot of resources, they had, you know, great advisors on this thing. They were obviously aware, because of the Reddy Ice proceedings, they were well aware that Reddy Ice was also a potential bidder.*
>
> *When I read any of these things, save and except for when counsel tells me that yes, this is a binding agreement, and you can sign the thing*

back, at the end of the day, I take all of this sort of stuff with a grain of salt. Because in my mind this is nothing more than a marketing pitch, and their plea to accept us, because they were deathly afraid they were going to be outbid by Reddy Ice.

Because from a theoretical perspective, I am sure that their position was Reddy Ice was able to pay more because of the synergies available to it. Again, I want to make that point, to say that the context of this thing is this is a marketing document to give us the warm and fuzzies we should be working with them to close the deal and shut the door with Reddy Ice.

...

153 A This is, again, I come back to my previous comments. This is a marketing document for these guys to win an auction. That is what this document is. Okay? At the end of the day. We have a definitive agreement here, which contemplates the assumption of the Desert Mountain lease. And perhaps through HIG being desirous of figuring out if there was some other basis upon which, you know, alternative arrangements could be made with Desert Mountain, it contemplated if there was a payment before closing that would be captured somehow.

(Robertson Cross Examination page 3, 30, 34-35, 47, 52, 63, 73, 119)

20. Contrary to the Landlord's submissions, the evidence was clear that the SISP did not contain a mandatory term that all bidders must assume the purchase of the the Arizona Facility at the contracted price $12,500,000.

(McMullen Cross Examination page 4)

(Robertson Cross Examination page 18)

The Agreements

21. On June 7, 2012, Arctic Glacier, LLC entered into an asset purchase agreement with the Arctic Glacier Income Fund and each of the subsidiaries of the Fund.

(Affidavit of Brian McMullen sworn October 31, 2012 (the "October 31 McMullen Affidavit")

22. On July 27, 2012, the Purchasers and the Vendors entered into an Assignment, Assumption and Amending Agreement for the purpose of, among other things, amending certain provisions of the Asset Purchase Agreement.

(October 31 McMullen Affidavit)

23. The Landlord is neither a party nor a beneficiary to either of these agreements.

(October 31 McMullen Affidavit)

The Purchased Assets

24. The Assets sold pursuant to the Asset Purchase Agreement are described in Article 2.01. Pursuant to Article 2.01(a), the "Assets" include the "Lands" of the Vendor, which are defined in Article 1.01 as:

> *...all freehold and leasehold property and interests therein described in Section 1.01A of the Vendors Disclosure Letter, including all rights of way, licences or rights of occupation, easements or other similar rights of any Vendor in connection with such freehold and leasehold property.*

25. The Arizona Lease was acquired as a leasehold interest by the Purchasers. The Landlord's submissions reflect a misunderstanding regarding this term. The Vendors and Purchasers acknowledge the deal was meant to transfer the leasehold interest of the Arizona Facility. Despite the Landlord's suggestion, the Purchasers were not obligated to purchase the real property in respect of the Arizona Facility, and instead an assignment of the leased property was contemplated and completed (which was reflected in Section 1.101A of the Vendors' disclosure letter among the Purchasers and Vendors dated June 7, 2012 which described the Arizona Lease under the heading "Leasehold Real Estate - United States").

(October 31 McMullen Affidavit)

(McMullen Cross Examination page 63)

The Purchase Price

26. The purchase price for the Assets is set forth in Section 2.05 of the Asset Purchase Agreement as follows:

> *The purchase price payable to the Vendors for the Assets...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.*

27. Prior to the closing of the transaction, the Purchasers and the Vendors determined that it was necessary to amend the above provision to take into account that the Purchasers would also be acquiring all of the petty cash of the Vendors.

(October 31 McMullen Affidavit)

Section 2.05 of the Asset Purchase Agreement was replaced with the following:

> *The purchase price payable to the Vendors for the Assets (such amount being hereafter 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; (ii) Petty Cash; and (iii) the Assumed Liabilities, subject to adjustment as provided in Section 2.07.*

28. The Purchasers did not believe it was necessary to amend section 2.05 of the Asset Purchase Agreement to delete the reference to the Arizona Facility in subsection (i) given that they knew that at the time of signing the Assignment, Assumption and Amending Agreement (which was immediately prior to the time of closing), the Vendors would not be purchasing the Arizona Facility and therefore believed this language to be simply not relevant. The Vendors were fully aware at this time, and all closing documents were prepared on the basis that, no additional amount was being included in the purchase price for the Arizona Lease Put.

(October 31 McMullen Affidavit)

(Exhibit 16, 17 and 22 to Robertson Cross Examination)

29. The Assignment, Assumption and Amending Agreement was required to reflect the Purchase Price adjustment sought by the Purchasers to address a number of issues

raised by the Purchasers. Further Purchase Price adjustments would have been taken had the Vendors attempted to push the economic cost of the Arizona Lease Put onto the Purchasers in the days leading up to the closing.

(McMullen Cross Examination pages 65-68, 71, 76-77)

(Exhibits 16, 17 and 18 to Robertson Cross Examination)

30. The Purchase Price originally contemplated the potential of paying an amount, "the price paid by the Vendors for the purchase of the land and building at 600 South 80th Avenue, Tolleson, Arizona." This provision was intended to address the possibility that a payment to the Landlord would be required by the Vendors prior to closing if the real property were acquired. However, the entry of the Sale Approval Order assigning the Lease overrode the Arizona Lease Put, and thus no further amount was payable or paid by the Vendor to the Landlord. Consequently, the Arizona Lease was acquired as a leasehold interest by the Purchasers upon closing.

(McMullen Cross Examination pages 39, 53-65, 79, 80-82, 83, 84, 90)

31. Notwithstanding the Landlord's assertions, this was not a last minute deduction in the Purchase Price, but a reflection of reality that on the eve of the closing the Vendors were not acquiring the real property from the Landlord, the Vendors were not selling real property to the Purchasers, and therefore this element of the "Purchase Price" would not be triggered. This is not an amendment to the definition but an application of the term. The Landlord has mischaracterized the requirements of the Purchasers to "consent" to any deal between the Vendors and the Landlord. Mr. McMullen's evidence is clear that this requirement merely ensured no further purchase price adjustment was required.

(McMullen Cross Examination pages 15-17, 24, 25, 26, 28, 35, 48)

32. Prior to closing, the purchase price/cash proceeds required under the Asset Purchase Agreement were finalized at $413.35 million, which did not include the Arizona Lease Put.

(October 31 McMullen Affidavit)

Cure Costs

33. Section 2.12(3) of the Asset Purchase Agreement provides:

> *The Purchaser will be responsible for all Cure Costs in respect of the Assigned Contracts, but only to the extent such Cure Costs have been reflected in the Working Capital Statement as Assumed Liabilities (emphasis added).*

34. Neither the purchase price for the Arizona Property nor reference to the Arizona Lease Put is reflected in the Working Capital Statement. Furthermore, no change of control payments are included in the Working Capital Statement.

(October 31 McMullen Affidavit)

Assumed Liabilities

35. Section 2.03 of the Asset Purchase Agreement sets out an exhaustive list of the liabilities that the Purchasers agreed to assume, being the "Assumed Liabilities", including:

> *(f) all Liabilities arising after the time of closing with respect to the ownership or exploitation of the Assets by or through the Purchaser...or otherwise arising by or through the Purchaser after the time of closing.*
>
> *(g) all Liabilities arising from or in connection with the performance of any of the Assigned Contracts (or breach thereof) after the time of closing (emphasis added).*

36. As stated above, any Assumed Liabilities arising prior to the time of closing had to be listed in the Working Capital Statement and neither the purchase price for the Arizona Property nor reference to the Arizona Lease Put is reflected in the Working Capital Statement. If the Arizona Lease Put was triggered by the sale transaction

(which again, the Purchasers deny), it was triggered at the time of closing, not "after the time of closing", and therefore would not fall within subsection (f) or (g) of the definition of Assumed Liabilities.

(October 31 McMullen Affidavit)

37. The Asset Purchase Agreement was by far the highest and best offer out of the SISP and the best outcome for the stakeholders of the Applicants in the circumstances.

(Robertson Cross Examination pages 27, 29, 31, 114)

(Exhibit "I" to the Affidavit of Bruce Robertson sworn October 31, 2012 (the "Robertson Affidavit")

The Sale Approval Order and the US Sale Approval Order

38. Integral to the proposed transaction, the Asset Purchase Agreement required approval and vesting orders to be obtained from the Canadian and US Courts in a form satisfactory to the Purchasers.

(Exhibits 8 and 9 to Robertson Cross Examination)

39. The Canadian hearing for the Canadian Sale Approval Order was first heard on June 21, 2012. The Sale Approval Order provides, among other things, as follows:

> *4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "**Monitor's Certificate**"), all of the Vendors' right, title and interest in and to the Assets described in the Asset Purchase Agreement, including, without limitation, the Vendors' rights, title and interest in and to any Assigned Contracts, including all leases of real property, shall vest, without further instrument of transfer or assignment, absolutely in the Purchaser or such other person(s) as the Purchaser may direct and the Monitor may agree (provided that no agreement will be required if such transfer is to an Affiliate that agrees to be jointly and severally liable with the Purchaser), free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, pledges, options, warrants, trusts or deemed trusts (whether contractual, statutory or otherwise), encumbrances, obligations, liabilities, demands, guarantees, restrictions, contractual commitments, rights, including without limitation, rights of first refusal and*

*rights of set-off, liens, executions, levies, penalties, charges, or other financial or monetary claims, adverse claims, or rights of use, puts or forced sales provisions exercisable as a consequence of or arising from closing of the Transaction, whether arising prior to or subsequent to the commencement of these CCAA Proceedings, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, equitable, possessory or otherwise, actual or threatened civil, criminal, administrative, regulatory, arbitral or investigative inquiry, action, complaint, suit, investigation, dispute, petition or proceeding by or before any Governmental Authority or person at law or in equity whether imposed by agreement, understanding, law, equity or otherwise, and any claim or demand resulting therefrom including but not limited to Antitrust proceedings commenced by the U.S. Department of Justice and various State's Attorney Generals (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Spivak dated February 22, 2012 and any subsequent charges created by the Court (the "**Court Charges**"); (ii) all charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Manitoba) or any other personal property registry system; (iii) Excluded Liabilities as defined in the Asset Purchase Agreement; and (iv) 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 Claims and Encumbrances affecting or relating to the Assets are hereby released, extinguished, expunged and discharged as against the Assets. (emphasis added)*

(October 31 McMullen Affidavit)

40. The Sale Approval Order was subsequently amended to reflect the final names of the Canadian and US Purchasers, as well as reflect that hearing was heard before the Winnipeg Court on July 12, 2012.

41. The Amended Canadian Sale Approval Order was recognized in the US Cpt 15 Proceedings on July 17, 2012.

Closing of the Sale Transaction

42. The Purchasers acquired assets from the Vendors and the transaction closed on July 27, 2012. At the time of closing, the $413.35 million purchase price was paid. Financing was obtained and investors secured in respect of the closing based on the

purchase price of $413.35 million. It is commercially unreasonable for the Landlord to suggest the Purchase Price could be altered post closing.

(McMullen Cross Examination pages 71-72)

43. Prior to closing, the Vendors provided a certificate certifying satisfaction or waiver of the conditions in sections 5.01 and 5.03 of the Asset Purchase Agreement, which include the payment of the purchase price. The Monitor issued a Monitor's certificate certifying, among other things, that the Purchasers paid in full the purchase price required under the Asset Purchase Agreement.

(October 31 McMullen Affidavit)

44. The Purchasers relied on the Sale Approval Orders and the Monitor's Certificate, which signalled the effective time of the vesting of the assets, which were obtained in order to close the transaction.

(October 31 McMullen Affidavit)

45. The Vendors issued a press release announcing the closing of the transaction. Among other things, the Vendors announced:

> *Prior to closing of the Transaction, Arctic Glacier agreed to certain amendments to the asset purchase agreement between Arctic Glacier and the Purchaser. As a result of the amendments and because Arctic Glacier did not purchase the land and buildings of its Arizona facility, the cash proceeds available on closing were $413.35 million subject to certain post-closing working capital and other adjustments under the asset purchase agreement.*

(October 31 McMullen Affidavit)

46. The Purchasers have been operating the business of the Vendors since the closing of the transaction on July 27, 2012.

(October 31 McMullen Affidavit)

Landlord's Involvement in the Proceedings

47. As a unit holder and landlord, Mr. Nagy and the Landlord continued to have significant connections to the Vendors following Mr. Nagy's resignation from management and board of directors/trustees of the Vendors. The Arizona Lease was a significant part of the Landlord's and Mr. Nagy's corporate or personal portfolio.

(Nagy Cross Examination page 1-4, 70, 73, 108, 135-136)

48. Mr. Nagy was fully aware of the CCAA proceedings and knew that the Monitor had a website for the CCAA proceedings on which the Monitor posted documents. Mr. Nagy, in fact, periodically visited that website. Mr. Nagy also reviewed press releases and postings on SEDAR. In Mr. Nagy's words, the Vendors' CCAA proceedings "certainly was big news around town".

(Nagy Cross Examination page 71-72, 113, 136, 137, 138, 140, 141, 160, 184)

(Desert Mountain LLC's Brief, para. 53)

49. In May 2012, Mr. Nagy held discussions with representatives and lawyers for the Vendors and a representative of the Monitor and received a written memorandum from the Vendors "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".

(Exhibit "B" to the Affidavit of Robert Nagy sworn October 9, 2012)

(Exhibit 11 and 13 to Nagy Cross Examination)

(Desert Mountain LLC's Brief, para. 21)

50. In May and June 2012, in the relevant time period leading up to the motions for the Sale Approval Orders, Mr. Nagy was very active in connection with the potential sale of the Vendors' assets pursuant to the SISP. Among other things, Mr. Nagy attended meetings with representatives of the Purchasers and/or their consultant prior

to submission of the Purchasers' bid in the Vendors' SISP to discuss the then potential transaction generally and made proposals of how to improve management of the Vendors' affairs and the efficiencies of the business of the Vendors.

(Nagy Cross Examination page 73, 74, 83, 108-110, 138, 184, 140, 141, 160, 208)

51. The Vendors were to effect notice of the motion for the Sale Approval Order. Notice was mailed via first class mail to the Landlord on June 14, 2012. **Pursuant to paragraph 65 of the Initial Order dated February 22, 2012, the Vendors and the Monitor were at liberty to serve any materials in these proceedings by forwarding true copies thereof by prepaid ordinary mail and that any such service shall be deemed to be received on the third business day after mailing if sent by ordinary mail.**

(Exhibit "D" to the Robertson Affidavit)

(Initial Order)

(Nagy Cross Examination page 203)

52. Roynat confirmed it was also keeping updated with public information regarding the CCAA proceedings. Roynat was served with notice of motion for the Sale Approval Order.

(Kelly Peters' Affidavit of Service sworn June 20, 2012)

(McMullen Cross Examination page 92-93)

53. On or about June 19, 2012, and prior to the hearing of the motion for the Sale Approval Order, the Purchasers began discussions with the Landlord specifically with respect to the Arizona Lease and its treatment in the Purchasers' proposed sale transaction. Mr. McMullen testified at his cross examination that on June 19, 2012 - two days before the motion for the Sale Approval Order and one day before the Asset Purchase Agreement was posted on SEDAR - he had a discussion with Mr. Nagy and that Mr. Nagy made specific references to the contents of the Asset Purchase Agreement

and, in particular, schedule 2.06 thereof, which he could not have known about except through review of the motion materials. Mr. McMullen testified as follows:

> 237 *Q We're talking about the June 19th conversation with Mr. Nagy, did you ask anything with respect to the agreement or schedule 2.06 to the agreement?*
>
> *A So in my previous comment I brought up the fact that we didn't practically -- we/I didn't bring it up to Nagy, but in fact in that conversation Nagy did bring it up to me. So he pointed out that, you know, in his read of the document, which had been evidently relatively recent, he noticed the 12 and a half million dollars reference in the footnote to the purchase price allocation in the APA.*
>
> **(McMullen Cross Examination page 40, 107-108) (question objected to by Landlord's counsel on the basis of being improper for re-examination))**
>
> **(Nagy Cross Examination page 187-189)**

54. Mr. Nagy could not dispute or affirm having a discussion with Mr. McMullen on June 19, 2012 or what was said in the course of same.

(Nagy Cross Examination page 187-189)

55. On Mr. Nagy's best evidence, he received the motion materials with respect to the Sale Approval Order between June 28, 2012 and July 3, 2012 – nine days before the motion for the amended Sale Approval Order (which was heard on July 12, 2012).

(Affidavit of Robert Nagy sworn November 7, 2012)

(Nagy Cross Examination page 89, 114)

56. The Landlord did not file or make submissions at the motions for the Sale Approval Order or the amended Sale Approval Order.

57. The Landlord also did not appeal or seek a stay of the Sale Approval Order or the amended Sale Approval Order.

58. In fact, it is the Landlord's position that this Court did not have jurisdiction in the first place to deal with the Arizona Property located in the US.

(Nagy Cross Examination page 196)

(Exhibit 23 to the Nagy Cross Examination)

59. The hearing in respect of the US Vesting Order was heard on July 17, 2012. Notice of this motion to the Landlord was effected on June 27, 2012. A copy of the amended Sale Approval Order was attached to US motion materials served on the Landlord.

(Nagy Cross Examination page 117, 201)

(Exhibit 22 to Nagy Cross Examination)

60. The Landlord did not file or make submissions at the US hearing.

61. The Landlord filed a notice of appeal the US Vesting Order on July 31, 2012, after the closing had occurred. The appeal was scheduled for mandatory mediation. As of December 18, 2012, the mandatory mediation has not been held.

(Nagy Cross Examination)

62. Further discussions between the Landlord and the Purchasers occurred in the days prior to closing the transaction, where Mr. McMullen advised the Landlord that the $12.5 million Arizona Lease Put would not be paid, and the Purchasers anticipated continuing under the current terms of the Arizona Lease. The Landlord still took no steps to stay, appeal or vary the order at that time.

(October 31 McMullen Affidavit)

63. Following the closing of the transaction on July 27, 2012, the Purchasers were not contacted by the Landlord regarding the Arizona Lease and the Sales Approval Order until August 30, 2012. Following the closing, the Landlord has been accepting, and continues to accept, the Purchasers' monthly rent payments totalling $108,000 per month.

(October 31 McMullen Affidavit)

(Nagy Cross Examination)

64. It is worth noting that Mr. Nagy made two proposals to the Purchasers in respect of the Arizona Lease; one in May 2012 and a second in June 2012. Despite suggesting that he relied upon the honouring of the Arizona Lease Put, and despite having knowledge of the potential Purchase Price allocation, both proposals by the Landlord involved an assignment of the leased premises – not a sale of real property; and neither involved payments of the $12.5 million Arizona Lease Put. Instead both Landlord and Purchasers (as future tenant) sought to negotiate future commercial lease terms. When those negotiations failed, the Landlord commenced this motion.

(Exhibit 10 to Nagy Cross Examination)

(Nagy Cross Examination page 207-208)

(Answers to Undertakings from the Cross Examination of Robert Nagy, Undertaking No. 4)

65. The Purchasers submit the Landlord's motion raises the following issues:

(a) Can and should the Sale Approval Order which vests out any obligations associated with the Arizona Lease Put be amended or varied?

(b) If the Sale Approval Order is amended or varied, do the Purchasers have any liability to the Landlord?

A. The Sale Approval Order which vests out any obligations associated with the Arizona Lease Put should not be amended or varied

i. The Court had jurisdiction and properly granted the Sale Approval Order containing the term vesting out any obligations associated with the Arizona Lease Put

66. The Purchasers sought paragraph 4 (quoted above at paragraph 39) (and paragraphs 6, 7, 8, 9 and 10) of the Sale Approval Order. The provisions are consistent with the usual form of US Orders which include assignment of contract language. A US

form of order was sought such that the US Court, where the Property was located, would recognize the Order.

(Exhibit 10 to Robertson Cross Examination)

(*In Re American Community Newspapers* LLC, 2009 WL 7215682 at 30 (U.S. Bankruptcy Court, D. Delaware), Tab 3)

(*In Re Ames Holding Corp.*, 2010 WL 2822030 at 39 (U.S. Bankruptcy Court, D. Delaware), Tab 4)

(*In Re Telogy LLC*, 2010 WL 2822092 at 24 (U.S. Bankruptcy Court, D. Delaware, Tab 5)

(*In Re Westcliff Medical Laboratories, Inc.*, 2010 WL 5167554 at 28 (U.S. Bankruptcy Court, C.D. California, Santa Ana Division), Tab 6)

(*In Re Champion Motor Group Inc.*, 2010 WL 5053964 at 24 (U.S. Bankruptcy Court, E.D. New York), Tab 7)

(Transcripts from Sale Approval Order hearing)

67. Orders with similar relief have also been granted in Canada.

(*Re Timminco Limited*, Ont. S.C.J., May 22, 2012 (12-CL-9539-00CL) ("Re Timminco"), Tab 8)

(*National Bank of Canada v. Hillsburgh Stock Farm (1997) Ltd.*, Sask. Q.B., December 19, 2012 (QBG No. 1562 of 2012) ("Re Hillsburgh"), Tab 9)

68. As acknowledged by the Landlord, s. 11.3 of the CCAA creates a complete code for the assignment of agreements and it is through the lens of s. 11.3 (and to an extent, s. 11, the general power to make orders that are appropriate in the circumstances) that the assignment of the lease should be considered. The relevant provisions of s. 11.3 read as follows:

> ***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.*

...

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.

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.

69. Section 11.3 of the CCAA authorizes the Court to make an order assigning the rights and obligations of a debtor company under an agreement to any person who is specified by the Court and who agrees to the assignment. Section 11.3(4) of the CCAA requires that monetary defaults must be satisfied. Industry Canada states the purpose of subsection 11.3(4) the CCAA as follows:

> *Subsection (4) is amended to ensure that the agreement may only be assigned if the court is satisfied that, if a monetary default has occurred, it will be remedied within a time frame set by the court. It also clarifies that monetary defaults do not include those that arise merely by virtue of the fact that the debtor company is insolvent or failed to perform a non-monetary obligation. <u>This amendment is required to ensure that agreements may not be drafted so as to be rendered unassignable, or assignable only at excessive cost, thereby defeating the purpose of the provision and providing the other party to the agreement a means of obtaining greater recovery than can be expected by other creditors of the same class.</u>* [Emphasis added]
>
> **(Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause Analysis:**

<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01985.html#a70>, Tab 10 ("Clause by Clause Analysis"))

70. The Landlord misstates the principle for which *Re Doman Industries* stands. Justice Tysoe, then at the Supreme Court of British Columbia, noted that s. 11(4)[2] was not intended 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"* [emphasis added]. Contrary to the argument put forth by the Landlord, Justice Tysoe explicitly noted that the Court has the jurisdiction to grant a permanent stay with respect to any events of default occurring during the restructuring period. Justice Tysoe noted with approval the comments of Justice Spence of the Ontario Superior Court of Justice when he stated that:

> *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.* [Emphasis added]

(*Re Doman Industries Ltd.*, [2003] B.C.J. No. 562 (S.C.) at para 15, Tab 11)

(*Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. (Comm. List) at para 32, Tab 12)

71. As stated above, in at least two prior Orders, Canadian Courts granted sale approval and vesting orders which permanently overrode any rights and remedies of

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[2] While not relevant to the immediate proceedings, it is of note that *Re Doman Industries* was decided prior to the enactment of s. 11.3. As such, the Court relied on a more general provision of the CCAA (s. 11(4) to assign contracts and stay the counterparties to those contracts from terminating them for breach of contract.)

any person arising under some of the transferred agreements as a result of the transfer of such agreements.

(Re Timminco and Re Hillsburgh, *supra*, Tabs 8 and 9)

72. Despite the Landlord's allegations that counsel deceived the Court at the sales approval motion, the Court was aware of, *inter alia*, the request to require assignment of leases including the Arizona Facility, and was provided with a blackline to the "model vesting order" which specifically reflected the provisions in paragraph 4 relating to the vesting of puts arising from closing of the sale transaction. In its confidential report to the Court, the Monitor noted the 25%/75% element in the Bid Letter and the extent to which the Purchasers' bid was greatly superior to the next best alternative.

(Exhibit "D" to the Affidavit of Keith McMahon sworn June 13, 2012)

ii. It would be novel, inappropriate and completely impractical to overturn the Sale Approval Order and unravel the transaction many months after its closing

73. The purpose of an approval and vesting order is to "effectively deal with the assets of the corporation and to obtain funds to pay creditors in accordance with the plan of arrangement, so that the corporation and all creditors can move forward".

(*Clemmer Steelcraft Technologies Inc. v. Bangor Metals Corp.*, 2009 ONCA 534 at para 9, Tab 13)

74. Upon the closing of the transaction contemplated under the approval and vesting order, the order cannot be varied. Varying the order at this stage would destroy the certainty and finality so essential in a sale of assets under the CCAA. As has been stated in the Ontario Superior Court of Justice:

> *... it is neither appropriate nor desirable to, in effect, open up and revisit the terms of a vesting order... upon which parties have subsequently acted and conducted their affairs.*
>
> ...
>
> *In the present case, the Approval and Vesting Order was a final judicial determination of the rights of the parties represented in that proceeding in respect of the assets that*

> *were the subject of the sale. The CCAA objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted subsequently to return to court to undo past transactions. Such an approach should be discouraged.*

(*Extreme Retail (Canada) Inc. v. Bank of Montreal*, [2007] O.J. No. 3304 at para 21, Tab 14)

75. **The Purchasers have not found a single reported case in any of the Canadian jurisdictions in which a Canadian Court varied or overturned a sale approval and vesting order without the consent of the purchaser.**

76. In the case at bar, if the Sale Approval Orders are varied or amended without the consent of the Purchasers, there is a ripple effect on the transaction entirely. The Landlord cannot amend one term of the transaction, while ignoring the balance of the transaction and the potential effect on the Purchasers and its stakeholders and Arctic Glacier and its stakeholders. If the transaction could be unscrambled as the Landlord is attempting, and the transaction reversed, there would be a detriment to the Purchasers, their investors, creditors, stakeholders and employees, as well as the Vendors' stakeholders and creditors. Unwinding the transaction would also involve a reversal of the payments to secured creditors and DIP Lenders made on the date of Closing, dismissal of former employees who are currently employed by the Purchasers and a reopening of the sales process undertaken by the Vendors. Put simply, this would be a catastrophic result for the business.

(McMullen Cross Examination page 88-89)

(Robertson Cross Examination page 164)

iii. The Landlord should not be permitted to raise objections to the Sale Approval Order well after the closing of the sale transaction

77. The Supreme Court of Canada, and courts across the country, have recognized that CCAA proceedings necessarily operate in "real time." With multiple stakeholders representing multiple (at times conflicting) interests, decisions are made in real time. In

order for real time litigation to work, it is imperative that interested parties not sit on their rights.

(*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, Tab 15)

(*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, Tab 16)

(*National Bank of Canada v. Stomp Pork Farm Ltd.*, 2008 SKCA 73, Tab 17)

78. The Landlord, an individual creditor, is pursuing its individual claim in isolation some seven months after the closing of the sale transaction, asking the Court to ignore the economic realities the parties were facing in closing a transaction involving in excess of $400 million, multiple stakeholders, numerous issues and many moving parts.

79. Courts have denied relief to parties who lie in the weeds waiting for an opportune time to assert themselves. In determining whether to deny relief to a creditor accused of sitting on its rights, the Alberta Court of Appeal in *Blue Range* noted that the timely bringing of a claim is an important general legal principle, not just in CCAA proceedings.

(*Re Blue Range Resources Corp.*, 2000 ABCA 285 at para 19, Tab 18)

80. *Lindsay v. Transtec Canada Ltd.* is the classic "lying in the weeds" case. In *Lindsay*, a pensioner was aware of CCAA proceedings in respect of his former employer but failed to submit a proof of claim regarding certain pension amounts subject to compromise. Instead, he waited until the plan was approved and then sought leave to bring an action against the debtor for his claim. The B.C. Supreme Court found that that the applicant was aware of the proceedings under the CCAA but failed to take any steps in respect of those proceedings, ultimately subverting the entire process. Justice Huddart refused to permit the commencement of the action and denied the applicant entry into the CCAA claims process. In noting the importance of participating in CCAA proceedings in a timely manner, Justice Huddart stated that:

> *Those who participate in CCAA proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.*
>
> ...
>
> *A CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself. Whatever it may have been in past years, it is now a stage where creditors are to participate in the collective enterprise of keeping a company going for the benefit of employees, customers, and the general community, as well as the creditors. As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.* [Emphasis added]

(*Lindsay v. Transtec Canada Ltd.*, (1994), 28 C.B.R. (3d) 110 (B.C.S.C.) at paras. 74-75, Tab 19)

81. In the case at bar, it is undisputed that Mr. Nagy was aware of the Vendors' CCAA proceedings and visited the Monitor's website for the Vendors' CCAA proceedings periodically. He followed press releases and postings on SEDAR. He was aware of the SISP that was being undertaken and had discussions and meetings with representatives of the Vendors and the Purchasers prior to the date of the Sale Approval Order.

(Nagy Cross Examination page 71-72, questions 250-252)

82. It is also undisputed that by June 19, 2012, at the latest, Mr. Nagy knew that an Asset Purchase Agreement was being entered into that would require Court approval. As a party with a significant interest in respect of the Vendors, Mr. Nagy "would expect" he was interested in when the Court approval of this transaction would be occurring.

(Nagy Cross Examination page 185)

83. On Mr. McMullen's undisputed evidence, Mr. Nagy was aware of the details of the Asset Purchase Agreement which could only be known through review of the

motion materials for the Sale Approval motion two days before such motion. Even on Mr. Nagy's best evidence, he received such motion materials before the motion to amend the Sale Approval Order, the motion for the US Sale Approval Order and the closing of the Asset Purchase Agreement.

84. Mr. Nagy was also aware and was informed by a number of lawyers that the matters relating to the CCAA proceedings, the SISP and the Sale Approval Orders are complicated. He sought the assistance of counsel prior to the closing but decided to decline to pursue further action.

(Nagy Cross Examination page 90, 106, 143-144, 192, 196)

85. In May 2012, Mr. Nagy also received a memorandum from the Vendors and call from counsel containing what he interpreted as "veiled threats" to, among other things, disclaim the Arizona Lease, create an unfunded and potentially unfundable unsecured debt with respect to the Vendors' obligation under the Arizona Lease, exclude the Arizona Property from the proposed transaction with the expectation that rejection of the lease will cause Roynat to foreclose, and/or to abandon the Arizona Property. The memo was written by Hugh Adams, who the Landlord acknowledges was "fully familiar" with the Arizona Lease.

(Nagy Cross Examination page 91, 95, 102, 197-200)

(Desert Mountain LLC's Brief, paras. 11, 21-24)

86. Despite being aware of all of these matters, Mr. Nagy and the Landlord chose not to retain counsel or participate in any of the motions relating to the sale of the Vendors' assets, including the Arizona Lease, until well after the closing of the sale transaction. Mr. Robertson aptly stated in his cross examination, *"[Mr. Nagy] has notice of everything that has gone on. Desert Mountain chose to have its head in the sand as opposed to being proactive themselves...."* and *"[t]he APA is as clear as can be, to the extent anybody takes the time to read it. And that APA was available to Desert Mountain, available to the Purchaser, everybody knew exactly what it meant"*.

(Robertson Cross Examination page 138, 151)

(McMullen Cross Examination page 75, 86, 106, 138)

87. Mr. Robertson also testified, *"[t]he one thing I would add is to the best of my knowledge, Desert Mountain, or no representative of Desert Mountain even reached out to the vendors, or anyone as part of this process until now. So, in my mind, it is a case of an interested party being disinterested, and having his head in the sand rather than being proactive in the circumstances."*

(Robertson Cross Examination page 87)

88. The timing of the Landlord's objections and motion is particularly egregious because it has waited until it was clearly too late in the proceedings for the Vendors, the Purchasers and the other stakeholders who have in good faith participated in the sales process to create an alternative amenable to all parties. Therefore, the Landlord should not be permitted to raise objections with respect to the Asset Purchase Agreement or the Sale Approval Orders at this late juncture.

(Nagy Cross Examination page 211)

iv. The Landlord's motion is an inappropriate collateral attack on the Sale Approval Order

89. The Landlord's Motion also constitutes a collateral attack on the Sale Approval Order and should not be permitted. It is worth repeating that no appeal has been filed in respect of the Canadian Sale Approval Order.

90. Where an order is sought which necessarily requires a party to breach an earlier order granted in CCAA proceedings, such order constitutes a collateral attack and cannot be granted. As held by the Supreme Court of Canada, *"the doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal."* Should a party take issue with an order granted, the proper means to raise an objection is by dealing with that order directly:

> *It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.*
>
> **(*Garland v. Consumers' Gas Co.* 2004 SCC 25 at para. 71, Tab 20)**

91. CCAA courts have refused to grant orders which have the effect of changing the effect and scope of a prior order.

(See, e.g, *Calpine Canada Energy Ltd. (Re)*, 2006 ABQB 743 at para. 16, Tab 21 and *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (S.C.J.), at paras. 94-100, Tab 22)

92. As outlined above, the Landlord had full opportunity to participate in the initial motions for the Sale Approval Orders and chose not to. The Landlord also chose not to appeal the Sale Approval Order and has not advanced the appeal of the US Sale Approval Order. Instead, the Landlord is attempting to subvert the CCAA process, circumvent the proper routes available to litigants and CCAA process participants with this collateral attack on the Sale Approval Order.

B. If the Sale Approval Order is amended or varied, the Purchasers are not responsible for payment of the Arizona Lease Put under the Asset Purchase Agreement

i. The Landlord is precluded from attempting to gain a benefit under the Asset Purchase Agreement as it is not a party thereto

93. The Landlord is not a party to nor a beneficiary under the Asset Purchase Agreement and has no remedy as against the Purchasers, thereunder.

94. The doctrine of privity of contract provides that only the parties to a contract can enforce that contract. As put by the Supreme Court of Canada, a contract will not *"confer rights or impose obligations arising under it on any person except the parties to it."* The main exceptions to the privity of contract doctrine are limited to situations involving agency, trusts, tort, collateral contracts, assignment (in that the party assigned the

contract can then ensure it is enforced) certain statutory exceptions. None of the exceptions to the doctrine are applicable in the immediate case.

(John McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012) at 303, Tab 23)

(*Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Col. Ltd.*, [1915] AC 847 at 853, Tab 24)

(*London Drugs Ltd. v. Kuehne & Nagel International Ltd.* [1992] 3 S.C.R. 299, Tab 25)

ii. General Principles of Contract Interpretation

95. The Supreme Court of Canada has held that *"[t]he contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time."*

(*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] S.C.J. No. 59, at para. 54, Tab 26)

96. The words in a contract must also be read in harmony with the agreement as a whole and in the context of the circumstances as they existed when the agreement was created. Particularly when interpreting commercial contracts, the subjective intent of the parties is not helpful or relevant to the exercise as an *"emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve."*

(*McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada* [1981] 2 S.C.R. 6, Tab 27)

(*Dumbrell v. The Regional Group of Companies, Inc.* (2007), 85 O.R. (3d) 616 (C.A.), at paras. 50-53, Tab 28)

97. It is also trite law that contracts are to be interpreted to be commercially reasonable. As the Supreme Court of Canada stated in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888:

> *...the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the*

> *true intent of the parties at the time of entry into the contract.* ***Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the*** *parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.* (page 901)
>
> **(*Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at 901, Tab 29)**

98. It would be commercially unreasonable to require the Purchaser to buy the real property interest in the Arizona Facility by requiring it to pay the Arizona Lease Put after it has already paid the required Purchase Price for the leasehold interest in the Arizona Facility.

99. Further, it is a well-accepted rule of interpretation, that in considering the context of the contract as a whole, a general power is to be read as limited by a specific restriction. The Supreme Court of Canada stated in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 as follows:

> *It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole. Where there are apparent inconsistencies between different terms of a contract,* ***the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question****. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term.* ***A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms -- or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.*** (para 9) [citations omitted]

(*BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at para 9, Tab 30)

iii. The Asset Purchase Agreement is clear regarding treatment of the Arizona Lease

100. In the case at bar, there are specific provisions that outline how the Arizona Lease was to be dealt with in the definition of the Purchase Price. Furthermore, the Asset Purchase Agreement defined specifically what liabilities the Purchasers would assume. The Arizona Lease Put is not found in either the "assumed liabilities" definition nor the specific liabilities outlined in the schedules and working capital statement. It is commercially unreasonable to suggest that the Arizona Lease Put should be implicitly found or read into the concept of assumed liabilities.

(McMullen Cross Examination pages 15-16, 24, 25, 26, 28, 35, 48)

101. The Asset Purchase Agreement provides clear treatment of the Arizona Lease. The agreement does not require the Purchasers to acquire the Arizona Property or pay the Arizona Lease Put. Rather, the Asset Purchase Agreement provides for the Purchasers to acquire the Arizona Lease as a leasehold interest and acquire certain specifically outlined liabilities with respect thereto, which liabilities do not include the Arizona Lease Put.

102. It is non-sensical and defies contractual interpretation principles to suggest that although the Arizona Lease Put was specifically referred to in the definition of Purchase Price, it should also be implied or read into the concept of assumed liabilities. It is clear from the Landlord's questions during cross examinations that even the Landlord does not accept such a theory.

(Robertson Cross Examination pages 52-54)

103. Such an interpretation is also inconsistent with the fact the Purchasers acquired the Arizona Facility as a leased property not real property. The Vendors' interpretation would result in the commercially unreasonable conclusion that the Purchasers acquired

assignment of the lease and the payout obligations to pay the Arizona Lease Put which once completed would result in the transfer of the real property interest.

iv. The liability to pay the Arizona Lease Put (if any) does not fall within the definition of Assumed Liabilities that were assumed by the Purchasers

104. The Purchasers' obligation, if any, relating to the Arizona Lease Put is found in the definition of Purchase Price. The Purchasers are responsible to pay any amount relating to the Arizona Facility only if the Vendors paid before closing. This did not occur. The issuance of the Vendors' Certificate, the Monitor's Certificate and Monitor's email to the Court on the eve of closing are consistent with the conclusion that the Purchase Price had been satisfied.

(McMullen Cross Examination pages 15-16, 24, 25, 26, 28, 33, 35, 36, 48, 61, 82, 90)

105. Further, section 2.03 of the Asset Purchase Agreement sets out an exhaustive list of the liabilities that the Purchasers agreed to assume, being the "Assumed Liabilities".

> *(f) all Liabilities arising after the time of closing with respect to the ownership or exploitation of the Assets by or through the Purchaser...or otherwise arising by or through the Purchaser after the time of closing.*
>
> *(g) all Liabilities arising from or in connection with the performance of any of the Assigned Contracts (or breach thereof) after the time of closing (emphasis added).*

106. Any Assumed Liabilities arising pre-closing had to be listed in the Working Capital Statement. Neither the purchase price for the Arizona Property nor reference to the Arizona Lease Put is reflected in the Working Capital Statement. Despite the Vendors' current interpretation of "assumed liabilities", there was no amendment to the corresponding Working Capital Statement to reflect such an obligation.

(McMullen Cross Examination pages 52-53, 96, 148-149, 212-213)

107. If the Arizona Lease Put was triggered by the sale transaction (which, again, the Purchasers deny), it was triggered at the time of closing, not "after it the time closing",

and therefore would not fall within subsection (f) or (g) of the definition of Assumed Liabilities.

(Exhibit 22 to Robertson Cross Examination)

108. Had the Vendors (or Landlord) sought to impose the Arizona Lease Put as an assumed liability on the eve of closing, the evidence is clear the Purchasers would have sought a further reduction in the Purchase Price in the amount of the Arizona Lease Put to ensure it did not inherit this economic cost.

(McMullen Cross Examination pages 66, 78, 99, 102)

(Robertson Cross Examination pages 48, 73, 137)

(Exhibit 16 to Robertson Cross Examination)

v. ***The Arizona Lease Put is not a Cure Cost or monetary default under the Sale Approval Order or within the meaning of the Asset Purchase Agreement and is therefore not payable by the Purchasers pursuant to the Asset Purchase Agreement***

109. Section 2.12(3) of the Asset Purchase Agreement provides:

> *The Purchaser will be responsible for all Cure Costs in respect of the Assigned Contracts, but only to the extent such Cure Costs have been reflected in the Working Capital Statement as Assumed Liabilities* [emphasis added].

110. The Sale Approval Order specifically reflects that the Purchasers pay cure costs/assumed liabilities only as outlined in the Asset Purchase Agreement. (See paras 6, 7, 9 and 10.)

111. Neither the purchase price for the Arizona Property nor reference to the Arizona Lease Put is reflected in the Working Capital Statement. Accordingly, the price to acquire the disputed property is not a Cure Cost within the meaning of the Asset Purchase Agreement or Sale Approval Order.

112. Furthermore, no change of control payments are included in the Working Capital Statement and are therefore not payable by the Purchasers pursuant to the Asset Purchase Agreement or Sale Approval Order.

113. In addition, as stated above, section 11.3(4) of the CCAA "*to ensure that agreements may not be drafted so as to be rendered unassignable, or assignable only at excessive cost, thereby defeating the purpose of the provision and providing the other party to the agreement a means of obtaining greater recovery than can be expected by other creditors of the same class.*"

(Clause by Analysis, *supra*, Tab 10)

114. In this case, upholding the Arizona Lease Put, at the above market cost, would render the Arizona Lease unassignable or assignable only at excessive cost and would defeat the purpose of section 11.3(4).

vi. The Disability Clause Argument is not applicable in the circumstances

115. The Landlord's latest attempt to characterize the Arizona Lease Put as having been triggered on February 20, 2012 – as a result of Mr. Nagy's resignation from the Vendors' boards of directors and/or trustees – was raised for the first time by Mr. Nagy in his supplementary affidavit in November 2012 - over fifteen months after the alleged triggering event. The provision is framed as a "disability" clause. The Landlord acknowledges he is not physically disabled. In any event, this triggering event, like the change of control provisions, would have been discharged by the Sale Approval Order.

(Exhibit 1 to Nagy Cross Examination)

116. Further, this theory appears to have been a creation raised post closing (and post the initial notice of motion) by the Landlord. However, the lack of any steps being initiated by the Landlord on this theoretical option speaks volumes. He did not raise the issue, nor take any of the steps it is required to take in the case of an "automatic exercise" of the Arizona Lease Put since his resignation in August 2011. No steps were

taken during CCAA proceedings prior to the sale. Respectfully, this is a further example of "lying in the weeds" which should not be condoned by the Court.

(Nagy Cross Examination pages 15, 120, 130, 131, 165)

Conclusion

117. In light of the foregoing, it is respectfully requested that the Landlord's motion be dismissed as against the Purchasers in its entirety, with costs in favour of the Purchasers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th day of February, 2013.

Elizabeth Pillon / Maria Konyukhova
STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Lawyers for HIG Zamboni, LLC