File No. CI 22-01-38613

THE KING'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MANITOBA CLINIC MEDICAL CORPORATION AND THE MANITOBA CLINIC HOLDING CO. LTD.

BRIEF OF LAW OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
DATED FEBRUARY 6, 2024
DATE OF HEARING : FRIDAY, FEBRUARY 9, 2024 AT 10:00A.M.
THE HONOURABLE MR. JUSTICE CHARTIER

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INDEX

I. DOCUMENTS AND AUTHORITIES RELIED ON

Documents to be relied on:

1. the pleadings and materials filed herein;
2. the Amended and Restated Initial Order granted December 1, 2022 (the "**ARIO**");
3. the Order (Sale and Investment Solicitation Process) granted April 21, 2023;
4. the Affidavit of Keith McConnell sworn November 28, 2022;
5. the Pre-Filing Report of Alvarez & Marsal Canada Inc. (the "**Monitor**") dated November 29, 2022;
6. the First Report of the Monitor dated January 20, 2023;
7. the Second Report of the Monitor dated April 18, 2023;
8. the Third Report of the Monitor dated July 31, 2023;
9. the Fourth Report of the Monitor dated September 22, 2023;
10. the Fifth Report of the Monitor dated October 27, 2023;
11. the Sixth Report of the Monitor dated November 20, 2023;
12. the Seventh Report of the Monitor dated February 6, 2024;
13. the Affidavit of Service of Shelby Braun, to be filed;
14. the Affidavit of Alecia Iwanchuk sworn February 6, 2024;
15. the Notice of Motion dated February 6, 2024; and
16. such further and other documentation as counsel may advise and this Honourable Court may permit.

Cases, statutory provisions and authorities to be relied on:

TABS

A. *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "***CCAA***"), s. 11, 11.02 and 12

B. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758

C. *The Personal Property Security Act,* C.C.S.M., c. P35, ss. 35(1)

D. *The Real Property Act,* C.C.S.M., c. R30, s. 64

E. *Re Target Canada Co.,* 2015 ONSC 7574

F. *Nortel Networks Inc.,* 2022 ONSC 6680

G. *Re Toys "R" Us (Canada) Ltd*, 2018 ONSC 609

H. *Re Green Relief Inc.,* 2020 ONSC 6837

I. *Re Arctic Glacier Income Fund* (Court File No. CI 12-01-76323)- Claims Procedure Order granted by Justice Spivak

II. INTRODUCTION

1. With the Medco Transaction[1] and the Realco Transaction (collectively, the "**Transactions**") now closed, the majority of the Applicants' Property has been liquidated, the Applicants are no longer operating their respective businesses, and the Monitor's focus has shifted to the outstanding administrative matters that need to be completed in order to terminate these *CCAA* proceedings.

2. The Monitor has filed two draft orders for this Court's approval, namely, the Stay Extension Order and the D&O Release Order:

(a) the Stay Extension Order contemplates, among other routine relief, the extension of the Stay Period until May 3, 2024 and Monitor distributing $35,849,000 of the net proceeds of the Transactions to CIBC, the Applicants' only secured creditor (the "**Interim Distribution**"); and

[1] Except where otherwise defined, capitalized terms will have the meanings given to them in the ARIO, the Seventh Report, and other orders and reports granted and filed in these proceedings, respectively.

(b) the D&O Release Order provides for the Directors' and Officers' release from certain post-filing liabilities they may have incurred in their capacities as directors and officers, unless an aggrieved party files and serves a sworn affidavit detailing the particulars of its claim against the Directors and Officers on or before the Claims Bar Date (i.e., March 9, 2024).

3. The Stay Extension Order is being sought so as to maintain the *status quo* in the *CCAA* proceedings while the Monitor completes the work necessary to conclude the same, while the D&O Release Order is, in the Monitor's respectful view, an expedient, fair way to resolve the $350,000 D&O Charge against the net proceeds of the Transactions.

4. This Brief of Law will discuss the law and evidence applicable to granting the relief sought in both the Stay Extension Order and the D&O Release Order, as well as the Monitor's submissions as to why the relief is appropriate in the circumstances.

III. FACTS

5. The relevant facts are set out in the Seventh Report and the previous reports and affidavit material filed in these proceedings. For the sake of economy, the facts will not be summarized here, but instead referred to, where appropriate, in the discussion below.

IV. ISSUES

6. This Brief of Law addresses the following issues:

(a) Should the relief sought in the Stay Extension Order be granted, namely:

(i) Should the Stay Period be extended?

(ii) Should the Monitor be permitted to make the Interim Distribution to CIBC?

(iii) Should the Court approve the Monitor’s activities, actions, and conduct described in the Seventh Report?

(iv) Should the Court approve the professional fees and disbursements of the Monitor, the Monitor’s legal counsel, and the Applicants’ legal counsel?

(b) Should the Directors and Officers be released in accordance with the terms of the D&O Release Order?

V. DISCUSSION

A. The Relief Sought in the Stay Extension Order should be granted

(i) The Stay Period should be extended

7. The Monitor requests that the Stay Period be extended to May 3, 2024.

8. Section 11.02 of the *CCAA* provides that the Court may grant extensions of the stay of proceedings if it is satisfied that circumstances exist that warrant the extension, and the Applicants are continuing to act in good faith and with due diligence.

9. In addition, the Court may also consider whether:

(a) extending the Stay Period will further the remedial purposes of the *CCAA*;

(b) the debtor has made progress to either restructure or sell its business assets during the previous Stay Period; and

(c) the comparative prejudice to any creditors or other stakeholders is outweighed by the prejudice that would be experienced by the debtor if stay extension were not granted.

***Worldspan Marine Inc. (Re)*,**
2011 BCSC 1758 at paras 13 and 22 [TAB B]

10. The extension of the Stay Period is being sought so as to maintain the *status quo* while the Monitor finalizes the administration of the *CCAA* Proceedings, including the resolution of the D&O Charge, which is discussed in a later section of this brief.

Seventh Report at para 52

11. The Monitor is of the opinion that the Applicants have acted in good faith and with due diligence throughout these *CCAA* proceedings.

Ibid

12. With respect to the additional considerations noted in the *Worldspan Marine* case and summarized in paragraph 9 above:

(a) **furthering the purposes of the *CCAA:*** the proposed extension of the Stay Period will further the remedial purposes of the *CCAA* by allowing the Monitor to complete outstanding administrative activities required to bring these proceedings to a close;

(b) **the Applicants' progress toward selling their assets during the Stay Period:** the Transactions closed in the preceding Stay Period; and

(c) **comparative prejudice if the extension is granted:** the Monitor is not aware of any party who will be materially prejudiced by the extension of the Stay Period.

Ibid

(ii) <u>The Monitor should be permitted to make the Interim Distribution to CIBC</u>

13. The Monitor currently holds approximately $36,925,000 as a result of the Transactions. The proposed Interim Distribution would result in CIBC receiving $35,925,000, and the Monitor maintaining a $1,000,000 holdback (the "**Holdback**") from the net proceeds of the Transactions, which the Monitor estimates will be sufficient to allow the Monitor to make any disbursements relating to the completion of Medco's year-end, indemnity claims against the D&O Charge, ongoing professional fees, and any unforeseen expenses incidental to the administration of the Applicants' estate. Any Holdback amounts remaining are likely to be distributed to CIBC as part of a future motion.

Seventh Report at paras 31 and 32

14. CIBC is the Applicants' only secured lender. As at November 23, 2022, Medco's indebtedness to CIBC totaled $5,108,112.58 and Realco's indebtedness to CIBC totaled $59,683,665.71.

Affidavit of Keith McConnell sworn November 28, 2022 at paras 43 and 44

15. The Applicants' indebtedness to CIBC is secured by various interests created under the following agreements, each of which was duly executed on August 22, 2017 (collectively, the "**CIBC Security**"):

(a) a general security agreement executed by Medco in favour of CIBC which granted CIBC a security interest in all of Medco's present and after-acquired personal property (the "**Medco GSA**");

(b) a general security agreement executed by Realco in favour of CIBC which granted CIBC a security interest in all of Realco's present and after-acquired personal property (the "**Realco GSA**"); and

(c) a demand debenture executed by Realco in favour of CIBC in the principal amount of $75,000,000 (the "**Facility Debenture**") which granted CIBC, among other things, a mortgage interest in the following lands owned by Realco (the "**Land**"):

Title No. 2821678/1
Lot 1 Plan 58713 WLTO
In RL 5 and 6 Parish of St John

16. The Medco GSA, Realco GSA, and the Facility Debenture are appended to the Affidavit of Keith McConnell sworn November 28, 2022, as Exhibits "12," "13," and "14," respectively.

17. The Monitor's Agent Counsel conducted a search of the Manitoba Personal Property Registry (the "**PPR**") for each of the Applicants on January 30, 2024. The PPR searches are collectively attached to the Affidavit of Alecia Iwanchuk sworn February 6, 2024 (the "**Iwanchuk Affidavit**") as Exhibit "A," and disclose the following registrations:

(a) in respect of Medco:

(i) CSI Leasing Canada Inc. ("**CSI Leasing**") has a registration against certain equipment formerly leased by Medco pursuant to Master Lease No. 301206 (the "**CSI Lease**"); and

(ii) CIBC has a registration against all of Medco's present and after-acquired personal property pursuant to the Medco GSA;

(b) in respect of Realco, CIBC has a registration against all of the present and after-acquired personal property of Realco.

18. The CSI Lease was a last minute addition to the Medco contracts that were assigned to 1439573 B.C. Ltd., and to facilitate that arrangement, CSI Leasing's PPR registration against the leased equipment was maintained as a permitted encumbrance in Schedule D to the Approval and Vesting Order – 1439573 B.C. Ltd. dated November 24, 2023. As shown in the PPR searches, the only encumbrances registered against the Applicants' personal property are CIBC's security interests pursuant to the Medco GSA and the Realco GSA. The security interests created by these security agreements have been duly perfected by way of registration in the PPR and therefore have priority over any unregistered security interests in the same collateral.

***The Personal Property Security Act,* C.C.S.M., c. P35 at ss. 35(1) [TAB C]**

19. The Monitor's Agent Counsel also conducted a search of the Manitoba Land Titles Registry (the "**Land Registry**") with respect to the Land on November 20, 2023. A copy of the Status of Title is attached to the Iwanchuk Affidavit as Exhibit "B," and discloses that the Facility Debenture (and other CIBC registrations) are the only monetary encumbrances that are registered against the Land. Therefore, CIBC also has priority to the funds derived from the sale of the Land.

***The Real Property Act,* C.C.S.M., c. R30 at s. 64 [TAB D]**

20. Against this backdrop, the Monitor recommends the Interim Distribution for the following reasons:

(a) based on the Monitor's review of the Security Opinion the Monitor is satisfied that the CIBC Security is valid and enforceable;

(b) the security interests created by the CIBC Security have been duly registered and perfected in the PPR and Land Registry;

(c) there are no other existing monetary encumbrances that are registered against the Applicants in either the PPR or the Land Registry;

(d) the Monitor is not aware of any other creditor that is asserting priority over CIBC with respect the net proceeds of the Transactions; and

(e) the Monitor has access to sufficient funds to finalize the outstanding administrative matters that are required to bring these *CCAA* proceedings to a close without the Interim Distribution amounts.

Seventh Report at paras 29 and 32-35

(iii) The Seventh Report should be approved

21. The Monitor requests this Court's approval of its Seventh Report and the activities described in that report. This is a routine request in *CCAA* proceedings and, where there is no opposition, this relief is regularly granted.

***Re Target Canada Co.,* 2015 ONSC 7574 at paras 1-2 [TAB E]**

22. The Seventh Report details the Monitor's activities since filing the Sixth Report. In addition to attending to the daily obligations associated with the Monitor's expanded mandate as per the ARIO and subsequently the Enhanced Powers Order, the Monitor and counsel spent a considerable amount of time negotiating and closing both of the Transactions.

Seventh Report at para 20

23. The Monitor is unaware of any objections to the relief sought or any allegations of wrongdoing or impropriety with respect to its activities to date, and therefore requests that the Seventh Report and the Monitor's activities described therein be approved.

(iv) The professional fees should be approved

24. The Monitor also seeks an order approving the professional fees and disbursements of the Monitor and its counsel pursuant to section 29 of the ARIO. Although not contemplated by the ARIO, the Monitor is additionally seeking the approval of the Applicants' counsel's fees and disbursements, as it has done on past motions.

25. The Court must consider whether the fees and expenses charged by a court-appointed officer are reasonable. In *Nortel Networks Inc.,* Chief Justice Morawetz outlined the list of non-exhaustive factors that the Court should consider in determining whether accounts are fair and reasonable:

> [10] The test on a motion to pass accounts is to consider the 'overriding principle of reasonableness,' with the predominant consideration in such assessment being the overall value contributed by the Monitor and its counsel. As stated in *Laurentian University of Sudbury,* 2022 ONSC 2927 at para. 9 ('*Laurentian*'), the Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation. See also *Bank of Nova Scotia v Diemer,* 2014 ONCA 851at para 45.
>
> [11] The following non-exhaustive factors assist courts in evaluating the fairness and reasonableness of a court-appointed officer's fees:
>
> (a) the nature, extent and value of the assets being handled;
>
> (b) the complications and difficulties encountered;
>
> (c) the degree of assistance provided by the company, its officers or its employees;
>
> (d) the time spent;
>
> (e) the Monitor's knowledge, experience and skill;
>
> (f) the diligence and thoroughness displayed;
>
> (g) the responsibilities assumed;
>
> (h) the results achieved; and
>
> (i) the cost of comparable services when performed in a prudent and economical manner.
>
> *Laurentian, supra* at para 10.

***Nortel Networks Inc.,* 2022 ONSC 6680 [TAB F]**

26. The Monitor has reviewed the invoices submitted to date and is of the view that the fees billed and expenses charged are reasonable and have been necessary to facilitate these *CCAA* proceedings, including because the Monitor and its legal counsel:

(a) were required to spend a considerable amount of time negotiating and closing three separate transactions, the efforts of which resulted in the Applicants' estate receiving over $36,000,000 in proceeds;

(b) engaged in numerous discussions with trade creditors and other stakeholders regarding ongoing issues associated with these *CCAA* proceedings and arising out of the Transactions; and

(c) worked closely with the Applicants to complete a reconciliation of the Medco physician accounts for the period ending in November 30, 2023.

Seventh Report at paras 20 and 45 - 50

B. The D&O Applicants' directors and officers should be released

(i) The D&O Release Order is a fair and efficient alternative to a claims process

27. Paragraph 18 of the ARIO created a $350,000 Directors' Charge on the Applicants' Property with respect to the Directors' and Officers' post-filing obligations and liabilities. Paragraph 39 of the ARIO provides that the Directors' Charge is a third ranking charge against the Property, behind the Administrative Charge and DIP Lender's Charge, respectively.

28. The Directors and Officers only have resort to the Directors' Charge "*to the extent that they do not have coverage under any Directors' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 17 of this Order.*"

ARIO at para 19

29. Before the $350,000 secured by the Directors' Charge can be distributed, it is necessary to identify and crystallize any claims against the Directors and Officers for which they may be entitled to be indemnified by the Applicants. On some insolvency files, this objective is accomplished by instituting a directors' and officers' claims process. As noted by Justice Myers in *Toys "R" Us (Canada) Ltd.*:

> [8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the CCAA. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to

> communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a 'claims bar date' by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

***Re Toys "R" Us (Canada) Ltd*, 2018 ONSC 609 [TAB G]**

30. Based on the facts and information of which the Monitor is aware, the Applicants are current in their post-filing obligations to their creditors, and the Monitor is unaware of any existing or threatened claims against the Directors and Officers for which they would be entitled to seek an indemnity from the Applicants. The D&O Release Order is therefore being sought as an expedient, but nevertheless fair, alternative to incurring the time and expense associated with running a directors' and officers' claims process. The Monitor notes that, similar to the traditional claims processes described by Justice Myers in the quotation above, the D&O Release Order:

(a) will be served on the members of the Service List and posted on the Monitor's website, thereby communicating to potential claimants that there is a process by which they must prove their claims by a specified date;

(b) contemplates the Directors and Officers (and Lender) participating in the Monitor's attempts to resolve and settle any Disputed Claims (paragraph 7); and

(c) if the Disputed Claims are not agreed upon and cannot be settled by negotiation, then the final determination as to whether the Disputed Claim will be released will be made by the Court (paragraph 6).

Seventh Report at paras 36 - 44

31. The D&O Release Order is therefore, in the Monitor's respectful submission, a fair and reasonable alternative for resolving any claims against the Directors' Charge.

(ii) <u>The applicable legal test for granting third party releases is met in the circumstances</u>

32. The Directors and Officers are distinct from the Applicants, and accordingly, their proposed release engages the case law with respect to third party releases in *CCAA* proceedings.

Courts sitting in such proceedings have held that they have the jurisdiction to grant third party releases even if a *CCAA* proceeding results in a sale of assets rather than a plan of arrangement.

***Re Green Relief Inc.*, 2020 ONSC 6837 at para 23 [TAB H]**

33. See also the Claims Procedure Order granted by Justice Spivak of this Court in *Re Arctic Glacier Income Fund* (Court File No. CI 12-01-76323) **[TAB I].**

34. The non-exhaustive factors that the Court must consider in determining whether to grant third-party releases was recently discussed in *Re Green Relief Inc.*:

> [27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in *CCAA* proceedings as including the following:
>
> (a) Whether the claims to be released are rationally connected to the purpose of the plan;
>
> (b) Whether the plan can succeed without the releases;
>
> (c) Whether the parties being released contributed to the plan;
>
> (d) Whether the releases benefit the debtors as well as the creditors generally;
>
> (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
>
> (f) Whether the releases are fair, reasonable and not overly-broad.
>
> [28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.
>
> [29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian,* it warrants separate identification on the facts of the case before me.

35. The Monitor submits that it is appropriate to grant the D&O Release Order at this stage for the following reasons:

(a) the Monitor is not currently aware of claims (or potential claims) against the Directors' Charge;

(b) the proposed releases exclude the following claims:

(i) those that arose before the Filing Date;

(ii) those that are enumerated in sections 5.1(2) and 19(2) of the *CCAA*; and

(iii) those arising from the Directors' and Officers' gross negligence or willful misconduct;

(c) parties will have until March 9, 2024 to file affidavits justifying their claims, if any, and if a party files an affidavit before the Claims Bar Date, that claim will not be effected by the D&O Release Order until such time as the parties reach an agreement or the Court makes a further order;

(d) the Directors' and Officers' were instrumental throughout these *CCAA* proceedings and their efforts benefitted the stakeholders; and

(e) CIBC, the party with the largest financial exposure in these proceedings, is not opposed to the D&O Release Order.

Seventh Report at paras 36 - 44

VI. CONCLUSION

36. For the reasons stated in this Brief of Law, the Monitor respectfully requests that the requested relief be granted in the form of the Stay Extension Order and D&O Release Order that have been filed with the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February, 2024.

McDOUGALL GAULEY LLP

Per: _____

Ian Sutherland, K.C. and Craig Frith, counsel to the Monitor, Alvarez & Marsal Canada Inc.

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

L.R.C. (1985), ch. C-36

Current to October 31, 2023

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Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

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

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

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

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

1997, c. 12, s. 124; 2007, c. 36, s. 67.

immeuble de la compagnie débitrice constitue une réclamation, que la date du fait ou dommage soit antérieure ou postérieure à celle où des procédures sont intentées au titre de la présente loi.

1997, ch. 12, art. 124; 2007, ch. 36, art. 67.

Disclosure of financial information

11.9 (1) A court may, on any application under this Act in respect of a debtor company, by any person interested in the matter and on notice to any interested person who is likely to be affected by an order made under this section, make an order requiring that person to disclose any aspect of their economic interest in respect of a debtor company, on any terms that the court considers appropriate.

Divulgation de renseignements financiers

11.9 (1) Sur demande de tout intéressé sous le régime de la présente loi à l'égard d'une compagnie débitrice et sur préavis de la demande à tout intéressé qui sera vraisemblablement touché par l'ordonnance rendue au titre du présent article, le tribunal peut ordonner à cet intéressé de divulguer tout intérêt économique qu'il a dans la compagnie débitrice, aux conditions que le tribunal estime indiquées.

Factors to be considered

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

(a) whether the monitor approved the proposed disclosure;

(b) whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company; and

(c) whether any interested person would be materially prejudiced as a result of the disclosure.

Facteurs à prendre en considération

(2) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, notamment, les facteurs suivants :

a) la question de savoir si le contrôleur acquiesce à la divulgation proposée;

b) la question de savoir si la divulgation proposée favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie débitrice;

c) la question de savoir si la divulgation proposée causera un préjudice sérieux à tout intéressé.

Meaning of *economic interest*

(3) In this section, ***economic interest*** includes

(a) a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest;

(b) the consideration paid for any right or interest, including those referred to in paragraph (a); or

(c) any other prescribed right or interest.

2019, c. 29, s. 139.

Définition de *intérêt économique*

(3) Au présent article, ***intérêt économique*** s'entend notamment :

a) d'une réclamation, d'un contrat financier admissible, d'une option ou d'une hypothèque, d'un gage, d'une charge, d'un nantissement, d'un privilège ou d'un autre droit qui grève le bien;

b) de la contrepartie payée pour l'obtention, notamment, de tout intérêt ou droit visés à l'alinéa a);

c) de tout autre intérêt ou droit prévus par règlement.

2019, ch. 29, art. 139.

Fixing deadlines

12 The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

R.S., 1985, c. C-36, s. 12; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 2004, c. 25, s. 195; 2005, c. 47, s. 130; 2007, c. 36, s. 68.

Échéances

12 Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

L.R. (1985), ch. C-36, art. 12; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 2004, ch. 25, art. 195; 2005, ch. 47, art. 130; 2007, ch. 36, art. 68.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from

Permission d'en appeler

13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Worldspan Marine Inc. (Re),*
2011 BCSC 1758

Date: 20111221
Docket: S113550
Registry: Vancouver

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

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44
and the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc.,
Queenship Marine Industries Ltd., 27222 Developments Ltd.
and Composite FRP Products Ltd.

Petitioners

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products	J.R. Sandrelli & J.D. Schultz
Counsel for Wolrige Mahon (the "VCO"):	K. Jackson & V. Tickle
Counsel for the Respondent, Harry Sargeant III:	K.E. Siddall
Counsel for Ontrack Systems Ltd.:	J. Leathley, Q.C.

Counsel for Mohammed Al-Saleh:	D. Rossi
Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.:	G. Wharton & P. Mooney
Counsel for Canada Revenue Agency:	N. Beckie
Counsel for Comerica Bank:	J. McLean, Q.C.
Counsel for The Monitor:	G. Dabbs
Place and Date of Hearing:	Vancouver, B.C. December 16, 2011
Place and Date of Judgment:	Vancouver, B.C. December 21, 2011

INTRODUCTION

[1] On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

POSITIONS OF THE PARTIES

[2] The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel "QE014226C010" (the "Vessel") with Fraser Yachts, to explore potential Debtor In Possession ("DIP") financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

[3] The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

[4] The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

[5] These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

[6] The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May

2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

[7] Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

[8] Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

[9] Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have gone to the company. Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

[10] Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

[11] As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

DISCUSSION AND ANALYSIS

[12] On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

[13] In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

[14] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

[22] Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

[23] The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

Whether circumstances exist that make an extension appropriate

[24] The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

[25] There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the

M A N I T O B A

THE PERSONAL PROPERTY SECURITY ACT

C.C.S.M. c. P35

LOI SUR LES SÛRETÉS RELATIVES AUX BIENS PERSONNELS

c. P35 de la *C.P.L.M.*

As of 6 Feb. 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 6 févr. 2024. Son contenu était à jour pendant la période indiquée en bas de page.

Animals

34(11) A perfected security interest in animals or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the animal has priority over any other security interest in the same collateral given by the same debtor other than a perfected purchase money security interest.

S.M. 2012, c. 40, s. 35.

Priorité de la sûreté sur des animaux

34(11) La sûreté opposable sur des animaux ou leur produit, consentie moyennant une prestation, afin de permettre au débiteur d'acquérir des aliments, des médicaments ou des hormones qui doivent être donnés aux animaux prime toute autre sûreté sur les mêmes biens grevés fournie par le même débiteur, à l'exclusion d'une sûreté en garantie du prix de vente devenue opposable.

General determination of priority

35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between conflicting perfected security interests in the same collateral is determined by the order of the occurrence of the following:

(i) the registration of a financing statement without regard to the date of attachment of the security interest,

(ii) possession or delivery of the collateral under section 24 without regard to the date of attachment of the security interest, or

(iii) perfection under section 5, 7, 7.1, 26, 28, 29 or 74,

whichever is earliest;

(b) a perfected security interest has priority over an unperfected security interest; and

(c) priority between conflicting unperfected security interests is determined by the order of attachment of the security interests.

Règles résiduelles en matière de priorité

35(1) Lorsque la présente loi ne prévoit aucun mode de détermination en ce qui a trait à l'ordre de priorité entre des sûretés :

a) l'ordre de priorité entre des sûretés opposables sur les mêmes biens grevés est établi selon l'ordre dans lequel les dates suivantes tombent :

(i) la date d'enregistrement d'un état de financement sans qu'il soit tenu compte de la date à laquelle la sûreté grève les biens,

(ii) la date de prise de possession ou de livraison des biens grevés conformément à l'article 24 sans qu'il soit tenu compte de la date à laquelle la sûreté les grève,

(iii) la date à laquelle la sûreté est devenue opposable en vertu de l'article 5, 7, 7.1, 26, 28, 29 ou 74;

b) une sûreté opposable prime une sûreté inopposable;

c) l'ordre de priorité entre des sûretés inopposables est établi en fonction de la date où elles ont grevé les biens.

Continuously perfected interest

35(2) For the purpose of subsection (1), a continuously perfected security interest shall be treated as perfected by the method by which it was originally perfected.

Sûreté opposable sans interruption

35(2) Pour l'application du paragraphe (1), la sûreté opposable aux tiers sans interruption est réputée opposable selon la méthode utilisée pour la rendre opposable initialement.

M A N I T O B A

THE REAL PROPERTY ACT

C.C.S.M. c. R30

LOI SUR LES BIENS RÉELS

c. R30 de la *C.P.L.M.*

As of 6 Feb. 2024, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 6 févr. 2024. Son contenu était à jour pendant la période indiquée en bas de page.

Approved form document prevails
63(5) When a document is attached as a schedule to a document in an approved form

(a) the schedule is deemed to be part of the document in an approved form; and

(b) the contents of the document in an approved form prevail if there is a conflict between the document and the schedule.

S.M. 1993, c. 7, s. 4; S.M. 1995, c. 27, s. 7; S.M. 2011, c. 33, s. 13; S.M. 2013, c. 11, s. 14 and 44.

Primauté des documents rédigés selon les formules approuvées
63(5) Les règles suivantes s'appliquent aux annexes des documents rédigés selon les formules approuvées :

a) l'annexe est réputée faire partie intégrante du document rédigé selon la formule approuvée;

b) en cas d'incompatibilité, le contenu du document rédigé selon la formule approuvée prévaut sur celui de l'annexe.

L.M. 1993, c. 7, art. 4; L.M. 1995, c. 27, art. 7; L.M. 2011, c. 33, art. 13; L.M. 2013, c. 11, art. 14 et 44.

Priority of registration
64 Instruments shall be registered in the order of the serial numbers assigned to them and entered in the daily record and instruments registered in respect of or affecting the same estates or interests shall, notwithstanding any expressed, implied or constructive notice, be entitled to priority according to the serial number.

Ordre de priorité de l'enregistrement
64 Les instruments sont enregistrés suivant le numéro d'ordre qui leur est assigné et inscrits dans le journal. L'ordre de priorité des instruments enregistrés à l'égard des mêmes domaines ou des mêmes intérêts s'établit suivant le numéro d'ordre, malgré toute connaissance expresse, implicite ou présumée.

Effect of certificate of registration
65(1) The certificate so endorsed shall be received in all courts as conclusive proof that the instrument was duly registered.

Effet du certificat de l'enregistrement
65(1) Le certificat ainsi inscrit est une preuve péremptoire devant tous les tribunaux que l'instrument a été dûment enregistré.

Issue of new certificates of title
65(2) Where, by reason of the number or complexity of the memorials already recorded on a certificate of title, or by reason of deterioration of, or damage to, the certificate of title, the district registrar is of the opinion that the title to the land to which the certificate of title relates can be more clearly set forth by issuing a new certificate of title, or new certificates of title, for the land, or part of the land, he may require the registered owner, or his agent, to request that such a new certificate of title, or new certificates of title, be issued before permitting further dealings with that land.

Délivrance de nouveaux certificats de titre
65(2) Si, en raison du nombre ou de la complexité des extraits déjà portés sur un certificat de titre ou en raison de sa détérioration ou de son endommagement, le registraire de district est d'avis que le titre du bien-fonds auquel le certificat de titre se rapporte peut être formulé plus clairement en délivrant un ou plusieurs nouveaux certificats de titre pour toute ou partie du bien-fonds, il peut exiger du propriétaire ou de son mandataire qu'il demande la délivrance d'un ou de plusieurs nouveaux certificats de titre avant d'autoriser d'autres opérations à l'égard du bien-fonds.

Instruments unfit for registration
66(1) The district registrar may reject an instrument appearing to be unfit for registration or filing and shall not register or file an instrument purporting to transfer or otherwise deal with or affect land under the new system except in the manner herein provided for registration or filing under the new system, nor unless

Non-conformité des instruments
66(1) Le registraire de district peut rejeter un instrument qui semble impropre à l'enregistrement ou au dépôt; il ne peut enregistrer ou déposer un instrument censé transférer ou autrement viser un bien-fonds assujetti au nouveau système qu'en la manière prévue par la présente loi pour l'enregistrement ou le dépôt

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation
Jeremy Dacks, for Target Canada Entitites
Susan Philpott, for Employees
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal
Jeff Carhart, for Ginsey Industries
Lauren Epstein, for Trustee of the Employee Trust
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals
Linda Galessiere, for Various Landlords

Subject: Insolvency

APPLICATION by monitor for approval of reports and activities set out in reports.

***Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future

be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> . . . . .
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > . . . . .
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
> >
> > . . . . .
> >
> > 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

CITATION: Nortel Networks Inc., 2022 ONSC 6680
COURT FILE NO.: CV-09-0007950-00CL
DATE: 2022-11-28

SUPERIOR COURT OF JUSTICE - ONTARIO

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED,
NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION, NORTEL NETWORKS
TECHNOLOGY CORPORATION, NORTEL COMMUNICATIONS INC., ARCHITEL SYSTEMS CORPORATION AND NORTHERN TELECOM CANADA LIMITED**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Joseph Pasquariello and Christopher G. Armstrong*, for the Monitor, Ernst & Young Inc.

HEARD: November 28, 2022

ENDORSEMENT

[1] Ernst and Young Inc., in its capacity as Monitor of the Canadian Debtors (the "Monitor") brings this motion for approval of the fees and disbursements of the Monitor and its counsel incurred during the period of November 1, 2021, through to and including October 31, 2022 (the "Period").

[2] Although these proceedings are in their wind-down phase, the Monitor, with the assistance of counsel, continues to undertake efforts to advance the administration of the Canadian Estate. During the Period, these efforts included completing the Fourth Distribution pursuant to the Plan of approximately $38 million, completing final distributions from the Health and Welfare Trust ("HWT"), and recovering a further $21 million for the benefit of the Canadian Estate's creditors.

[3] The Monitor submits that the fees and disbursements for the Period are fair and reasonable in the circumstances of these proceedings.

[4] The motion was not opposed.

[5] In support of the motion, the Monitor delivered the One Hundred Sixty First Report dated November 17, 2022 (the "161st Report"), which provides a detailed summary of the activities of the Monitor and its counsel throughout the Period together with a detailed breakdown of the Monitor's and its counsel's fees and disbursements. The 161st Report supplements the other Reports that were filed during the Period that detailed the activities of the Monitor. In addition, affidavits from representatives of the Monitor and each of its counsel provide a listing of the accounts sought to be passed, including each account date and amount, along with summary tables identifying the individual professionals who have worked on the matter and each of their ranks, average hourly billing rates, total number of hours worked and total associated professional fees, among other information.

[6] The accounts of the Monitor and its counsel for the Period total approximately CA$3 million, inclusive of applicable taxes, the details of which are as follows:

	Fees November 1, 2021 - October 31, 2022	**Disbursements**	**Taxes**	**Total**
Ernst & Young Inc.	2,351,108.00	30,823.55	309,651.22	2,691,582.77
Goodmans LLP	228,592.50	649.54	29,801.48	259,043.52
Total Fees (CAD)	**2,579,700.50**	**31,473.09**	**339,452.70**	**2,950,626.29**
Allen & Overy LLP	71,473.35	2,275.25	-	73,748.60
Pachulski Stang Ziehl & Jones LLP	2,478.00	1,277.82	-	3,755.82
Total Fees (USD)	**73,951.35**	**3,553.07**	**-**	**77,504.42**

[7] The Monitor and its counsel billed amounts at standard hourly rates consistent with the relevant market and that they, in their professional judgment, considered fair and reasonable in the circumstances of these proceedings.

[8] The efforts of the Monitor and (as applicable) its counsel during the Period have achieved significant results for the Canadian Estate and its creditors. These efforts included:

(a) completing the Fourth Distribution, which saw approximately $38 million distributed to more than 15,000 creditors, bringing cumulative distributions under the Plan to approximately $4.5 billion;

(b) continuing to administer the Initial, Second, Third and Fourth Distributions, which included following-up on uncashed cheques and the re-issuance of over 510 cheques totaling approximately $1 million;

(c) carrying out the steps contemplated by the Final HWT Distribution Order;

(d) continuing to progress the wind-up and repatriation of funds from NNI and the Canadian Debtors' foreign controlled subsidiaries, recovering approximately $9.4 million during the Period;

(e) entering into an assignment agreement with NNI pursuant to which certain of NNI's residual assets were assigned to NNL; and

(f) working with the Trustee of the Nortel D&O Trust regarding its wind-up and the return of trust funds to the Canadian Estate as residual beneficiary.

[9] The issue on this motion is whether the Court should approve the fees and disbursements of the Monitor and its counsel for the Period.

[10] The test on a motion to pass accounts is to consider the "overriding principle of reasonableness", with the predominant consideration in such assessment being the overall value contributed by the Monitor and its counsel. As stated in *Laurentian University of Sudbury,* 2022 ONSC 2927 at para. 9 ("*Laurentian*"), the Court does not engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of a professional services may not be instructive when looked at in isolation. See also *Bank of Nova Scotia v Diemer,* 2014 ONCA 851at para 45.

[11] The following non-exhaustive factors assist courts in evaluating the fairness and reasonableness of a court-appointed officer's fees:

(a) the nature, extent and value of the assets being handled;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the company, its officers or its employees;

(d) the time spent;

(e) the Monitor's knowledge, experience and skill;

(f) the diligence and thoroughness displayed;

(g) the responsibilities assumed;

(h) the results achieved; and

(i) the cost of comparable services when performed in a prudent and economical manner.

Laurentian, supra at para 10.

[12] Applying these factors to the present case, the Monitor submits that the accounts of the Monitor and its counsel during the Period are fair reasonable and should be approved, specifically noting that:

(a) the Monitor continues to oversee the administration of an estate of significant residual value and deliver results for creditors, with a further $38 million

being distributed pursuant to the Plan and approximately $21 million in additional funds being recovered during the Period.

(b) the Monitor, with the assistance of its counsel, has undertaken a scope of work that is well beyond the typical role of a Monitor in a CCAA proceeding, overseeing the entire administration of the Canadian Estate for the benefit of creditors.

While the Monitor anticipates the ongoing administration of the Canadian Estate for a further period of time pending the wind-up of foreign affiliates and potential further distributions to creditors, the Monitor has worked to diligently "close out" matters during the Period where possible.

[13] The Monitor requests an order passing its accounts and those of its counsel and approving its fees and disbursements and those of its counsel incurred during the Period, being:

(a) for the Monitor, CA$2,691,582.77, inclusive of applicable taxes;

(b) for Goodmans, CA$259,043.52, inclusive of applicable taxes;

(c) for A&O, US$73,748.60, inclusive of applicable taxes; and

(d) for PSZJ, US$3,755.82, inclusive of applicable taxes.

[14] Having reviewed the 161st Report and hearing submissions, I am satisfied that the accounts of the Monitor and its counsel should be passed and approved.

[15] The motion is granted and the Order has been signed in the form presented.

Geoffrey B. Morawetz

Date: November 28, 2022

CITATION: Re TOYS "R" US (CANADA) LTD., 2018 ONSC 609
COURT FILE NO.: CV-17-00582960-00CL
DATE: 20180125

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TOYS "R" US (CANADA) LTD. TOYS "R" US (CANADA) LTEE

BEFORE: F.L. Myers J.

COUNSEL: *Brian F. Empey and Bradley Wiffen,* counsel for the applicant
Jane Dietrich, counsel for Grant Thornton Limited, the Monitor
Linc Rogers, counsel for JPMorgan Chase Bank, NA, DIP Agent
Jesse Mighton, counsel for Crayola Canada
Linda Galessiere, counsel for various landlords
Timothy R. Dunn, counsel for CentreCorp Management Services Limited
Adam Slavens and Jonathan Silver, counsel for LEGO
Sean Zweig, counsel for the Unsecured Creditors Committee of Toys "R" Us Inc. and other debtors in Chapter 11 proceedings before the United States Bankruptcy Court for the Eastern District of Virginia

HEARD: January 25, 2018

ENDORSEMENT

[1] Toys "R" Us (Canada) Ltd. Toys "R" Us (Canada) Ltee asks the court to extend the time that it remains under protection of the *CCAA* while it attempts to restructure. It also asks the court to approve a draft claims procedure by which the outstanding claims of its creditors can be recognized and quantified.

[2] No significant stakeholder opposed the relief sought and I have granted it accordingly.

[3] I am satisfied that the applicant is acting in good faith and with due diligence in pursuit of its restructuring process to date. These are the findings required for it to be entitled to an extension of time under the statute. The applicant's financial results through the holidays exceeded conservative forecasts. It reports that it has sufficient liquidity to operate in the normal course throughout the proposed extended period without drawing upon its extraordinary financing. The extension of time will allow the applicant to advance a going concern

restructuring process here and in coordination with its affiliates in the US. The Monitor supports the request. Accordingly the request for an extension of the proceedings is granted.

[4] The outcome of a successful restructuring process usually involves the applicant proposing a plan of compromise or arrangement to its creditors. The creditors have the opportunity to vote on whether they agree to the terms of the plan proposed. To approve a plan, the *CCAA* requires a vote of more than 50% of the creditors in number who hold collectively more than two-thirds of the claims measured by dollar value.

[5] In many cases, instead of a plan, the applicant proposes a value-maximizing liquidating transaction. After a liquidation, there will likely be distributions to creditors of the proceeds of liquidation in cash or other property *pari passu* by rank.

[6] In either case, whether a plan or a liquidating transaction is proposed, it is necessary to determine the precise number of creditors and the precise amount of their respective claims, so that the creditors can vote and/or receive distributions accordingly.

[7] In a bankruptcy governed by the provisions of the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3, creditors are required to prove their claims individually by delivering to the trustee in bankruptcy sworn proof of claim forms that are accompanied by supporting invoices and other relevant documentation. The *CCAA*, by contrast, does not set out a specific procedure for creditor claims to be proven and counted.

[8] Claims procedure orders are routinely granted under the court's general powers under ss. 11 and 12 of the *CCAA*. Claims procedure orders are designed to create processes under which all of the creditors of an applicant and its directors and officers can submit their claims for recognition and valuation. Claims procedures usually involve establishing a method to communicate to potential creditors that there is a process by which they must prove their claims by a specific date. The procedure usually includes an opportunity for the debtor or its representative to review and, if appropriate, contest claims made by creditors. If claims are not agreed upon and cannot be settled by negotiation, then the claims procedure orders may go on to establish an adjudication mechanism in court or, typically in Ontario, by arbitration that is then subject to an appeal to the court. Claims procedure orders will usually also establish a "claims bar date" by which claims must be submitted by creditors. Late claims may not be allowed as it can be necessary to establish a cut off to give accurate numbers for voting and distribution purposes.

[9] The claims processes in bankruptcy do not necessarily fit well in a *CCAA* proceeding. It is very unusual for a large corporation to go bankrupt and require proof of claims to be delivered by every single creditor under the *BIA* statutory claims process. Creditors of large companies can number in the thousands. It can be very time consuming and therefore very expensive for each of thousands of creditors to submit proof of claims and for the debtor or the Monitor to review, track, and deal with each claim individually. Managing claims processes for a large business can therefore be a very substantial undertaking that is often occurring behind the scenes throughout *CCAA* processes.

[10] Yet, experience shows that the vast majority of claims are usually dealt with consensually. At any given time, most large businesses have readily ascertainable payables outstanding that are carefully tracked electronically by the applicant's financial managers. Requiring each creditor to prove the state of its outstanding claims by submitting invoices then is often just a make work project that provides no real incremental value beyond the information available by just looking at a listing of outstanding trade payables on the debtor's financial systems.

[11] Toys "R" Us has submitted a draft form of claims procedure that addresses the unnecessary cost of requiring its thousands of trade creditors to prove their claims individually. It proposes to list creditor claims from the company's books and records and to provide each known creditor with a simple claim statement that sets out the amount of its claim that is already recognized by the company. If a creditor agrees with the amount that the company says it owes, the creditor need do nothing and the scheduled or listed claim will become the final proven claim at the claims bar date.

[12] The draft claims procedure allows creditors who disagree with the amounts set out in their claims statements to file notices of dispute with the Monitor by the claims bar date to engage an individualized review process.

[13] This negative option scheduled claim process will eliminate the need for filing proofs of claim and supporting evidence in the vast majority of cases. It also ensures that known claims are not lost in procedural uncertainty which always causes a certain percentage of creditors to fail to file their claims on a timely basis.

[14] This is certainly not the first case to use a negative option scheduled claims process like the one proposed here. Creative scheduled claims procedures, like this one, that streamline claims processes, make it easier for all known creditor claims to be recognized and counted, and save significant time and money, are encouraged. Each case must be responsive to its own facts and circumstances. What works in one case may be wholly inapt in another. But in all cases it is appropriate to make efforts to increase efficiency, affordability, and certainty as was done here. The overriding concern of the court is to ensure that any claims procedure process is both fair and reasonable. The negative option scheduled claim process proposed in this case meets both touchstones.

[15] Finally, the proposed minor amendment to the cross-border protocol has already been adopted by the US court. The change proposed is not opposed and it is reasonable to keep the terms of both orders consistent.

[16] Order signed accordingly.

F.L. Myers J.

Date: January 25, 2017

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, *Joshua W. Winter* for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

[5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should 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;
>
> (c) whether the Monitor filed with the court a report stating that in its 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 creditors were consulted;
>
> (e) the effects of the proposed sale or distribution 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.

[6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

[7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

[8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

[9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

[10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

[11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

[12] The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

[13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

[14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

[15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that

representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

[16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

[17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

[18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

[19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

[20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

[21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

[22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

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

[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

Court 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")

CERTIFIED COPY
of

CLAIMS PROCEDURE ORDER

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THE QUEEN'S BENCH
Winnipeg Centre

THE HONOURABLE MADAM	)	WEDNESDAY, THE 5th DAY
	)	
JUSTICE SPIVAK	)	OF SEPTEMBER, 2012.

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")

CLAIMS PROCEDURE ORDER

THIS MOTION, made by Alvarez & Marsal Canada Inc. in its capacity as monitor of the Applicants (the "**Monitor**") for an order establishing a claims process to identify and determine claims of creditors of the Applicants (the "**Claims Process**") was heard this day at the Law Courts Building at 408 York Avenue, in The City of Winnipeg, in the Province of Manitoba.

ON READING the Notice of Motion and the Sixth Report of the Monitor (the "**Sixth Report**"), and on hearing the submissions of counsel for the Monitor, counsel for the Applicants and Glacier Valley Ice Company, L.P. (California) (together, "**Arctic Glacier**" or the "**Arctic Glacier Parties**"), counsel for the Direct Purchaser Claimants (as hereinafter defined), counsel for the Plaintiffs in the Indirect Purchaser Litigation (as hereinafter defined), counsel for the Trustees of the Applicant Arctic Glacier Income Fund, counsel for Desert Mountain Ice LLC, counsel for the Executive Vice-President of Operations for Arctic Glacier, the Chief Process Supervisor and representatives of Talamod Fund LP and Coliseum

Capital Partners LP, also present in person or by telephone, no one appearing for any other party although duly served as appears from the affidavit of service, filed:

SERVICE

1. THIS COURT ORDERS that the time for service of this Motion and the Sixth Report is hereby abridged and validated such that this Motion is properly returnable today and hereby dispenses with further service thereof.

DEFINITIONS AND INTERPRETATION

2. THIS COURT ORDERS that, for the purposes of this Order establishing a Claims Process for the Creditors of Arctic Glacier (and in addition to terms defined elsewhere herein), the following terms shall have the following meanings ascribed thereto:

"**Administration Charge**" has the meaning given to that term in paragraph 50 of the Initial Order.

"**Asset Purchase Agreement**" means the asset purchase agreement between Arctic Glacier Income Fund et al. and H.I.G. Zamboni, LLC made as of June 7, 2012, as amended.

"**Assumed Liabilities**" means the liabilities the Purchaser assumed, fulfilled, performed and discharged as set out in Section 2.03 of the Asset Purchase Agreement.

"**BIA**" means the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

"**Business Day**" means a day, other than a Saturday or a Sunday, on which banks are generally open for business in Winnipeg, Manitoba.

"**Calendar Day**" means a day, including a Saturday, Sunday and any statutory holidays.

"**Canadian Retail Litigation**" means the class actions listed on Schedule "G" to this Order, commenced in Canada.

"**Canadian Retail Litigation Claimants**" means each of the members of the class(es) described in the Canadian Retail Litigation class actions.

"**CCAA**" means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C36, as amended.

"**CCAA Proceedings**" means the proceedings commenced by Arctic Glacier in the Court at Winnipeg under Court File No. CI 12-01-76323.

"**CCAA Service List**" means the service list in the CCAA Proceedings as defined in paragraph 66 of the Initial Order and posted on the Monitor's Website, as amended from time to time.

"**Chapter 15 Cases**" means the proceedings commenced by the Monitor as the foreign representative on behalf of the Applicants on February 22, 2012 in the United States Bankruptcy Court for the District of Delaware under Chapter 15 of title 11 of the *United States Code* under Case No. 12-10605 (KG).

"**Claim**" means any right or claim of any Person, other than an Excluded Claim, but including an Equity Claim, that may be asserted or made in whole or in part against an Arctic Glacier Party, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by

guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person (including Directors, Officers and Trustees) to advance a claim for contribution or indemnity or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Claims Bar Date, (B) relates to a time period prior to the Claims Bar Date, or (C) is a right or claim of any kind that would be a claim provable in bankruptcy within the meaning of the BIA had the Arctic Glacier Party become bankrupt on the Claims Bar Date.

"**Claimant**" means any Person having a Claim, including a DO&T Indemnity Claim, or a DO&T Claim and includes the transferee or assignee of a Claim, a DO&T Indemnity Claim or a DO&T Claim or a trustee, executor, liquidator, receiver, receiver and manager, or other Person acting on behalf of or through any such Person.

"**Claimants' Guide to Completing the DO&T Proof of Claim**" means the guide to completing the DO&T Proof of Claim form, in substantially the form attached as Schedule "D-2" hereto.

"**Claimants' Guide to Completing the Proof of Claim**" means the guide to completing the Proof of Claim form, in substantially the form attached as Schedule "C-2" hereto.

"**Claims Bar Date**" means October 31, 2012.

"**Class Claim**" means a Claim that may be proven by a Class Representative in accordance with the terms of this Order.

"**Class Representative**" means, for the purposes of this Order establishing a Claims Process for the Creditors of Arctic Glacier, Dickinson Wright LLP in respect of the Direct Purchaser Claimants, Harrison Pensa LLP in respect of the Canadian Retail Litigation Claimants, and Wild Law Group PLLC in respect of the Indirect Purchaser

Claimants described in the Indirect Purchaser Litigation commenced in the United States, or such other class representative who is acceptable to the Monitor.

"**Court**" means the Court of Queen's Bench of Manitoba.

"**Creditor**" means any Person having a Claim (including a Class Claim), DO&T Claim or a DO&T Indemnity Claim and includes, without limitation, the transferee or assignee of a Claim, DO&T Claim or DO&T Indemnity Claim transferred and recognized as a Creditor in accordance with paragraph 48 hereof or a trustee, executor, liquidator, receiver, receiver and manager or other Person acting on behalf of or through such Person.

"**Creditors' Meeting**" means any meeting of creditors called for the purpose of considering and/or voting in respect of any Plan, if one is filed, to be scheduled pursuant to further order of the Court.

"**Deemed Proven Claims**" means: (i) a Claim in favour of the Direct Purchaser Claimants in the principal amount of US$10,000,000 plus applicable interest against the Applicants Arctic Glacier Income Fund, Arctic Glacier Inc. and Arctic Glacier International Inc.; and (ii) the DOJ Claim.

"**Direct Purchaser Claimants**" means each of the members of the class(es) described in the statements of claim issued in the Direct Purchaser Litigation.

"**Direct Purchaser Litigation**" means the class actions listed on Schedule "I" to this Order.

"**Direct Purchasers' Advisors' Charge**" has the meaning given to that term in paragraph 4 of the Order of the Honourable Madam Justice Spivak in the CCAA Proceedings on May 15, 2012.

"**Director**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a director or *de facto* director of an Arctic Glacier Party.

"**Directors' Charge**" has the meaning given to that term in paragraph 40 of the Initial Order.

"**Dispute Notice**" means a written notice to the Monitor, in substantially the form attached as Appendix "1" to Schedule "F" hereto, delivered to the Monitor by a Person who has received a Notice of Revision or Disallowance, of its intention to dispute such Notice of Revision or Disallowance.

"**DOJ Claim**" means the Claim of the United States against Arctic Glacier International Inc. in the amount of US$7,032,046.96 as of July 9, 2012, plus interest compounding annually until the date of payment of such Claim at the United States federal post-judgment interest rate of 0.34%, as provided for in the *Stipulation and Order Among the Monitor, Debtors, and the United States Attorney's Office for the Southern District of Ohio Regarding March 2010 Criminal Judgment of Arctic Glacier International Inc.*, dated July 17, 2012, as entered by the U.S. Court in the Chapter 15 Cases.

"**DO&T Claim**" means (i) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors, Officers or Trustees that relates to a Claim for which such Directors, Officers or Trustees are by law liable to pay in their capacity as Directors, Officers or Trustees, or (ii) any right or claim of any Person that may be asserted or made in whole or in part against one or more Directors, Officers or Trustees, in that capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind whatsoever, and any interest accrued thereon or costs payable in respect thereof, including by reason of the commission of a tort (intentional or unintentional), by reason of any breach of contract or other agreement (oral or written), by reason of any breach of duty (including any legal, statutory, equitable or fiduciary duty) or by reason of any right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), and whether or not any indebtedness, liability or obligation is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal,

equitable, secured, unsecured, perfected, unperfected, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature, including any right or ability of any Person to advance a claim for contribution or indemnity from any such Directors, Officers or Trustees or otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation, and any interest accrued thereon or costs payable in respect thereof (A) is based in whole or in part on facts prior to the Claims Bar Date, or (B) relates to a time period prior to the Claims Bar Date, but not including an Excluded Claim.

"**DO&T Indemnity Claim**" means any existing or future right of any Director, Officer or Trustee against an Arctic Glacier Party, which arose or arises as a result of any Person filing a DO&T Proof of Claim in respect of such Director, Officer or Trustee for which such Director, Officer or Trustee is entitled to be indemnified by such Arctic Glacier Party.

"**DO&T Indemnity Claims Bar Date**" has the meaning set out in paragraph 21 hereof.

"**DO&T Indemnity Proof of Claim**" means the indemnity proof of claim in substantially the form attached as Schedule "E" hereto to be completed and filed by a Director, Officer or Trustee setting forth its purported DO&T Indemnity Claim and which shall include all supporting documents in respect of such DO&T Indemnity Claim.

"**DO&T Proof of Claim**" means the proof of claim, in substantially the form attached as Schedule "D" hereto, to be completed and filed by a Person setting forth its DO&T Claim and which shall include all supporting documentation in respect of such DO&T Claim.

"**Equity Claim**" has the meaning set forth in Section 2(1) of the CCAA.

"**Excluded Claim**" means:

(i) any Claim entitled to the benefit of the Administration Charge, the Inter-Company Balances Charge (as defined in the Initial Order) or the Direct Purchasers' Advisors' Charge;

(ii) any Claim of an Arctic Glacier Party against another Arctic Glacier Party; and

(iii) any Claim in respect of Assumed Liabilities.

"**Government Authority**" means a federal, provincial, state, territorial, municipal or other government or government department, agency or authority (including a court of law) having jurisdiction over an Arctic Glacier Party.

"**Indirect Purchaser Claimants**" means each of the members of the putative classes described in the complaints or statements of claim issued in the Indirect Purchaser Litigation.

"**Indirect Purchaser Litigation**" means the putative class actions listed on Schedule "H" to this Order, commenced in the United States.

"**Initial Order**" means the Initial order of the Honourable Madam Justice Spivak made February 22, 2012 in the CCAA Proceedings, as amended, extended, restated or varied from time to time.

"**Monitor's Website**" means www.alvarezandmarsal.com/arcticglacier.

"**Notice of Revision or Disallowance**" means a notice, in substantially the form attached as Schedule "F" hereto, advising a Claimant or a Class Representative, as the case may be, that the Monitor has revised or disallowed all or part of a Claim, Class Claim, DO&T Claim or DO&T Indemnity Claim submitted by such Claimant or Class Representative pursuant to this Order.

"**Notice to Claimants**" means the notice to Claimants for publication in substantially the form attached as Schedule "B" hereto.

"**Officer**" means anyone who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, an officer or *de facto* officer of an Arctic Glacier Party.

"**Person**" is to be broadly interpreted and includes any individual, firm, corporation, limited or unlimited liability company, general or limited partnership, association, trust, unincorporated organization, joint venture, Government Authority or any agency, regulatory body, officer or instrumentality thereof or any other entity, wherever situate or domiciled, and whether or not having legal status, and whether acting on their own or in a representative capacity.

"**Plan**" means any proposed plan(s) of compromise or arrangement to be filed by any or all of the Applicants pursuant to the CCAA as amended, supplemented or restated from time to time in accordance with the terms thereof.

"**Proof of Claim**" means the proof of claim in substantially the form attached as Schedule "C" hereto to be completed and filed by a Person setting forth the Claim (including a Class Claim) it is entitled to file and which shall include all supporting documentation in respect of such Claim.

"**Proof of Claim Document Package**" means a document package that includes a copy of the Notice to Claimants, the Proof of Claim form, the DO&T Proof of Claim form, the Claimants' Guide to Completing the Proof of Claim form, the Claimants' Guide to Completing the DO&T Proof of Claim form, and such other materials as the Monitor, in consultation with Arctic Glacier, may consider appropriate or desirable.

"**Proven Claim**" means each of the Deemed Proven Claims and each Claim that has been proven in accordance with this Order.

"**Purchaser**" means Arctic Glacier LLC, formerly known as H.I.G. Zamboni, LLC, and its affiliates Arctic Glacier U.S.A., Inc. and Arctic Glacier Canada Inc.

"**Trustee**" means any Person who is or was or may be deemed to be or have been, whether by statute, operation of law or otherwise, a trustee or *de facto* trustee of the Applicant Arctic Glacier Income Fund, in such capacity.

"**U.S. Court**" means the United States Bankruptcy Court for the District of Delaware having jurisdiction over the Chapter 15 Cases.

3. THIS COURT ORDERS that all references as to time herein shall mean local time in Winnipeg, Manitoba, Canada, and any reference to an event occurring on a Calendar Day or a Business Day shall mean prior to 5:00 p.m. Winnipeg time on such Calendar Day or Business Day unless otherwise indicated herein.

4. THIS COURT ORDERS that all references to the word "including" shall mean "including without limitation", that all references to the singular herein include the plural, the plural include the singular, and that any gender includes all genders.

GENERAL PROVISIONS

5. THIS COURT ORDERS that the Monitor, in consultation with Arctic Glacier, is hereby authorized to use reasonable discretion as to the adequacy of compliance with respect to the manner in which forms delivered hereunder are completed and executed, and the time in which they are submitted, and may, where it is satisfied that a Claim, a DO&T Claim or a DO&T Indemnity Claim has been adequately proven, waive strict compliance with the requirements of this Order, including in respect of completion, execution and time of delivery of such forms. Further, the Monitor may request any further documentation from a Person that the Monitor, in consultation with Arctic Glacier, may require in order to enable it to determine the validity of a Claim, a DO&T Claim or a DO&T Indemnity Claim.

6. THIS COURT ORDERS that if any Claim, DO&T Claim or DO&T Indemnity Claim arose in a currency other than Canadian dollars, then the Person making the Claim, DO&T Claim or DO&T Indemnity Claim shall complete its Proof of Claim, DO&T Proof of Claim or DO&T Indemnity Proof of Claim, as applicable, indicating the

amount of the Claim, DO&T Claim or DO&T Indemnity Claim in such currency, rather than in Canadian dollars or any other currency.

7. THIS COURT ORDERS that Claims, DO&T Claims and DO&T Indemnity Claims shall be claimed and paid in the currency in which they are owed and, to the extent that there are insufficient funds to pay a Claim, DO&T Claim and/or DO&T Indemnity Claim in the currency in which it is owed, the Monitor is hereby authorized to convert the currency at the Bank of Canada noon exchange rate on the date of the Initial Order.

8. THIS COURT ORDERS that a Person making a Claim, DO&T Claim or DO&T Indemnity Claim shall complete its Proof of Claim, DO&T Proof of Claim or DO&T Indemnity Proof of Claim, as applicable, indicating the amount of the Claim, DO&T Claim or DO&T Indemnity Claim, including interest calculated to the Claims Bar Date.

9. THIS COURT ORDERS that the form and substance of each of the Notice to Claimants, Proof of Claim, Claimants' Guide to Completing the Proof of Claim, DO&T Proof of Claim, Claimants' Guide to Completing the DO&T Proof of Claim, DO&T Indemnity Proof of Claim, Notice of Revision or Disallowance and the Dispute Notice attached as Appendix "1" thereto, substantially in the forms attached as Schedules "B", "C", "C-2", "D", "D-2", "E" and "F" respectively to this Order are hereby approved. Notwithstanding the foregoing, the Monitor, in consultation with Arctic Glacier, may from time to time make non-substantive changes to such forms as the Monitor, in consultation with Arctic Glacier, considers necessary or advisable.

10. THIS COURT ORDERS that copies of all forms delivered by a Creditor or the Monitor hereunder, as applicable, shall be maintained by the Monitor and, subject to further order of the Court, the relevant Creditor will be entitled to have access thereto by appointment during normal business hours on written request to the Monitor.

11. THIS COURT ORDERS that consultation with the Chief Process Supervisor appointed pursuant to paragraph 25 of the Initial Order (the "**CPS**") shall satisfy any obligation of the Monitor in this Order to consult with Arctic Glacier and obtaining the

consent of the CPS shall satisfy any obligation of the Monitor in this Order to obtain the consent of Arctic Glacier. The protections provided to the CPS in the Initial Order and/or the Transition Order dated July 12, 2012, shall apply to any activities undertaken by the CPS in accordance with this Order.

MONITOR'S ROLE

12. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights, duties, responsibilities and obligations under the CCAA and under the Initial Order, is hereby directed and empowered to take such other actions and fulfill such other roles as are authorized by this Order or incidental thereto.

13. THIS COURT ORDERS that (i) in carrying out the terms of this Order, the Monitor shall have all of the protections given to it by the CCAA, the Initial Order, other orders in the CCAA Proceeding, and this Order, or as an officer of the Court, including the stay of proceedings in its favour, (ii) the Monitor shall incur no liability or obligation as a result of the carrying out of the provisions of this Order, (iii) the Monitor shall be entitled to rely on the books and records of the Arctic Glacier Parties and any information provided by the Arctic Glacier Parties, all without independent investigation, and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

NOTICE TO CLAIMANTS, DIRECTORS AND OFFICERS

14. THIS COURT ORDERS that:

(a) the Monitor shall, no later than two (2) Business Days following the making of this Order, post a copy of the Proof of Claim Document Package on the Monitor's Website;

(b) the Monitor shall, no later than five (5) Business Days following the making of this Order, cause the Notice to Claimants to be published in (i) The Globe and Mail newspaper (National Edition) on one such day, (ii) the Wall Street

Journal (National Edition) on one such day, and (iii) the Winnipeg Free Press on one such day;

(c) the Monitor shall, provided such request is received in writing by the Monitor prior to the Claims Bar Date, deliver, as soon as reasonably possible following receipt of a request therefor, a copy of the Proof of Claim Document Package to any Person requesting such material; and

(d) the Monitor shall send to any Director, Officer or Trustee named in a DO&T Proof of Claim received on or before the Claims Bar Date a copy of such DO&T Proof of Claim, including copies of any documentation submitted to the Monitor by the Claimant making the DO&T Claim, as soon as practicable.

15. THIS COURT ORDERS that within seven (7) Business Days following the making of this Order, the Monitor shall send a Proof of Claim Document Package to all known Creditors based on the books and records of Arctic Glacier, except that, in respect of Class Claims, the Monitor shall send the Proof of Claim Document Package only to the Class Representative and, in respect of any other putative class actions, the Monitor shall send the Proof of Claim Document Package only to the first listed plaintiff's counsel on the originating process associated with that putative class action.

16. THIS COURT ORDERS that, except as otherwise set out in this Order or any other orders of the Court, neither the Monitor nor any Arctic Glacier Party is under any obligation to send or provide notice to any Person holding a Claim, a DO&T Claim or a DO&T Indemnity Claim, and without limitation, neither the Monitor nor any Arctic Glacier Party shall have any obligation to send or provide notice to any Person having a security interest in a Claim, DO&T Claim or DO&T Indemnity Claim (including the holder of a security interest created by way of a pledge or a security interest created by way of an assignment of a Claim, DO&T Claim or DO&T Indemnity Claim), and all Persons shall be bound by any notices published pursuant to paragraphs 14(a) and 14(b) of this Order regardless of whether or not they received actual notice, and any steps taken

in respect of any Claim, DO&T Claim or DO&T Indemnity Claim in accordance with this Order.

17. THIS COURT ORDERS that the delivery of a Proof of Claim Document Package, Proof of Claim, DO&T Proof of Claim, or DO&T Indemnity Proof of Claim by the Monitor to a Person shall not constitute an admission by the Arctic Glacier Parties or the Monitor of any liability of any Arctic Glacier Party or any Director, Officer or Trustee to any Person.

CLAIMS BAR DATE

Claims and DO&T Claims

18. THIS COURT ORDERS that Proofs of Claim and DO&T Proofs of Claim shall be filed with the Monitor on or before the Claims Bar Date. For the avoidance of doubt, a Proof of Claim or DO&T Proof of Claim, as applicable, must be filed in respect of every Claim or DO&T Claim, regardless of whether or not a legal proceeding in respect of a Claim or DO&T Claim has been previously commenced.

19. THIS COURT ORDERS that any Person that does not file a Proof of Claim as provided for herein such that the Proof of Claim is received by the Monitor on or before the Claims Bar Date (a) shall be and is hereby forever barred from making or enforcing such Claim against the Arctic Glacier Parties and all such Claims shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such Claim as against any other Person who could claim contribution or indemnity from the Arctic Glacier Parties; (c) shall not be entitled to vote such Claim at any Creditors' Meeting in respect of any Plan or to receive any distribution thereunder in respect of such Claim; and (d) shall not be entitled to any further notice in and shall not be entitled to participate as a Claimant or Creditor in the CCAA Proceedings in respect of such Claim.

20. THIS COURT ORDERS that any Person that does not file a DO&T Proof of Claim as provided for herein such that the DO&T Proof of Claim is received by the Monitor on or before the Claims Bar Date (a) shall be and is hereby forever barred from

making or enforcing such DO&T Claim against any Directors, Officers or Trustees, and all such DO&T Claims shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such DO&T Claim as against any other Person who could claim contribution or indemnity from any Directors, Officers or Trustees; (c) shall not be entitled to receive any distribution in respect of such DO&T Claim; and (d) shall not be entitled to any further notice in and shall not be entitled to participate as a Claimant or Creditor in the CCAA Proceedings in respect of such DO&T Claim.

DO&T Indemnity Claims

21. THIS COURT ORDERS that any Director, Officer or Trustee wishing to assert a DO&T Indemnity Claim shall deliver a DO&T Indemnity Proof of Claim to the Monitor so that it is received by no later than fifteen (15) Business Days after the date of deemed receipt of the DO&T Proof of Claim pursuant to paragraph 51 hereof by such Director, Officer or Trustee (with respect to each DO&T Indemnity Claim, the "**DO&T Indemnity Claims Bar Date**").

22. THIS COURT ORDERS that any Director, Officer or Trustee that does not file a DO&T Indemnity Proof of Claim as provided for herein such that the DO&T Indemnity Proof of Claim is received by the Monitor on or before the applicable DO&T Indemnity Claims Bar Date (a) shall be and is hereby forever barred from making or enforcing such DO&T Indemnity Claim against any Arctic Glacier Party, and such DO&T Indemnity Claim shall be forever extinguished; (b) shall be and is hereby forever barred from making or enforcing such DO&T Indemnity Claim as against any other Person who could claim contribution or indemnity from an Arctic Glacier Party; and (c) shall not be entitled to vote such DO&T Indemnity Claim at any Creditors' Meeting in respect of any Plan or to receive any distribution in respect of such DO&T Indemnity Claim.

Excluded Claims

23. THIS COURT ORDERS that Persons with Excluded Claims shall not be required to file a Proof of Claim in this process in respect of such Excluded Claims, unless required to do so by further order of the Court.

PROOFS OF CLAIM

24. THIS COURT ORDERS that each Person shall include any and all Claims it asserts against the Arctic Glacier Parties in a single Proof of Claim.

25. THIS COURT ORDERS that each Person shall include any and all DO&T Claims it asserts against one or more Directors, Officers or Trustees in a single DO&T Proof of Claim.

26. THIS COURT ORDERS that if a Person submits a Proof of Claim and a DO&T Proof of Claim in relation to the same matter, then that Person shall cross-reference the DO&T Proof Claim in the Proof of Claim and the Proof of Claim in the DO&T Proof of Claim.

DOJ CLAIM

27. THIS COURT ORDERS that the Government of the United States shall be deemed to have submitted a Proof of Claim in the amount of and on account of the DOJ Claim, and the Government of the United States does not need to take any further action to prove the DOJ Claim in this Claims Process unless it wishes to do so; provided, however, that this paragraph only addresses the rights of the United States Attorney's Office for the Southern District of Ohio and the U.S. Department of Justice Antitrust Division on account of the DOJ Claim, and nothing contained herein shall excuse any other United States federal or state agency from otherwise complying with the terms of this Order.

CLASS CLAIMS

28. THIS COURT ORDERS that the Class Representative in respect of the Direct Purchaser Litigation shall be deemed to have submitted a Proof of Claim on behalf of the Direct Purchaser Claimants in the principal amount of US$10,000,000 plus applicable interest against the Applicants Arctic Glacier Income Fund, Arctic Glacier Inc. and Arctic Glacier International Inc. and such Claim shall be a Deemed Proven Claim.

29. THIS COURT ORDERS that the Class Representative in respect of the Canadian Retail Litigation may submit a Proof of Claim in respect of Claims of the Canadian Retail Litigation Claimants in the Canadian Retail Litigation for which they are Class Representative, indicating the amount claimed by such Canadian Retail Litigation Claimants and the basis of such Claim.

30. THIS COURT ORDERS that the Class Representative in respect of the Indirect Purchaser Litigation may submit a Proof of Claim in respect of Claims of the Indirect Purchaser Claimants set out in the Indirect Purchaser Litigation for which they are Class Representative, indicating the amount claimed by such Indirect Purchaser Claimants and the basis of such Claim.

31. THIS COURT ORDERS that, notwithstanding any other provisions of this Order, Canadian Retail Litigation Claimants and Indirect Purchaser Claimants are not required to file individual Proofs of Claim in respect of Claims relating solely to the Class Claims described in the Indirect Purchaser Litigation or Canadian Retail Litigation. However, any Canadian Retail Litigation Claimant or Indirect Purchaser Claimant may file a Proof of Claim to assert her claim individually and, in such event, such Canadian Retail Litigation Claimant or Indirect Purchaser Claimant shall be deemed to have elected not to authorize the Class Representative to include her Claim.

32. THIS COURT ORDERS that:

(a) nothing contained in this Order shall prejudice the Arctic Glacier Parties' or the Monitor's rights to object to or otherwise oppose, on any and all bases, the validity and/or amount of any Class Claim that may be filed by the Canadian Retail Litigation Claimants or Indirect Purchaser Claimants in the CCAA Proceedings, including on the basis that the class cannot be certified under applicable law or the claim is not otherwise qualified as a Class Claim in the Claims Process established by this Order or further order of this Court;

(b) nothing contained in this Order, this motion or the evidence submitted in the CCAA Proceedings is an admission or recognition of the Class

Representative's right to represent the Class for any other purpose other than filing a Proof of Claim on behalf of Canadian Retail Litigation Claimants or Indirect Purchaser Claimants and resolving such Claim in accordance with this Order or further order of the Court; and

(c) this Order is without prejudice to the right of the Canadian Retail Litigation Claimants and Indirect Purchaser Claimants, their Class Representatives or their counsel, with leave of this Court, to seek an order in the Canadian Retail Litigation or Indirect Purchaser Litigation, as applicable, granting rights of representation in these CCAA Proceedings.

REVIEW OF PROOFS OF CLAIM & DO&T PROOFS OF CLAIM

33. THIS COURT ORDERS that the Monitor, subject to the terms of this Order, shall review all Proofs of Claim and DO&T Proofs of Claim filed, and at any time:

(a) may request additional information from a Claimant or Class Representative, as the case may be;

(b) may request that a Claimant or Class Representative, as the case may be, file a revised Proof of Claim or DO&T Proof of Claim, as applicable;

(c) may, (i) with the consent of the Arctic Glacier Parties and any Person whose liability may be affected or (ii) with Court approval in a further order of the Court and (iii) in respect of a Class Claim, subject to the approval of a court of competent jurisdiction over the Indirect Purchaser Litigation or Canadian Retail Litigation resolve and settle any issue or Claim arising in a Proof of Claim or DO&T Proof of Claim or in respect of a Claim or DO&T Claim; and

(d) may, in consultation with Arctic Glacier with respect to the Proofs of Claim and the Directors, Officers and Trustees named in the applicable DO&T Proof of Claim with respect to the DO&T Proofs of Claim, as applicable, by

notice in writing, revise or disallow (in whole or in part) any Claim or DO&T Claim.

34. THIS COURT ORDERS that where a Claim or DO&T Claim has been accepted by the Monitor in accordance with this Order, such Claim or DO&T Claim shall constitute such Claimant's Proven Claim.

35. THIS COURT ORDERS that where a Claim or DO&T Claim is revised or disallowed (in whole or in part), the Monitor shall deliver to the Claimant or, in the case of a Class Claim, to the Class Representative, a Notice of Revision or Disallowance, attaching the form of Dispute Notice.

36. THIS COURT ORDERS that where a Claim or DO&T Claim has been revised or disallowed (in whole or in part), the revised or disallowed Claim or DO&T Claim (or revised or disallowed portion thereof) shall not be a Proven Claim until determined otherwise in accordance with the procedures set out in paragraphs 41 to 47 hereof or as otherwise ordered by the Court.

REVIEW OF DO&T INDEMNITY PROOFS OF CLAIM

37. THIS COURT ORDERS that the Monitor, subject to the terms of this Order, shall review all DO&T Indemnity Proofs of Claim filed, and at any time:

(a) may request additional information from a Director, Officer or Trustee;

(b) may request that a Director, Officer or Trustee file a revised DO&T Indemnity Proof of Claim;

(c) may attempt to resolve and settle any issue or Claim arising in a DO&T Indemnity Proof of Claim or in respect of a DO&T Indemnity Claim;

(d) may accept (in whole or in part) any DO&T Indemnity Claim; and

(e) may, by notice in writing, revise or disallow (in whole or in part) any DO&T Indemnity Claim.

38. THIS COURT ORDERS that where a DO&T Indemnity Claim has been accepted by the Monitor in accordance with this Order, such DO&T Indemnity Claim shall constitute such Director, Officer or Trustee's Proven Claim.

39. THIS COURT ORDERS that where a DO&T Indemnity Claim is revised or disallowed (in whole or in part), the Monitor shall deliver to the Director, Officer or Trustee a Notice of Revision or Disallowance, attaching the form of Dispute Notice.

40. THIS COURT ORDERS that where a DO&T Indemnity Claim has been revised or disallowed (in whole or in part), the revised or disallowed DO&T Indemnity Claim (or revised or disallowed portion thereof) shall not be a Proven Claim until determined otherwise in accordance with the procedures set out in paragraphs 41 to 47 hereof or as otherwise ordered by the Court.

DISPUTE NOTICE

41. THIS COURT ORDERS that a Person who has received a Notice of Revision or Disallowance in respect of a Claim (including a Class Claim), a DO&T Claim or a DO&T Indemnity Claim who intends to dispute such Notice of Revision or Disallowance shall file a Dispute Notice with the Monitor not later than the twenty-first (21st) Calendar Day following deemed receipt of the Notice of Revision or Disallowance pursuant to paragraph 51 of this Order. The filing of a Dispute Notice with the Monitor in accordance with this paragraph shall result in such Claim, DO&T Claim or DO&T Indemnity Claim being determined as set out in paragraphs 41 to 47 of this Order.

42. THIS COURT ORDERS that where a Claimant that receives a Notice of Revision or Disallowance fails to file a Dispute Notice with the Monitor within the time period provided therefor in paragraph 41 of this Order, the amount of such Claimant's Claim, DO&T Claim or DO&T Indemnity Claim, as applicable, shall be deemed to be as set out in the Notice of Revision or Disallowance and such amount, if any, shall constitute such Claimant's Proven Claim, and the balance of such Claimant's Claim, DO&T Claim, or DO&T Indemnity Claim, if any, shall be forever barred and extinguished.

RESOLUTION OF CLAIMS, DO&T CLAIMS AND DO&T INDEMNITY CLAIMS

43. THIS COURT ORDERS that, as soon as practicable after the delivery of the Dispute Notice in respect of a Claim or DO&T Claim to the Monitor, the Monitor shall attempt to resolve and settle the Claim or DO&T Claim with the Claimant or Class Representative, as applicable, in accordance with paragraph 33 of this Order.

44. THIS COURT ORDERS that as soon as practicable after the delivery of the Dispute Notice in respect of a DO&T Indemnity Claim to the Monitor, the Monitor shall attempt to resolve and settle the purported DO&T Indemnity Claim with the applicable Director, Officer or Trustee, in accordance with paragraph 37 of this Order.

45. THIS COURT ORDERS that in the event that a dispute raised in a Dispute Notice is not settled within a time period or in a manner satisfactory to the Monitor in consultation with the Arctic Glacier Parties and the applicable Claimant, the Monitor shall seek directions from the Court concerning an appropriate process for resolving the dispute.

46. THIS COURT ORDERS that any Claims and related DO&T Claims and/or DO&T Indemnity Claims shall be determined at the same time and in the same proceeding.

47. THIS COURT ORDERS that, notwithstanding any provision of this Order, in the event that a dispute is raised in a Dispute Notice in respect of any Class Claim made on behalf of the Indirect Purchaser Claimants in the Indirect Purchaser Litigation, the Monitor shall appoint a special claims officer for the purpose of determining such dispute, which special claims officer:

(a) is a lawyer resident and licensed to practice in the United States of America;

(b) has substantial experience as counsel in U.S. antitrust class actions; and

(c) is acceptable to each of the Arctic Glacier Parties, the Monitor and the applicable Class Representative, provided that, should the parties fail to agree

on a special claims officer within a reasonable time, the Monitor shall apply for directions pursuant to this Order to appoint a special claims officer with the qualifications set out in subparagraphs (a) and (b).

NOTICE OF TRANSFEREES

48. THIS COURT ORDERS that neither the Monitor nor the Arctic Glacier Parties shall be obligated to send notice to or otherwise deal with a transferee or assignee of a Claim, DO&T Claim or DO&T Indemnity Claim as the Claimant in respect thereof unless and until (i) actual written notice of transfer or assignment, together with satisfactory evidence of such transfer or assignment, shall have been received by the Monitor, and (ii) the Monitor shall have acknowledged in writing such transfer or assignment, and thereafter such transferee or assignee shall for all purposes hereof constitute the "Claimant" in respect of such Claim, DO&T Claim or DO&T Indemnity Claim. Any such transferee or assignee of a Claim, DO&T Claim or DO&T Indemnity Claim shall be bound by all notices given or steps taken in respect of such Claim, DO&T Claim or DO&T Indemnity Claim in accordance with this Order prior to the written acknowledgement by the Monitor of such transfer or assignment.

49. THIS COURT ORDERS that the transferee or assignee of any Claim, DO&T Claim or DO&T Indemnity Claim (i) shall take the Claim, DO&T Claim or DO&T Indemnity Claim subject to the rights and obligations of the transferor/assignor of the Claim, DO&T Claim or DO&T Indemnity Claim, and subject to the rights of the Arctic Glacier Parties and any Director, Officer or Trustee against any such transferor or assignor, including any rights of set-off which any Arctic Glacier Party, Director, Officer or Trustee had against such transferor or assignor, and (ii) cannot use any transferred or assigned Claim, DO&T Claim or DO&T Indemnity Claim to reduce any amount owing by the transferee or assignee to an Arctic Glacier Party, Director, Officer or Trustee, whether by way of set off, application, merger, consolidation or otherwise.

DIRECTIONS

50. THIS COURT ORDERS that the Monitor, the Arctic Glacier Parties and any Person (but only to the extent such Person may be affected with respect to the issue on which directions are sought) may, at any time, and with such notice as the Court may require, seek directions from the Court with respect to this Order and the claims process set out herein, including the forms attached as Schedules hereto.

SERVICE AND NOTICE

51. THIS COURT ORDERS that the Monitor may, unless otherwise specified by this Order, serve and deliver the Proof of Claim Document Package, the DO&T Indemnity Proof of Claim, the Notice of Revision or Disallowance, and any letters, notices or other documents to Claimants, Directors, Officers, Trustees, or other interested Persons, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to such Persons (with copies to their counsel as appears on the CCAA Service List if applicable) at the address as last shown on the records of the Arctic Glacier Parties or set out in such Person's Proof of Claim, DO&T Proof of Claim or DO&T Indemnity Proof of Claim. Any such service or notice shall be deemed to have been received: (i) if sent by ordinary mail, on the fourth Business Day after mailing; (ii) if sent by courier or personal delivery, on the next Business Day following dispatch; and (iii) if delivered by electronic transmission by 5:00 p.m. on a Business Day, on such Business Day, and if delivered after 5:00 p.m. or on a day other than on a Business Day, on the following Business Day. Notwithstanding anything to the contrary in this paragraph 51, Notices of Revision or Disallowance shall be sent only by (i) email or facsimile to an address or number or email address that has been provided in writing by the Claimant, Director, Officer or Trustee, or (ii) courier.

52. THIS COURT ORDERS that any notice or other communication (including Proofs of Claim, DO&T Proofs of Claims, DO&T Indemnity Proofs of Claim and Dispute Notices) to be given under this Order by any Person to the Monitor shall be in writing in substantially the form, if any, provided for in this Order and will be

sufficiently given only if delivered by prepaid ordinary mail, prepaid registered mail, courier, personal delivery or electronic transmission addressed to:

Alvarez & Marsal Canada Inc., Arctic Glacier Monitor
Address: Royal Bank Plaza, South Tower
200 Bay Street
Suite 2900
P.O. Box 22
Toronto, Ontario Canada
M5J 2J1
Fax No.: 416-847-5201
Email: **mmackenzie@alvarezandmarsal.com**
jnevsky@alvarezandmarsal.com
Attention: Melanie MacKenzie and Joshua Nevsky

53. THIS COURT ORDERS that if, during any period during which notices or other communications are being given pursuant to this Order, a postal strike or postal work stoppage of general application should occur, such notices or other communications sent by ordinary mail and then not received shall not, absent further Order of the Court, be effective and notices and other communications given hereunder during the course of any such postal strike or work stoppage of general application shall only be effective if given by courier, personal delivery or electronic transmission in accordance with this Order.

54. THIS COURT ORDERS that, in the event that this Order is later amended by further order of the Court, the Monitor shall post such further order on the Monitor's Website and such posting shall constitute adequate notice of such amendment.

MISCELLANEOUS

55. THIS COURT ORDERS that nothing in this Order shall constitute or be deemed to constitute an allocation or assignment of Claims, DO&T Claims, DO&T Indemnity Claims, or Excluded Claims into particular affected or unaffected classes for the purpose of a Plan and, for greater certainty, the treatment of Claims, DO&T Claims, DO&T

Indemnity Claims, Excluded Claims or any other claims are to be subject to a Plan or further order of the Court and the class or classes of Creditors for voting and distribution purposes shall be subject to the terms of any proposed Plan or further order of the Court.

56. THIS COURT ORDERS that nothing in this Order shall prejudice the rights and remedies of any Directors, Officers or Trustees or other Persons under the Directors' Charge or any applicable insurance policy or prevent or bar any Person from seeking recourse against or payment from the Arctic Glacier Parties' insurance and any Director's, Officer's and/or Trustee's liability insurance policy or policies that exist to protect or indemnify the Directors, Officers, Trustees and/or other persons, whether such recourse or payment is sought directly by the Person asserting a Claim or a DO&T Claim from the insurer or derivatively through the Director, Officer, Trustee or any Arctic Glacier Party; provided, however, that nothing in this Order shall create any rights in favour of such Person under any policies of insurance nor shall anything in this Order limit, remove, modify or alter any defence to such claim available to the insurer pursuant to the provisions of any insurance policy or at law; and further provided that any Claim or DO&T Claim or portion thereof for which the Person receives payment directly from or confirmation that she is covered by the Arctic Glacier Parties' insurance or any Director's, Officer's or Trustee's liability insurance or other liability insurance policy or policies that exist to protect or indemnify the Directors, Officers, Trustees and/or other Persons shall not be recoverable as against an Arctic Glacier Party or Director, Officer or Trustee, as applicable.

57. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, including the United States Bankruptcy Court for the District of Delaware, or in any other foreign jurisdiction, to give effect to this Order and to assist the Arctic Glacier Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Arctic Glacier Parties and to the Monitor, as an officer of the Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign

proceeding, or to assist the Arctic Glacier Parties and the Monitor and their respective agents in carrying out the terms of this Order.

CERTIFIED A TRUE COPY

DEPUTY REGISTRAR