

COURT FILE NUMBER 25-2585991
25-2582159

COURT COURT OF QUEEN'S BENCH OF
ALBERTA

JUDICIAL CENTRE CALGARY



#444360 \$25

IN THE MATTER OF THE *BANKRUPTCY*
AND INSOLVENCY ACT, RSC 1985, C B-3,
AS AMENDED

J.C.

AND IN THE MATTER OF THE
BANKRUPTCY OF TRAKOPOLIS IoT
CORP.

AND IN THE MATTER OF THE
BANKRUPTCY OF TRAKOPOLIS SaaS
CORP.

DOCUMENT**APPEAL OF NOTICE OF
DISALLOWANCE**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT

MLT AIKINS LLP
Barristers & Solicitors
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Phone: (604) 608-4597
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Attention: William E.J. Skelly
File: 0068641.00002

NOTICE TO RESPONDENTS on the Service List attached as **Schedule "A"**.

This application is made against you. You are the Respondents.

You have the right to state your side of this matter before the Judge.

To do so, you must be in Court when the application is heard as shown below:

Date: TBA
Time: TBA
Where: Calgary Courts Centre, 601 - 5 Street S.W., Calgary, Alberta
Before Whom: The Presiding Justice in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. ESW Holdings Inc. (the "**Applicant**" or "**ESW**") is seeking an Order substantially in the form attached hereto as **Schedule "B"**:
 - (a) abridging the time for, and validating service of, this Application to appeal the Notices of Disallowance (the "**Disallowance Appeal**") and the materials filed in support of this Disallowance Appeal, if necessary, on the parties set out in the Service List attached hereto as **Schedule "A"**, and dispensing with service on any party not served;
 - (b) permitting ESW to submit supplementary evidence supporting its Proofs of Claim, as contained in the Affidavit of Neeraj Gupta, sworn on April 22, 2020;
 - (c) overturning the Notices of Disallowance (as defined below) issued by Alvarez & Marsal Canada Inc. (the "**Trustee**") on March 20, 2020 and March 29, 2020 with respect to the Proofs of Claim filed by ESW (the "**ESW Claim**") in the bankruptcy of Trakopolis IoT Corp. ("**IoT**") and Trakopolis SaaS Corp. ("**SaaS**", and collectively with IoT, "**Trakopolis**");
 - (d) directing the Trustee to allow ESW's Claim pursuant to the Warrant Certificate (as defined below) and rank such claim as a priority claim, rather than an equity claim;
 - (e) directing the Trustee to give full force and effect to the SaaS Guarantee (as defined below);
 - (f) granting ESW costs of this Appeal on a solicitor and own client (full-indemnity) basis; and
 - (g) granting such further and other relief as may be sought by ESW as this Honourable Court deems just and appropriate in the circumstances.

Grounds for Making this Application:

Background

2. On September 28, 2018, ESW provided IoT with a term sheet (the "**Term Sheet**") that contemplated ESW lending funds to IoT in order to refinance its existing indebtedness.

3. In the course of its due diligence, ESW identified two subsidiaries of IoT, namely SaaS and Trakopolis USA Corp. (“**Trak USA**”). SaaS owned the intellectual property of IoT and Trak USA acted as IoT’s payment agent in the United States.
4. On November 15, 2018, ESW advanced funds to IoT and SaaS pursuant to a Loan and Security Agreement dated November 15, 2018 (the “**LSA**”).
5. As part of the security for the LSA, on November 15, 2018, SaaS guaranteed the obligations of IoT to ESW pursuant to a guarantee (the “**SaaS Guarantee**”).
6. The parties intended to complete their financing transaction on November 15, 2018. In order to facilitate the financing, ESW was provided with what were purported to be IoT’s banking details to wire funds at closing.
7. To further facilitate the financing, IoT provided, among other things, a certificate of compliance dated November 15, 2018 (the “**Certificate of Compliance**”).
8. On November 15, 2018, the following amounts were funded in accordance with the instructions provided to ESW by IoT:
 - (a) USD \$1,716,943.84 (the “**Rejected Amount**”) by ESW to IoT;
 - (b) USD \$60,000.00 to ESW as a lender’s fee;
 - (c) USD \$55,474.36 as the lender’s legal fees; and
 - (d) USD \$1,167,581.80 to Silicon Valley Bank, IoT’s creditor.
9. The Rejected Amount was not accepted by the receiving bank for IoT; the account that was represented to ESW as belonging to IoT, in fact, belonged to SaaS.
10. On or around November 16, 2018, ESW was informed that IoT was not the operating company as ESW had been led to believe, and IoT did not own the Canadian assets.
11. On November 16, 2018, counsel for ESW, Aird & Berlis, e-mailed counsel for IoT and SaaS explaining ESW’s concern that as a result of the information ESW had received concerning SaaS and IoT, IoT could not be in compliance with the terms of the LSA (in particular, the covenants).

12. As a result of discovering that SaaS was actually the operating entity and owner of the Canadian assets, IoT, SaaS and ESW agreed to enter into, without novation, the Amended and Restated Loan Agreement dated November 27, 2018 (the “**ARLA**”, and collectively with the LSA, the “**Credit Agreement**”), pursuant to which that portion of the funds not yet advanced (consisting of the Rejected Amount) would be funded to Trakopolis.
13. It was a term of the ARLA that IoT and SaaS acknowledge the security granted under the LSA, including the SaaS Guarantee, to be valid and enforceable in relation to the ARLA. To that end, on November 27, 2018, IoT and SaaS provided an executed acknowledgment to confirm and acknowledge the continuing effect and enforceability of all security documents that existed at the time of the LSA (the “**Acknowledgment**”). The SaaS Guarantee existed at the time of the LSA.
14. It was a term of the ARLA that IoT guarantee the obligations of SaaS to ESW, and on November 27, 2018, IoT guaranteed the obligations of SaaS to ESW pursuant to a guarantee (the “**IoT Guarantee**”).
15. On November 27, 2018, the ARLA was entered into and the Rejected Amount, being the only amount remaining to be funded under the Credit Agreement, was delivered to SaaS, subject to applicable disbursements.

The Warrant Certificate

16. It was a condition precedent of the Credit Agreement that IoT was to provide ESW with a share purchase warrant, as described in the warrant certificate (the “**Warrant Certificate**”).
17. The Warrant Certificate provided ESW with the option to purchase 1,307,620 common shares in IoT (the “**Warrant Shares**”) at any point between November 15, 2018 and November 15, 2023 at the set price of \$0.34 per common share (the “**Purchase Option**”).
18. If an “Acquisition” (as defined below) occurred while the Purchase Option remained outstanding, then IoT agreed under the Warrant Certificate to purchase the Warrant for cancellation at a price determined by the agreed pricing formula (the “**Re-Purchase Payment Obligation**”).
19. The Re-Purchase Payment Obligation was the subject of specific negotiation between the parties and provided real and tangible value to Trakopolis as an alternative method of compensating ESW for providing funding in exchange for reduced ongoing interest costs relative to that offered by other lenders. The Re-Purchase Payment Obligation allowed Trakopolis to retain more capital

for the operation of the business, a fact to which Trakopolis' counsel testified in its filings to the TSX Venture Exchange.

20. The Warrant Certificate defines acquisition as including, “the sale, lease, exclusive license, or other disposition of all or substantially all of the assets of [IoT]” (“**Acquisition**”).
21. On or about December 20, 2019, LLR Partners (“**LLR**”), through its subsidiary 1234600 BC Ltd., and Trakopolis entered into an Asset Purchase Agreement (the “**Asset Purchase Agreement**”), pursuant to which LLR purchased all tangible and intangible assets, property, and rights of each of IoT and SaaS (the “**Transaction**”). The Transaction was completed on January 22, 2020.
22. The Transaction, comprising of the sale of all or substantially all of the assets of IoT, constituted an Acquisition and triggered the Re-Purchase Payment Obligation, at a price determined by the relevant formula to be USD \$600,000.00
23. On January 9, 2020, the Honourable Justice A.D. Macleod granted a Sale Approval and Vesting Order approving the Transaction.
24. It was specifically negotiated between counsel for ESW (MLT Aikins) and counsel for IoT and SaaS (Osler) that the Sale Approval and Vesting Order would only discharge the security granted by SaaS to ESW as it related to the assets described in the Asset Purchase Agreement. In all other respects, the security would remain valid and in full force and effect.
25. At the time of the Transaction, ESW had not exercised its option to purchase any of the Warrant Shares, and as such, ESW never held an equity interest pursuant to the Warrant Certificate.
26. Prior to and after the completion of the Transaction, ESW never waived its rights under the Warrant Certificate and it was always the intention of ESW to rely on the Warrant Certificate. ESW's intention to maintain its rights under the Warrant Certificate were made clear to counsel to Trakopolis on multiple occasions.
27. Further, ESW never released the obligations pursuant to the SaaS Guarantee or the IoT Guarantee.
28. The majority of the amounts owing from IoT and SaaS to ESW were paid out as a result of the Transaction. However, the parties expressly agreed to defer a decision on Trakopolis' obligations

with respect to the Re-Purchase Payment Option and ESW has continuously reserved its right to claim the USD \$600,000.00 payment triggered by the Transaction.

29. Following the completion of the Transaction, IoT and SaaS were assigned into bankruptcy to facilitate an orderly wind-up and liquidation of each company (such bankruptcies are respectively referred to as the “**IoT Bankruptcy**” and the “**SaaS Bankruptcy**”).
30. On February 12, 2020, ESW submitted its Proofs of Claim for the IoT Bankruptcy (the “**IoT Claim**”) and SaaS Bankruptcy (the “**SaaS Claim**”) to the Trustee in Bankruptcy for IoT and SaaS, both of which included ESW’s claim under the Warrant Certificate.

The March 20, 2020 Notices of Disallowance

31. On March 20, 2020, the Trustee served ESW with a Notice of Disallowance for ESW’s claim in the IoT Bankruptcy (the “**March 20 IoT Disallowance**”) and a Notice of Disallowance for ESW’s Claim in the SaaS Bankruptcy (the “**March 20 SaaS Disallowance**”, and collectively with the March 20 IoT Disallowance, the “**March 20 Disallowances**”).

March 20 IoT Disallowance

32. In the March 20 IoT Disallowance, the Trustee concluded that the IoT Claim arising from the Warrant Certificate is an equity claim pursuant to s. 140.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”), and not entitled to any priority.

March 20 SaaS Disallowance

33. Similarly, in the March 20 SaaS Disallowance, the Trustee concluded that the SaaS Claim arising from the Warrant Certificate is an equity claim pursuant to s. 140.1 of the *BIA*.
34. The Trustee also Trustee concluded that, “there is no evidence that was provided in the ESW 996 AB [SaaS] Claim that demonstrates an actual [SaaS Guarantee] exists. In the absence of an executed [SaaS Guarantee], it does not appear that Trak SaaS has any obligation to ESW pursuant to the Warrant.”
35. Counsel for ESW informed the Trustee, and the Trustee acknowledged, that executed copies of the SaaS Guarantee had previously been provided to the Trustee on February 12, 2020 as part of the SaaS Claim at Exhibit “F”.

March 29, 2020 Notices of Disallowance

36. On March 29, 2020, the Trustee issued a new Notice of Disallowance for ESW's Claim in the IoT Bankruptcy (the "**March 29 IoT Disallowance**") a new Notice of Disallowance for ESW's Claim in the SaaS Bankruptcy (the "**March 29 SaaS Disallowance**", and together with the March 29 IoT Disallowance, the "**March 29 Disallowances**").

March 29 IoT Disallowance

37. Under the March 29 IoT Disallowance, the Trustee continued to hold that the IoT Claim arising from the Warrant Certificate is an equity claim pursuant to s. 140.1 of the *BIA*.

March 29 SaaS Disallowance

38. Under the March 29 SaaS Disallowance, the Trustee continued to hold that the SaaS Claim arising from the Warrant Certificate is an equity claim pursuant to s. 140.1 of the *BIA*.
39. In the March 29 SaaS Disallowance, the Trustee also advanced an interpretation of the SaaS Guarantee that the SaaS Guarantee was excluded by the ARLA. For the reasons that follow, this is an untenable interpretation.

ESW's Claim Under the Warrant Certificate is a Provable Claim

40. ESW's IoT Claim and SaaS Claim against the Warrant Certificate are both debt claims and are entitled to priority, since ESW never became a shareholder of IoT.
41. First, the Transaction qualifies as an event of Acquisition as contemplated under the Warrant Certificate.
42. Second, as of January 22, 2020, ESW had not exercised its option to purchase shares pursuant to the Warrant Certificate, and did not own any shares in IoT.
43. As such, ESW never became a shareholder of IoT and has never held an equity interest in IoT.
44. ESW's claim under the Warrant Certificate is more properly classified as a contractual obligation triggered by an event of Acquisition, and is entitled to priority under the *BIA*.

The SaaS Guarantee Exists Secures ESW's Claim

45. The Trustee incorrectly concluded that the SaaS Guarantee is excluded by the ARLA.
46. A copy of the ARLA was attached at Exhibit "A" of the SaaS Proof of Claim, and a duly executed copy of the SaaS Guarantee was attached at Exhibit "F" of the SaaS Proof of Claim.
47. The Trustee is correct that the ARLA contains an "entire agreement clause" (the "**Entire Agreement Clause**"). However, the Entire Agreement Clause does not exclude the SaaS Guarantee, but rather, it incorporates it through reference to "other Loan Documents" and "Obligations."
48. The Entire Agreement Clause states, "This Agreement and the other Loan Documents embody the entire agreement and understanding between the parties hereto and thereto and supersede all prior agreements and understandings between such parties relating to the subject matter hereof and thereof and may not be contradicted by evidence of prior or contemporaneous agreements of the parties."
49. The ARLA defines "Loan Documents" as, "this Agreement, the Confidentiality Agreement, the Expenses Agreement, the Notice of Security Interest in Intellectual Property, the Guarantees, the General Security Agreements, the Pledge Agreement, the Control Agreement, note or notes executed by Borrower and Guarantors, and any other document, instrument or agreement entered into in connection with this Agreement or the Obligations, all as amended or extended from time to time."
50. The ARLA defines "Obligations" as, "all debt, principal, interest, Lender Expenses, fees, the Prepayment Premium, if any, and other amounts owed to Lender by Borrower pursuant to this Agreement or any other agreement, whether absolute or contingent, due or to become due, now existing or hereafter arising, including any interest that accrues after the commencement of an Insolvency Proceeding and including any debt, liability, or obligation owing from Borrower to others that Lender may have obtained by assignment or otherwise."
51. The parties intended that the definition of "Loan Documents" in the ARLA would include other documents and instruments entered into in connection to the ARLA
52. The parties intended that the definition of "Obligations" would have the effect of applying the terms of the ARLA to other obligations that SaaS owed to ESW, pursuant to any other

agreement, regardless of whether that agreement was absolute or contingent, or due or to become due.

53. This is further confirmed by the Acknowledgment where IoT and SaaS specifically acknowledge the security granted under the LSA (including the SaaS Guarantee) secures the obligations under the ARLA.
54. Thus, there is no merit to the Trustee's conclusion that the Entire Agreement Clause excludes the SaaS Guarantee, when in fact, the Entire Agreement Clause expressly contemplates other loan documents arising in connection with the ARLA, and IoT and SaaS acknowledged in writing that the security under the LSA secures their obligations under the ARLA.

The Supplemental Evidence in the Affidavit of Neeraj Gupta is Relevant and Necessary

55. The new evidence contained in the Affidavit of Neeraj Gupta is both relevant and necessary to the Appeal of the March 20 Disallowances and the March 29 Disallowances.
56. The supplementary evidence contained in the Affidavit of Neeraj Gupta, sworn on April 22, 2020, explains that ESW never became a shareholder of IoT, which is crucial to clarify where it appears the Trustee assumed ESW exercised its options under the Warrant Certificate, and merely held an equity claim.
57. The supplementary evidence demonstrates that counsel for all parties have agreed from the beginning that ESW reserved its right to claim the amount triggered by the Warrant Certificate, and remains entitled to claim this amount as a debt claim.
58. The supplementary evidence is necessary to respond to the Trustee's statement that it was advised the SaaS Guarantee was only contemplated and considered for the LRA and not the ARLA. The supplementary evidence demonstrates that the SaaS Guarantee was, in fact, contemplated by the ARLA and intended to support the ARLA.
59. Further, the supplementary evidence demonstrates that there was never an intention on ESW's part to exclude the SaaS Guarantee or the IoT Guarantee from the definition of Loan Documents and in fact, the Acknowledgment specifically includes them.

60. It is especially necessary to file the Acknowledgment document in response to the Trustee's interpretation that the ARLA excludes the SaaS Guarantee, when the Acknowledgment demonstrates IoT's and SaaS's confirmation that the SaaS Guarantee secures the ARLA.

Material or evidence to be relied on:

61. Affidavit of Neeraj Gupta, sworn April 22, 2020 filed herewith.
62. Brief of Law of ESW, to be filed.
63. Such further and other material as counsel may advise and this Honourable Court may permit.

Applicable Rules:

64. *Alberta Rules of Court*, Alta Reg 124/2010.

Applicable Acts and Regulations:

65. *The Bankruptcy and Insolvency Act*, RSA 1985, c B-3.
66. Such further and other Acts and Regulations as this Honourable Court may allow.

How the Application is Proposed to be Heard or Considered:

67. Before the presiding Justice on the Commercial List.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

Schedule "A"

Service List

(See attached)

Party/Contact Information	Service Method
Aird & Berlis LLP Brookfield Place, 181 Bay Street, Suite 1800 Toronto, Ontario M5J 2T9 Attention: Sean Mason	smason@airdberlis.com Counsel to ESW
MLT Aikins LLP 2100 Livingston Place 222 3 Ave SW Calgary, Alberta T2P 0B4 Attention: William E. J. Skelly	wskelly@mltaikins.com Counsel to ESW
Torys LLP 525 – 8th Avenue S.W., 46th Floor Eighth Avenue Place East Calgary, Alberta T2P 1G1 Attention: Kyle Kashuba	kkashuba@torys.com Counsel to the Proposal Trustee
Alvarez and Marsal 250 6 Ave SW Suite 1110 Calgary, Alberta T2P 3H7 Attention: Orest Konowalchuck Jill Strueby Bryan Krol	okonowalchuck@alvarezandmarsal.com jstrueby@alvarezandmarsal.com bkrol@alvarezandmarsal.com Proposal Trustee
Osler, Hoskin & Harcourt LLP Suite 2500 – 450 1 Street SW Calgary, Alberta T2P 5H1 Attention: Randal Van de Mosselaer Frank Turner Andrea Whyte Emily Paplawski	rvandemosselaer@osler.com fturner@osler.com awhyte@osler.com epaplawski@osler.com Counsel to Trakopolis
Borden Ladner Gervais LLP Centennial Place 520 3 Ave SW #1900, Calgary, AB T2P 0R3 Attention: Josef G.A. Kruger, Q.C.	JKruger@blg.com
Norton Rose Fulbright LLP 400 3 Ave SW Calgary AB T2P 4H2 Attention: Virginie Gauthier	virginie.gauthier@nortonrosefulbright.com

SCHEDULE "B"

Form of Order

(See attached)

COURT FILE NUMBER 25-2585991
25-2582159

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *BANKRUPTCY
AND INSOLVENCY ACT*, RSC 1985, C B-3, AS
AMENDED

AND IN THE MATTER OF THE
BANKRUPTCY OF TRAKOPOLIS IoT CORP.

AND IN THE MATTER OF THE
BANKRUPTCY OF TRAKOPOLIS SaaS
CORP.

DOCUMENT ORDER (Appeal of Disallowance)

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT

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Fax: (604) 682-7131
Attention: William E.J. Skelly/Catrina Webster
File: 0068641.00002

DATE ON WHICH ORDER WAS PRONOUNCED:

LOCATION OF HEARING OR TRIAL: CALGARY, ALBERTA

NAME OF JUSTICE WHO MADE THIS ORDER:

UPON Trakopolis IoT Corp. and Trakopolis SaaS Corp. (collectively, "**Trakopolis**") assigning into bankruptcy (the "**Trakopolis Bankruptcy**"); **AND UPON** Alvarez & Marsal Canada Inc., in its capacity as the Trustee of the Trakopolis Bankruptcy (the "**Trustee**") serving Notices of Disallowance with respect to the Proofs of Claim submitted by the Applicant, ESW Holdings Inc. ("**ESW**"); **AND UPON** the application of ESW appealing the Notice of Disallowance (the "**Disallowance Appeal**"); **AND UPON** having read the Disallowance Appeal, the Affidavit of Neeraj Gupta, sworn April 22, 2020, the Brief of

Law of ESW, and the Affidavit of Service, file; **AND UPON** hearing from counsel for ESW, counsel for the Trustee, counsel for Trakopolis, and any other parties present;

IT IS HEREBY ORDERED THAT:

Service of the Disallowance Appeal

1. The time for service of this Application, together with all materials filed in support of this Application, on the parties set out in the Service List attached as **Schedule “A”** is hereby declared to be good and sufficient and no other person is required to have been served with such documents, and this hearing is properly returnable before this Honourable Court today.
2. Service of this Order shall be deemed good and sufficient by serving the same on the persons listed on the service list attached as **Schedule “A”** to this Disallowance Appeal.

Supplementary Evidence

3. ESW is hereby permitted to submit supplementary evidence, as contained in the Affidavit of Neeraj Gupta, sworn on April 22, 2020, in addition to the evidence contained in ESW’s Proofs of Claim.

ESW’s Proof of Claim

4. The Notices of Disallowance are hereby overturned.

ESW’s Claim Pursuant to the Warrant Certificate

5. The Trustee shall accept ESW’s Claim pursuant to the Warrant Certificate as a debt claim, rather than an equity claim, entitled to the full priority ascribed to such claims under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

The SaaS Guarantee

6. The Trustee shall give full force and effect to the SaaS Guarantee (as defined in the Disallowance Appeal).

Costs

7. ESW is entitled to costs of this Disallowance Appeal on a solicitor and own client (full-indemnity) basis.

Justice of the Court of Queen's Bench of Alberta