

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

IN THE MATTER OF *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 COMARK INC.

**APPLICANT**

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**FACTUM OF THE APPLICANT**

**(Motion to Assign Agreements  
Returnable August 13, 2015)**

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August 10, 2015

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**FACTUM OF THE APPLICANT  
(Motion to Assign Agreements  
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**PART I - NATURE OF THIS MOTION**

1. On March 26, 2015, the Applicant, Comark Inc. (the “**Applicant**” or “**Comark**”), sought and received protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”) pursuant to an initial order of this Court, as amended and restated on April 21, 2015 and further amended on June 1, 2015 (the “**Initial Order**”). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the monitor in this CCAA proceeding (the “**Monitor**”). Under the terms of the Initial Order, the Court directed Comark to commence a sale and investor solicitation process (the “**SISP**”) to seek out qualified purchasers or investors for Comark’s business and property.

2. On July 29, 2015, this Court approved an asset sale transaction (the “**Transaction**”) pursuant to which Comark agreed to sell substantially all of its business and assets to Pacific West Commercial Corporation and its permitted assignees (the “**Purchaser**”).

3. This Factum is filed in support of the Applicant's motion for an order assigning the rights and obligations under certain leases (the "**Leases**") and certain contracts (the "**Remaining Contracts**") to the Purchaser pursuant to section 11.3 of the CCAA. Despite the intensive and best efforts of Comark and its advisors, Comark has not been able to secure the consent to assignment of all of the landlords and counterparties necessary to close the Transaction and for the Purchaser to operate the business as a going concern.

4. Section 11.3 of the CCAA provides this Court with the jurisdiction to compel the assignment of contracts, including leases, to which a CCAA debtor is a party. The Applicant submit that all of the criteria for court-ordered assignment under section 11.3 of the CCAA are satisfied. The Monitor has approved the proposed assignments. The Purchaser and its permitted assignees are each willing and able to perform all of the covenants and obligations under the Leases and Remaining Contracts, as applicable. All monetary defaults associated with the assignment of the Leases and Remaining Contracts will be remedied. Moreover, it is clearly appropriate in the circumstances for this Court to assign the Leases and Remaining Contracts to the Purchaser.

5. The assignment of the Leases and Remaining Contracts are critical for a successful going concern solution for the business of Comark, with all of the associated benefits therefrom to Comark's employees, suppliers, customers and landlords. If Comark is not able to obtain consents for the assignment of the required number of Leases, the Transaction will not close, to the detriment of Comark and all of its stakeholders.

## **PART II – FACTS**

6. The relevant facts with respect to this Motion are briefly outlined herein. They are more fully set out in the Affidavit of Gerald Bachynski sworn July 31, 2015 (the “**Third Bachynski Affidavit**”) and in the Fifth Report of the Monitor dated August 6, 2015 (the “**Fifth Report**”). Capitalized terms in this Factum that are not otherwise defined have the same meanings as in the Third Bachynski Affidavit.

### **Background**

7. On March 26, 2015, Comark sought and received Court protection pursuant to the CCAA in the form of the Initial Order.

#### **Third Bachynski Affidavit at para. 7**

8. The Initial Order, among other things, appointed Alvarez & Marsal Canada Inc. to act as the Monitor in these CCAA proceedings; granted a stay of proceedings until and including April 24, 2015, as later extended by subsequent orders of this Court and presently expiring on August 28, 2015; and directed Comark to immediately commence the SISP.

#### **Initial Order dated March 26, 2015; Third Bachynski Affidavit at paras. 7-8**

9. On July 29, 2015, this Court approved the Transaction pursuant to an asset purchase agreement made between Comark and the Purchaser dated July 16, 2015 (the “**Asset Purchase Agreement**”) and granted the Approval and Vesting Order.

#### **Third Bachynski Affidavit at para. 9**

10. Since the granting of the Initial Order, the Applicant has been operating its business as a going concern in close consultation with the Monitor.

#### **Third Bachynski Affidavit at para. 10**

### **Key Terms of the Sale Transaction**

11. The Transaction represents both the highest and the best offer identified in the extensive, Court-supervised SISP that was conducted.

#### **Third Bachynski Affidavit at para. 16**

12. The details regarding the terms of the Transaction are set out in the Affidavit of Neville Lewis sworn July 20, 2015 and the Fourth Report of the Monitor dated July 23, 2015. In sum, pursuant to the Asset Purchase Agreement, the Purchaser will acquire substantially all of the property, assets and rights of Comark and assume certain liabilities and obligations of Comark on an “as is, where is” basis. The Purchaser has indicated that it is committed to preserving the Business and each of the Ricki’s, Bootlegger and cleo banners (the “**Banners**”) as a going concern.

13. The completion of the Transaction will result in numerous benefits to Comark’s stakeholders, including that the Purchaser will offer employment to at least 90% of Comark’s current full-time and part-time employees with at least 90% of those offers to be on terms and conditions which are substantially similar in the aggregate for each individual employee.

14. The Purchaser will assume all liabilities and obligations of Comark in connection with the performance of the Assigned Contracts and any Cure Amounts related to the Assigned Contracts will be paid (as such terms are defined in the Asset Purchase Agreement).

#### **Third Bachynski Affidavit at paras. 16 and 17**

### **The Assignment of Agreements**

15. The Transaction contemplates the assignment of the Assigned Contracts by obtaining the consent of the relevant counterparty to each of the Assigned Contracts, or if necessary, through

an Order of the Court pursuant to section 11.3 of the CCAA. Under the Asset Purchase Agreement, the Purchaser has agreed to assume, at closing, all of the Assumed Liabilities arising from or in connection with the performance of the Assigned Contracts.

**Third Bachynski Affidavit at para. 18**

16. The Assigned Contracts include all contracts in connection with operation of the business, including real property leases for store locations and for each of the Comark's Banners, the corporate headquarters and the distribution centre. The vast majority of the Assigned Contracts are leases. The assignment of these leases is essential to the continuation of Comark's business by the Purchaser and for the continued employment of substantially all of Comark's employees.

**Third Bachynski Affidavit at para. 1; Fifth Report at para. 3.2**

17. It is a condition of the closing of the Transaction that Comark will obtain landlord consents for the assignment of all of the Tier A Leases (representing approximately 226 stores) and for 80% of the Tier B Leases (representing approximately 71 stores). Pursuant to the Asset Purchase Agreement, to the extent Comark does not obtain the consent to the assignment of the remaining 20% of Tier B Leases within 60 days following closing (the "**Tier B Lease Deadline**"), the purchase price will be reduced by the amount, if any, equal to the aggregate of the Lease Adjustment Amount for each such Tier B Lease. Subsequent to the Tier B Lease Deadline, the applicable Tier B Lease shall be deemed to be an Excluded Contract under the Asset Purchase Agreement.

18. To the extent that Comark is not able to obtain consents for the assignment of any leases that are Assigned Contracts, it would be necessary to make an application for an Order of the

Court authorizing the assignment of such Assigned Contracts pursuant to section 11.3 of the CCAA.

19. In respect of the Assigned Contracts other than leases, the Asset Purchase Agreement requires that Comark use commercially reasonable efforts to obtain the consent of the applicable counterparty, or, in the event that the requisite consents are not obtained, to seek an Order compelling the assignment of all of the rights and obligations of Comark under the Assigned Contracts to the Purchaser.

**Third Bachynski Affidavit at paras. 20-22**

**Discussions with Landlords and Counterparties to Contracts**

20. Pursuant to the SISP, the outside date for the completion of a sale transaction was August 15, 2015. To allow for various steps to be taken with respect to the conditions to closing, Salus agreed to an extension of the outside date to August 24, 2015. To ensure that the Transaction is closed by this time, Comark, the Purchaser and their respective legal counsel, with the assistance of the Monitor, have had and continue to have daily intensive discussions with landlords and other contractual counterparties in an effort to negotiate and obtain their consent to assignment prior to the hearing of the motion to assign agreements.

21. As of July 31, 2015, despite intensive discussions with landlords and counterparties to contracts, the Applicant had not been able to obtain sufficient consents to fulfill its closing obligation under the Asset Purchase Agreement. Accordingly, the Applicant is seeking an order assigning to the Purchaser the rights and obligations of Comark under the approximately 261 Leases and 21 other Assigned Contracts in respect of which consent to the assignment from the respective counterparty has not been obtained.

**Third Bachynski Affidavit at paras. 27-28; Fifth Report at paras. 3.7-3.8**

### **The Assignment is Reasonable and Appropriate**

22. The Purchaser and its permitted assignees have advised, and Comark and the Monitor believe, that the Purchaser has the financial ability to perform the obligations under the Assigned Contracts. One of the documents provided to the Applicant is an information memorandum prepared by the Purchaser, at the request of certain landlords, containing financial information relating to the Transaction and the financial forecast of each of cleo, Ricki's and Bootlegger individually (the "**Information Memorandum**"). Each of the new entities holding cleo, Bootlegger, and Ricki's, subsequent to closing, will, on an individual basis, be sufficiently capitalized to both perform its respective obligations under the Assigned Contracts and to continue as financially healthy going concern entities. Sales for each new entity Banner are expected to increase from prior years and the Transaction will result in a significant reduction of debt overall across all of the new cleo, Ricki's and Bootlegger entities.

#### **Third Bachynski Affidavit at paras. 29-30; Fifth Report at paras. 3.11-3.12**

23. Each of Comark's three Banners are being capitalized with their own working capital and will have access to a debt facility granted to a parent company that will be used to capitalize each of the Banner entities on an as needed basis. Since the new debt is denominated in Canadian dollars, there will not be the same risk exposure to foreign exchange fluctuations as Comark's previous debt facilities.

24. For the fiscal year ending February 28, 2015, Comark's total rent expense, including maintenance and other occupancy costs, amounted to only 30.0% of gross profit. On an individual Banner basis, the equivalent metric was only 27.0% for Bootlegger, 31.7% for Ricki's and 31.3% for cleo. These results were achieved prior to Comark filing for CCAA. Since the



Filing Date, Comark has implemented a number of restructuring initiatives for each Banner, including the closing of underperforming stores and renegotiating certain leases.

**Third Bachynski Affidavit at para. 31; Fifth Report at paras. 3.12**

25. The Applicant is requesting a sealing order in respect of the Information Memorandum as it contains commercially sensitive financial information, the disclosure of which would be harmful to Comark.

**Third Bachynski Affidavit at para. 36; Fifth Report at para. 7.9**

26. Assignment of the Leases and Remaining Contracts is subject to monetary defaults, including pre-filing monetary defaults, being remedied within two business days of the date of the respective assignment or delivery of a Monitor's certificate in connection with an 11.3 assignment order.

27. No amendments are being sought in respect of the Leases or the Remaining Contracts and, because this is a going concern sale, any restriction on use provisions with respect to leased premises will be complied with on a go forward basis.

28. Absent the assignment to the Purchaser or to its permitted assignees, the Leases and Remaining Contracts would be disclaimed pursuant to the provisions of the CCAA.

29. The assignment of the Leases is a condition of closing and therefore is critical to the successful restructuring of Comark. Without the assignment of Leases, Comark will not be able to continue as a going concern, resulting in the loss of employment for thousands of employees and the loss of business to Comark's suppliers. Further, landlords will no longer have a tenant in respect of their leased premises.

**Third Bachynski Affidavit at paras. 23, 32 and 33; Fifth Report at paras. 7.3-7.5**

### **PART III- ISSUES AND THE LAW**

30. This Motion addresses the following issues:

- (a) The assignment of the Leases and Remaining Contracts to the Purchaser; and
- (b) The sealing of confidential information contained in the Information Memorandum;

#### **A. Assignment of Agreements**

- (a) *Test Under Section 11.3 of the CCAA is Met*

31. Section 11.3(1) of the CCAA, which was introduced as part of the 2009 amendments to the CCAA, provides that, on application by a debtor company and on notice to every party to an agreement (including a lease) and to the Monitor, the Court may make an order assigning the rights and obligations of the company under the lease to any person specified by the Court who agrees to the assignment.

32. Section 11.3(2) sets out certain exceptions to this grant of jurisdiction, none of which are relevant to the current motion. The Leases and Remaining Contracts do not include any collective agreements, eligible financial contracts or contracts entered into post-filing.

#### **Fifth Report at para. 7.2**

33. Section 11.3(3) of the CCAA sets out three criteria that shall, among other things, be considered by the Court in exercising its jurisdiction under section 11.3(1). These are:

- (a) whether the Monitor approved the proposed assignment;

- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

34. In addition, under section 11.3(4) of the CCAA, the Court may not make an order under section 11.3(1) unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company’s insolvency, the commencement of proceedings under the CCAA or the company’s failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the Court.

35. Section 11.3 allows this Court to order an assignment of an agreement even where the terms of the agreement place restrictions on assignment, including a prohibition on assignment without the counterparty’s consent. There is no requirement in section 11.3 to seek the consent of a landlord or other counterparty to an assignment, although Comark has diligently and on a good faith basis sought such consent from each landlord and contractual counterparty in relation to the Leases and Remaining Contracts. The Court’s jurisdiction to order the assignment applies regardless of whether the landlords or counterparties have been asked for consent, or whether the landlords or counterparties have acted reasonably or unreasonably in refusing consent to assign the agreements. The governing considerations are those that are set out in section 11.3 of the CCAA, rather than the considerations contained in the agreements.

36. There are very few cases considering the scope of section 11.3 of the CCAA since its enactment and the few cases that apply section 11.3 do not contain significant discussion of its interpretation. However, there are a number of examples of orders issued under section 11.3 which make it clear that the purpose of section 11.3 is to allow a debtor company to assign an

agreement for value, regardless of whether the terms of the agreement would otherwise restrict or prohibit assignment.

***Re TBS Acquireco Inc.*, 2013 ONSC 4663 at paras. 19-25, Book of Authorities, Tab 1**

***Re White Birch Paper Holding Co.*, 2010 CarswellQue 11311 (QSC) [*White Birch*] at para. 16, Book of Authorities, Tab 2**

37. This is consistent with pre-2009 CCAA case law permitting assignment of agreements despite any provisions in the agreement that would otherwise prohibit or restrict assignment. Pre-2009 case law permitted agreements to be assigned in the face of an objection by a counterparty as long as the assignment was “important for the restructuring” and did not result in undue prejudice to or loss of claims by the counterparty. Any interference with the third party’s contractual rights was required to be limited to what is necessary in order to further the restructuring process.

***Re Playdium Entertainment Corp.*, 2001 CarswellOnt 4109 (ONSC), Book of Authorities, Tab 3**

***Re Hayes Forest Service Ltd.*, 2009 BCSC 1169, Book of Authorities, Tab 4**

***Re Nexient Learning Inc.*, 2009 CarswellOnt 8071 (ONSC) at para. 59, Book of Authorities, Tab 5**

38. The Applicant submits that all of the criteria set out in section 11.3 have been satisfied. To the extent that any of the criteria from the pre-2009 CCAA case law have not been subsumed under or superseded by the criteria set out in section 11.3, these criteria have also been satisfied.

(b) ***Monitor Approves the Proposed Assignment***

39. The Monitor supports the proposed relief sought in this Motion, including the assignment of the rights and obligations under the Leases and the Remaining Contracts to the Purchaser.

**Fifth Report at paras. 7.1, 7.8 and 7.10**

(c) ***Assignee Able to Perform the Obligations under the Leases and Contracts***

40. The Purchaser has provided to Comark and the Monitor information and financial projections of its financial ability to perform the obligations under the Assigned Contracts, including the Information Memorandum. From an operating perspective, each Banner is expected to generate positive cash flow and emerge from Comark's restructuring stronger and more commercially sound.

**Third Bachynski Affidavit at para. 31; Fifth Report at para. 7.3**

41. The Applicant and the Monitor are also of the view that each Banner's ability on an individual basis to meet its obligations under the Leases and Remaining Contracts is strong and will have strengthened significantly upon emerging under new ownership. Each of the new entities holding Cleo, Bootlegger and Ricki's, subsequent to closing, will, on an individual basis, be well capitalized with their own working capital to continue as financially healthy going concern entities.

**Third Bachynski Affidavit at paras. 30-31; Fifth Report at paras. 3.12-3.13**

42. In this Motion, the Applicant is not asking this Court to impose a contractual amendment to any of the Leases or the Remaining Contracts on the applicable counterparties. The purpose of this Motion is to override, on a one-time basis, the assignment restriction in the Leases and Remaining Contracts. This is the very purpose of section 11.3 of the CCAA.

(d) ***It is Appropriate to Assign the Leases and Contracts to Assignee***

43. The Applicant submits that it is appropriate to assign the Leases and Remaining Contracts to the Purchaser, including its permitted assignees, for the following reasons:

- (a) The process leading up to the Transaction was approved by this Honourable Court as fair and reasonable, pursuant to the requirements of section 36 of the CCAA, in its order dated July 29, 2015. The Transaction, which included the assignment of the Leases and Remaining Contracts, was approved by this Court on the basis that it maximizes value in relation to the assets of the debtor for the benefit of stakeholders.
- (b) The Applicant has used intensive efforts to obtain consents of the landlords and counterparties to the Leases and Remaining Contracts on a consensual basis.
- (c) There is minimal, if any, prejudice to the applicable landlords or counterparties from the assignments since no amendments are being sought by the Purchaser in respect of the Leases and Remaining Contracts and any restriction on use provisions in respect of leased premises will be complied with on a go-forward basis. Further, the applicable landlords and contractual counterparties are receiving the benefit of a tenant/customer going forward.
- (d) All monetary defaults have been or will be remedied within two business days of the delivery of the Monitor's certificate confirming completion of the Transaction.
- (e) If the Leases are not assigned, they will be disclaimed, leaving the landlords with no tenant immediately capable of occupying and operating in the premises and with a potentially sizeable damages claim against the Applicant. Further, the employment of thousands of employees will be terminated as a result of the store closures.

- (f) All counterparties to the Leases and Remaining Contracts were provided with notice of the motion for assignment of agreement.

44. The Applicant therefore submits that the proposed assignment of agreements is in the best interests of the landlords and counterparties to the agreements, as well as Comark's employees, supplier and customers.

- (e) ***The Applicant Will Remedy All Monetary Defaults in relation to the Leases and Contracts***

45. Under section 11.3(4) of the CCAA, the Applicant must remedy all monetary defaults prior to or on the assignment of the agreements. Pursuant to the Asset Purchase Agreement, all monetary defaults in relation to the Leases and Remaining Contracts, including those relating to the period prior to March 26, 2015, will be remedied by payment of all Cure Amounts within two business days of the delivery of the Monitor's certificate.

## **B. Sealing the Confidential Information**

46. The Applicant requests that the sensitive commercial information in the Information Memorandum be sealed from the public record and kept confidential.

47. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, Iacobucci J. adopted the following test to determine when a sealing order should be made:

A confidentiality order under Rule 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

***Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*] at para. 53, Book of Authorities, Tab 6**

48. There is an important public interest in protecting Comark's sensitive financial information given that its disclosure would be harmful to Comark and could negatively affect any future transaction with respect to Comark.

**Third Bachynski Affidavit at para. 36; Fifth Report at para. 7.9**

49. This Court has granted orders sealing confidential supplements relating to commercial sensitive information on numerous occasions. For instance, in *Comstock Canada Ltd. (Re)*, this Court granted a sealing order for certain financial statements of the Applicant in order to protect against the disclosure of sensitive and confidential financial information which could adversely affect the Applicant and its stakeholders. Similarly, in *Canwest Publishing Inc.*, the Court allowed the sealing of an unredacted agreement which contained "commercial sensitive information the disclosure of which would be harmful to the solicitation process" and where "the salutary effects of sealing it outweigh any deleterious effects."

***Comstock Canada Ltd. (Re)*, 2013 ONSC 4756 at para. 61, Book of Authorities, Tab 7, citing the test in *Sierra Club***

***Canwest Publishing Inc. (Re)*, 2010 ONSC 222 at para. 65, Book of Authorities, Tab 8, citing the test in *Sierra Club***

50. The Applicant therefore requests that the Court grant the sealing order for the Information Memorandum attached as Confidential Exhibit C to the Third Bachynski Affidavit.



**PART IV — NATURE OF THE ORDER SOUGHT**

51. For all of the reasons above, the Applicant submits that this Honourable Court should grant the relief sought by the Applicant on this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of August, 2015.

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Marc Wasserman

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Caitlin Fell

**Schedule “A”**

**LIST OF AUTHORITIES**

| <b><u>Tab</u></b> | <b><u>Case Law</u></b>  |
|-------------------|---|
| 1.                | <i>TBS Acquireco Inc. (Re)</i> , 2013 ONSC 4663                                 |
| 2.                | <i>White Birch Paper Holding Co. (Re)</i> , 2010 CarswellQue 11311 (QSC)        |
| 3.                | <i>Playdium Entertainment Corp. (Re)</i> , 2001 CarswellOnt 4109 (ONSC)         |
| 4.                | <i>Hayes Forest Service Ltd. (Re)</i> , 2009 BCSC 1169                          |
| 5.                | <i>Nexient Learning Inc. (Re)</i> , 2009 CarswellOnt 8071 (ONSC)                |
| 6.                | <i>Sierra Club of Canada v. Canada (Minister of Finance) (Re)</i> , 2002 SCC 41 |
| 7.                | <i>Comstock Canada Ltd. (Re)</i> , 2013 ONSC 4756                               |
| 8.                | <i>Canwest Publishing Inc. (Re)</i> , 2010 ONSC 222                             |

**Schedule “B”*****Companies’ Creditors Arrangement Act, RSC 1985, c C-36*****Assignment of agreements**

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

**Exceptions**

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

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

**Factors to be considered**

- (3) In deciding whether to make the order, the court is to consider, among other things,
- (a) whether the monitor approved the proposed assignment;
  - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
  - (c) whether it would be appropriate to assign the rights and obligations to that person.

**Restriction**

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

**Copy of order**

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

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APPLICANT

Court File No. CV15-10920-00CL

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