

**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 PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT WITH RESPECT TO
COMARK INC. ("THE APPLICANT")**

**FIFTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
AUGUST 6, 2015**

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1.0 INTRODUCTION

- 1.1 On March 26, 2015 Comark Inc. (“**Comark**”, the “**Company**” or the “**Applicant**”) applied for and was granted protection by the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”). Pursuant to an order of the Court dated March 26, 2015 (the “**Initial Order**”), Alvarez & Marsal Canada Inc. (“**A&M**”, or the “**Monitor**”) was appointed Monitor of the Applicant in the CCAA proceedings (the “**CCAA Proceedings**”).
- 1.2 As contemplated by the Initial Order, the Applicant attended the Comeback Hearing on April 7, 2015. The Comeback Hearing was unopposed.
- 1.3 On April 21, 2015, this Court issued the “Amended and Restated Initial Order” (hereinafter, unless the context otherwise requires, the “**Initial Order**”), which incorporates certain changes to the Initial Order granted March 26, 2015 that are described in the Second Report of the Monitor (the “**Second Report**”) dated April 16, 2015.
- 1.4 In connection with the CCAA Proceedings, A&M, in its capacities as Proposed Monitor and as Monitor, has provided this Court with five prior reports including the Pre-Filing Report (the “**Prior Reports**”). The Prior Reports, the Initial Order, and other Court-filed documents and notices in these CCAA Proceedings are available on the Monitor’s website at: www.alvarezandmarsal.com/comark.
- 1.5 On July 29, 2015, this Court issued an order (the “**Approval and Vesting Order**”), among other things:

- a) approving the sale transaction (the “**Transaction**”) contemplated by the Asset Purchase Agreement made between the Company and Pacific West Commercial Corporation and its permitted assignees (“**Pacific West**” or the “**Purchaser**”) dated July 16, 2015 (the “**APA**”);
- b) upon the delivery of the Monitor’s Certificate, vesting in the Purchaser the Applicant’s right, title and interest in and to the assets described in the APA free and clear of any claims and encumbrances other than certain permitted encumbrances as set out in the draft Approval and Vesting Order; and
- c) ordering that the Confidential Exhibit to the Affidavit of Neville Lewis sworn July 20, 2015 (the “**July Lewis Affidavit**”) and the confidential appendices to the Fourth Report be sealed from the public record and kept confidential.

1.6 This Court also issued an order on July 29, 2015 (the “**Distribution Order**”) among other things:

- a) approving a distribution from the sale proceeds of the Transaction to Salus Capital Partners, LLC (“**Salus**”) in an amount to be determined by the Monitor and in the maximum amount of Salus’ secured claim;
- b) extending the Stay Period, as defined in paragraph 14 of the Initial Order, until and including October 30, 2015; and
- c) approving the Monitor’s Fourth Report to Court dated July 23, 2015 (the “**Fourth Report**”) and the activities of the Monitor detailed herein.

1.7 The purpose of this report (the “**Fifth Report**”) is to provide the Court with:

1. information regarding:
 - a) the assignment of certain agreements held by the Company to the Purchaser;
 - b) the status of Competition Act approval of the Transaction;
 - c) the disclaimer of further leases by the Applicant;
 - d) the activities of the Monitor since the date of the Fourth Report; and
 - e) the Applicant's motion returnable August 13, 2015 (the "**Assignment Motion**") seeking an order (the "**Assignment Order**"), among other things:
 - i. assigning the rights and obligations under certain leases and contracts held by the Applicant to Pacific West and its permitted assignees;
 - ii. ordering that the Confidential Exhibit "C" to the Affidavit of Gerald Bachynski sworn July 31, 2015 (the "**July Bachynski Affidavit**") be sealed and kept confidential pending further order of the Court; and
 - iii. approving this Fifth Report and the Monitor's activities described herein; and
2. the Monitor's conclusions and recommendations in connection with the foregoing.

2.0 TERMS OF REFERENCE

- 2.1 In preparing this Fifth Report, the Monitor has been provided with and has relied upon, unaudited financial information, books, records and financial information prepared by certain senior management of Comark ("**Senior Management**"), and discussions with Senior Management (collectively, the "**Information**").

- 2.2 Future oriented financial information referred to in this Fifth Report was prepared based on management's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not ascertainable, the actual results will vary from the projections. Even if the assumptions materialize, the variations could be significant.
- 2.3 Capitalized terms not otherwise defined in this Fifth Report are as defined in the Prior Reports, the Initial Order, the Affidavits of Neville Lewis sworn on May 26, 2015 and on July 20, 2015, the July Bachynski Affidavit, the SISP, and the APA, as applicable.
- 2.4 Unless otherwise stated, all monetary amounts contained in this Fifth Report are expressed in Canadian dollars.

3.0 STATUS OF ASSIGNMENT OF CONTRACTS

- 3.1 The APA contemplates the assignment of the Assigned Contracts by obtaining the consent of the counter party 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 APA, 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.
- 3.2 The Assigned Contracts include substantially all of the Company's contracts related to the business, including certain software and service contracts (including an agreement providing point-of-sale services), and real property leases for store locations, the Banner and Corporate Headquarters, and the Laval Distribution Centre. The vast majority of the Assigned Contracts are leases. The APA contemplates that substantially all of the real property leases will be assigned to the Purchaser. 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.

- 3.3 It is a condition to Closing that Comark will obtain, at or prior to Closing, 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 APA, 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 (the "**Lease Adjustment**"). Subsequent to the Tier B Lease Deadline, the applicable Tier B Lease shall be deemed to be an Excluded Contract under the APA.
- 3.4 To the extent that Comark is not able to obtain consents for the assignment of any leases that are Assigned Contracts, it would make an application for an order of the Court authorizing the assignment of such Assigned Contracts pursuant to section 11.3 of the CCAA.
- 3.5 In respect of the Assigned Contracts, other than leases, the APA requires that the Company 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.
- 3.6 On July 20, 2015, Comark sent a letter to each landlord with a Lease that is intended to be an Assigned Contract to advise of the Transaction and request consent to the assignment of the applicable Lease. On July 28, 2015, Comark sent a letter to each

counterparty to an Assigned Contract, other than a lease, to advise of the Transaction and request consent to the assignment of the applicable contract. The landlords and other counterparties were advised that if they did not provide their consent to the assignment of the Assigned Contract, Comark would be required to seek an order of the Court pursuant to section 11.3 of the CCAA to assign the contract without consent.

3.7 Pursuant to the SISP, the outside date for the completion of a sale transaction was August 15, 2015, but 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, the Company, 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 counterparties in an effort to negotiate and obtain their consent to assignment prior to the hearing of the Assignment Motion.

3.8 As of July 31, 2015, the Company had not been able to obtain sufficient consents to fulfill the Company's closing obligation under the APA. Accordingly, the Company 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 (together, the "**Remaining Contracts**"). The Company continues to work diligently to obtain consents for the assignment of the Remaining Contracts. To the extent that the Company is able to obtain such consents prior to the hearing of the Assignment Motion, the relevant counterparty and agreement will be removed from the schedule to the Assignment Order.

The Company's Support for the Assignment of the Remaining Contracts

- 3.9 The Purchaser has agreed to accept all Assigned Contracts, including real property leases, on the same terms and conditions as set out in each of the Assigned Contracts. Assignments are subject to the payment of all Cure Amounts in respect of any Assigned Contract. All Cure Amounts, including those relating to the pre-filing period, will be remedied within two Business Days of the date of the assignment of the respective Assigned Contract, or in the case of an assignment of a contract pursuant to section 11.3 of the CCAA, within two business days of the delivery of the Monitor's certificate confirming completion of the Transaction. The Cure Amounts are an Assumed Liability of the Purchaser with a corresponding adjustment to Working Capital in favour of the Purchaser, if applicable.
- 3.10 The Purchaser has advised Comark that it anticipates assigning the Purchased Assets in respect of each of the Company's three Banners as well as the Comark head office and the Laval Distribution Centre to separate permitted assignee entities. Accordingly, each of cleo, Ricki's and Bootlegger will be purchased and operated by a separate individual entity.
- 3.11 The Purchaser, including its permitted assignees, has advised, and the Company and the Monitor believe that the Purchaser and each of the permitted assignees on an individual basis, has the financial ability to perform their respective obligations under the Assigned Contracts. The Purchaser has provided evidence of its financial ability to the Company and the Monitor, including an information memorandum prepared by the Purchaser in consultation with the Company and the Monitor, 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**"). The Information Memorandum is attached as Confidential Exhibit "C" to the July Bachynski Affidavit, which is subject to a request for a sealing order.

- 3.12 As shown on the pro forma balance sheets contained in 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.
- 3.13 The Company has been advised by the Purchaser that 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. From an operating perspective, each Banner is expected to generate positive cash flow and emerge from Comark's restructuring stronger and more commercially sound. 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 margin. 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. As a result, Comark is of the view that each Banner's ability on an individual basis to meet its obligations under the Leases is strong and will have strengthened significantly upon emerging under new ownership.

4.0 STATUS OF COMPETITION ACT APPROVAL

4.1 It is a condition to Closing that Competition Act Approval be obtained and that Comark and the Purchaser shall each use commercially reasonable efforts to take certain actions, as specified in the APA, with respect to obtaining such approval.

4.2 On August 4, 2015, the Competition Bureau issued an Advance Ruling Certificate pursuant to Section 102 of the Competition Act which is sufficient to satisfy the condition for Competition Act approval under the APA.

5.0 OTHER MATTERS

Update Regarding Lease Disclaimers

5.1 As described in the Fourth Report, the Purchaser included ten leases as Excluded Contracts under the provisions of the APA which represent ten store locations that the Company, in consultation with the Purchaser had identified as unprofitable.

5.2 On July 20, 2015, the Company, with the consent of the Monitor, delivered disclaimer notices to the landlords of these leases (the "**Disclaimer Notices**").

5.3 Subsequent to July 20, 2015, the Company was contacted by a number of those landlords regarding possible amendments to certain leases that the Company was disclaiming. As a result of these negotiations, the Company anticipates that leases for nine of the ten store locations will be amended with terms that are more favourable to the Company. To the extent that such amendments are formalized, it is the Company's intention to withdraw

the respective Disclaimer Notices by seeking the consent of the relevant landlords and sending a notice of withdrawal to those landlords with the consent of the Monitor.

5.4 The Monitor notes that the 30-day notice period provided in the Disclaimer Notices expires on August 19, 2015.

5.5 The Company provided termination letters dated July 29, 2015 to the eleven employees of the one store location in respect of which the lease disclaimer will not be withdrawn to advise that their employment would be terminated effective August 15, 2015.

6.0 MONITOR'S ACTIVITIES SINCE THE DATE OF THE FOURTH REPORT

6.1 In addition to the Monitor's activities described above, the activities of the Monitor since the date of the Fourth Report (July 23, 2015) have included the following:

- a) assisting the Applicant with communications with employees, suppliers, landlords, and other parties;
- b) continuing to assist the Applicant in communications with suppliers and assisting the Applicant to secure orders for the holiday season;
- c) responding to enquiries from stakeholders, including addressing questions or concerns of parties who contacted the Monitor on the toll-free number or general email account established by the Monitor;
- d) monitoring the receipts, disbursements, purchase commitments, and arrangements in respect of payment terms and for deposits with certain suppliers and creditors of the Applicant, including tracking outstanding balances and commitments;
- e) posting non-confidential materials filed with the Court to the website established by the Monitor for the CCAA Proceedings;

- f) assisting the Applicant in its reporting to the DIP Lender as required under the DIP Facility and to Bridging as required under the Inventory Purchase Guarantee Facility;
- g) reviewing the Company's weekly DIP Facility draw requests;
- h) participating in discussions with the Applicant, its legal counsel, Toronto-Dominion Bank ("TD") and its legal counsel regarding various matters related to the Company's cash management processes and its banking agreement with TD;
- i) together with the Applicant, the Purchaser, and their respective legal counsel, participating in calls with landlords and with counter-parties to other Assigned Contracts in respect of obtaining consent to the assignment of Leases and other Assigned Contracts to the Purchaser;
- j) assisting the Applicant in its ongoing communications with certain landlords in respect of lease disclaimer notices sent on July 20, 2015;
- k) together with the Applicant, its legal counsel, the Purchaser and its legal counsel, participating in communications in respect of the Transition Services Agreement contemplated by the APA;
- l) attending the hearing held on July 29, 2015 in respect of the Approval and Vesting Order and the Distribution Order;
- m) working with the Applicant, the Applicant's legal counsel and the Monitor's legal counsel in connection with the Assignment Motion; and
- n) preparing this Fifth Report in consultation with the Monitor's legal counsel.

7.0 MONITOR'S RECOMMENDATIONS

The Assignment of the Assigned Contracts

- 7.1 The Monitor is of the view that section 11.3 of the CCAA applies to the Remaining Contracts and that the factors set out therein to be considered by the Court in deciding whether to make an order for the assignment of the Remaining Contracts have been satisfied.
- 7.2 The Remaining Contracts do not include any collective agreements, eligible financial contracts or contracts entered into post-filing.
- 7.3 The Company has shown that each of the Purchaser and its assignees under the Transaction are and will be able to comply with the covenants and obligations under the Assigned Contracts and no amendments are being sought by the Purchaser in respect of the Remaining Contracts. Further, since the Transaction is a going concern sale, any restriction on use provisions in respect of leased premises will be complied with on a go-forward basis.
- 7.4 Assignment of the Remaining Contracts is subject to monetary defaults, including pre-filing monetary defaults, being remedied, by payment of all Cure Amounts within two Business Days of the date of the respective assignment.
- 7.5 The assignment of the Remaining Contracts is a condition of closing and therefore is critical to the successful going concern sale of Comark's business.
- 7.6 All counter parties to the Remaining Contracts were provided with notice of the Assignment Motion.

7.7 The Company has engaged in extensive and ongoing discussions with landlords throughout these CCAA Proceedings, including with respect to the assignment of the Assigned Contracts. Pursuant to the APA, the Purchaser has agreed to assume all liabilities and obligations of the Company in connection with the performance of the Assigned Contracts on an “as is, where is” basis. As noted above, the Transaction, if completed, will preserve Comark’s business as a going concern, which includes consequential benefits to Comark’s employees, landlords and suppliers.

7.8 As a result of the foregoing, the Monitor approves of the assignment of the Remaining Contracts and believes that it is appropriate to assign the rights and obligations under the Remaining Contracts to the Purchaser and its permitted assignees.


The Confidential Exhibits to the July Bachynski Affidavit

7.9 The Applicant is seeking a sealing order in respect of the Confidential Exhibit to the July Bachynski Affidavit. Disclosure of the commercially sensitive information contained therein could negatively affect any future transaction with respect to the Applicant. As such, the Monitor supports the Applicant’s request for a sealing order in respect of this information.

7.10 For the foregoing reasons, the Monitor is of the view that the relief requested by the Applicant in its motion is reasonable and respectfully recommends that this Court grant the relief sought by the Applicant.

All of which is respectfully submitted to this Court this 6th day of August, 2015.

**Alvarez & Marsal Canada Inc., in its capacity
as Monitor of Comark Inc.**

Per: 
John J. Walker
Senior Vice President

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FIFTH REPORT OF THE MONITOR
(Dated August 6, 2015)**

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