

**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.**

**NINTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
MAY 25, 2016**

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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 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 nine 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**”) which, among other things, approved the sale transaction (the “**Transaction**”).

contemplated by the asset purchase agreement made between the Company and Pacific West Commercial Corporation and its permitted assignees (collectively, the “**Purchaser**”) dated July 16, 2015 (the “**APA**”). Pursuant to the Approval and Vesting Order, upon delivery of the Monitor’s Certificate, the Applicant’s right, title and interest in and to the assets described in the APA vested in the Purchaser free and clear of any claims and encumbrances other than certain permitted encumbrances.

- 1.6 On July 29, 2015, this Court also issued an order which, among other things: (i) approved a distribution from the sale proceeds paid to the Monitor on the closing (“**Closing**”) of the Transaction (the “**Sale Proceeds**”) to Salus Capital Partners, LLC (“**Salus**”) in an amount to be determined by the Monitor and in the maximum amount of Salus’ secured claim; and (ii) extended the Stay Period, as defined in paragraph 14 of the Initial Order, until and including October 30, 2015.
- 1.7 On August 13, 2015, this Court issued an order, among other things, assigning the rights and obligations under certain leases and contracts held by the Applicant to the Purchaser.
- 1.8 On October 30, 2015, this Court issued an order, among other things: (i) unsealing the unredacted APA and the Confidential Appendix “D” to the Monitor’s Fourth Report to the Court dated July 23, 2015, both of which had been sealed by the Approval and Vesting Order; and (ii) extending the Stay Period to November 30, 2015.
- 1.9 On November 30, 2015, this Court issued an order (the “**D&O Claims Procedure Order**”), among other things, approving the proposed procedure (the “**D&O Claims Procedure**”) for the solicitation, determination and resolution of certain claims against

current and former directors and officers of the Applicant, and extending the Stay Period to February 29, 2016.

1.10 On February 23, 2016, this Court issued an order (the “**Stay Extension Order**”), among other things, extending the Stay Period to May 31, 2016, authorizing distributions to Salus from time to time in amounts to be determined by the Monitor in the maximum aggregate amount of Salus’ remaining secured claim (the “**Remaining Salus Secured Claim**”), terminating the Directors’ Charge subject to the reservation of \$80,000 (the “**D&O Reserve**”) until final resolution of the claims received pursuant to the D&O Claims Procedure, ordering that the confidential schedule to the Affidavit of Gerald Bachynski sworn February 16, 2016 (the “**Confidential Schedule**”) be sealed from the public record and kept confidential, approving the payment of \$17,773 into court to the credit of the Employees’ Pension Plan of Robinson’s, a former division of the Company, as set out in the Confidential Schedule, and reducing the Administration Charge to \$375,000.

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

1. an update in respect of the D&O Claims Procedure;
2. information regarding:
 - a) the Company’s receipts and disbursements for the period August 20, 2015 to May 20, 2016;
 - b) the activities of the Monitor since the date of the Monitor’s Eighth Report to the Court dated February 18, 2015 (the “**Eighth Report**”);

- c) the Monitor's motion returnable May 31, 2016 seeking an order approving the professional fees and disbursements of the Monitor and its legal counsel (the "**Fee Approval Motion**");
 - d) the Applicant's motion returnable May 31, 2016 seeking an order, among other things:
 - i. extending the Stay Period to October 31, 2016; and
 - ii. approving this Ninth Report and the Monitor's activities described therein; and
3. the Monitor's recommendations in connection with the foregoing.

2.0 TERMS OF REFERENCE

- 2.1 In preparing this Ninth 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 Ninth 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 Ninth Report are as defined in the Affidavit of Gerald Bachynski sworn May 24, 2016 (the “**Bachynski Affidavit**”), the Initial Order and the APA, as applicable.

2.4 Unless otherwise stated, all monetary amounts contained in this Ninth Report are expressed in Canadian dollars.

3.0 CONCLUSION OF THE DIRECTOR AND OFFICER CLAIMS PROCEDURE

3.1 In this section, all capitalized terms not defined elsewhere have the meaning ascribed to them in the D&O Claims Procedure Order.

3.2 The Monitor, with the assistance of the Applicant, carried out the D&O Claims Procedure in accordance with the D&O Claims Procedure Order. Further details regarding the D&O Claims Procedure are set forth in the Seventh Report of the Monitor dated November 25, 2015 and the Eighth Report.

3.3 In accordance with the D&O Claims Procedure, six Proofs of Claim totaling approximately \$98,600 were filed with the Monitor on or before the Claims Bar Date (the “**Submitted Claims**”).

3.4 The Monitor, in consultation with the Applicant, reviewed the Submitted Claims and determined that none of the Submitted Claims qualified as Accepted Claims. Accordingly, on January 15 and 20 and February 5 and 9, 2016, the Monitor sent Notices of Revision or Disallowance to each of the Claimants disallowing their respective Submitted Claims in their entirety.

- 3.5 Under the D&O Claims Process, a Claimant who intended to dispute the disallowance or revision of its Claim was required to deliver a Notice of Dispute to the Monitor within fifteen days after the date the Notice of Revision or Disallowance was deemed to be received by the Claimant, or such later date as the Monitor, in consultation with the Applicant, may agree in writing or the Court may order (the “**Dispute Period**”). A Claimant who delivered a Notice of Dispute was also required to, within ten Business Days of delivery of the Notice of Dispute, file an application with the Court seeking determination of the claim (the “**Dispute Application**”).
- 3.6 The Monitor received a Notice of Dispute in respect of one of the Notices of Revision or Disallowance. The Monitor, in consultation with the Applicant, reviewed the Notice of Dispute and remained of the view that the Submitted Claim was properly disallowed in full. The Claimant who filed the Notice of Dispute has not filed a Dispute Application with the Court and the deadline to do so has now passed. Therefore, the disputed claim has been extinguished and released.
- 3.7 The Dispute Period in respect of all of the Notices of Revision or Disallowance sent to the Claimants has expired and, other than the Notice of Dispute described above, the Monitor did not receive any other Notices of Dispute. The Submitted Claims have therefore all been extinguished and released. Accordingly, pursuant to the provisions of the Stay Extension Order, the D&O Reserve is no longer required to be held by the Monitor.

4.0 APPROVAL OF FEES

- 4.1 The Initial Order requires that the Monitor and its legal counsel pass their accounts from time to time and refer said accounts to a judge of this Court. The Monitor and its counsel have maintained detailed records of their professional costs and time during the course of these CCAA proceedings.
- 4.2 The Affidavit of John J. Walker sworn May 19, 2016 (the “**Walker Affidavit**”), attests to the fees and disbursements of the Monitor for the period March 26, 2015 to May 14, 2016 in the amount of \$3,747,663.33, including HST.
- 4.3 The Affidavit of Brian F. Empey, a partner with the law firm Goodmans LLP (“**Goodmans**”) sworn May 18, 2016 (the “**Empey Affidavit**” and, together with the Walker Affidavit, the “**Fee Affidavits**”), attests to the fees and disbursements of Goodmans, acting as legal counsel to the Monitor, for the period from March 9, 2015 to March 24, 2016 in the amount of \$576,051.44, including HST. The Monitor confirms that the fees and disbursements set out in the Goodmans’ invoices relate to advice sought by the Monitor and that, in the Monitor’s view, Goodmans’ fees and disbursements are reasonable.
- 4.4 Copies of the Fee Affidavits are included in the Motion Record of the Monitor dated May 19, 2016 in respect of the Fee Approval Motion.
- 4.5 It is the Monitor’s view that its fees and disbursements described in the Walker Affidavit, as well as those of its legal counsel, as described in the Empey Affidavit, are fair and reasonable in the circumstances. The Applicant has reviewed Fee Affidavits and views the fees and disbursements described therein to be reasonable in the circumstances. The

Monitor therefore requests that this Court approve its fees and disbursements and the fees and disbursements of its legal counsel.

5.0 POST-CLOSING RECEIPTS AND DISBURSEMENTS

5.1 The receipts and disbursements of the Applicant during the post-Closing period August 20, 2015 to May 20, 2016 are summarized in the table below.

Comark Inc.	
Schedule of Receipts and Disbursements	
For the Post-Closing Period August 20, 2015 to May 20, 2016	
(\$000's)	
	Amount (\$)
Receipts	
Sale Proceeds (note 1)	77,664
Cash on hand at August 19, 2015	5,377
Proceeds from term deposit	1,101
Net receipts from post-closing sales	239
Net receipts from pre-closing sales	653
Tax and workers' compensation refunds	174
Other receipts	456
Pension trust funds	18
Total Receipts	85,681
Disbursements	
Distributions to Salus	76,671
Working Capital Adjustment	4,378
Payment to Purchaser of funds collected on its behalf	239
Bridging finance fees	280
General and administrative expenses	4
Outstanding cheques	206
Cure costs	1,026
Priority payments (note 2)	40
Pension trust funds paid into Court	18
Director and Officer run-off insurance policy	26
GST/HST	187
Professional fees	2,566
Total Disbursements	85,642
Available Funds (note 3)	40
Note 1 Sale Proceeds include approximately \$663,500 of GST/HST and QST on the Transaction.	
Note 2 Priority payments include amounts paid in respect of vacation pay on termination pay for former employees in provinces where such amounts form a Directors' and Officers' liability and certain statutory termination pay in provinces where such amounts constitute a deemed trust.	
Note 3 Amount does not include retainers in the aggregate amount of \$275,000 held by the Applicant's legal counsel, the Monitor, and the Monitor's legal counsel.	

- 5.2 As summarized above, receipts consist predominantly of the Sale Proceeds. Also included in receipts is cash on hand at the time of Closing, the proceeds from a term deposit, and certain tax refunds, all of which, pursuant to the APA, are Excluded Assets and are therefore the property of the Applicant. Other receipts include refunds from the cancellation of certain insurance policies and benefits plans, a refund from an insurance claim, interest, a tenant inducement that was refunded in association with a disclaimed lease and certain trust funds received in relation to the Pension Plan, as discussed in the Eighth Report.
- 5.3 The Applicant's bank accounts remained open for a period of time post-Closing in order to allow certain payments to clear. During that time, receipts from credit card sales continued to be deposited for several days. To the extent that those receipts related to the post-Closing period, the APA provides that such funds belong to the Purchaser and, accordingly, have been remitted to the Purchaser, as outlined in the above table.
- 5.4 Significant disbursements include: (i) distributions to Salus, including a distribution of \$1.1 million made on February 24, 2016 as authorized by the Stay Extension Order; (ii) the Working Capital Adjustment paid to the Purchaser, as described in the Eighth Report; (iii) cure costs of approximately \$1.0 million required to be paid pursuant to the APA, which include approximately \$634,000 paid to the Purchaser to reimburse it for cure costs paid on behalf of the Applicant; (iv) priority payments to certain former employees of the Company in respect of vacation pay accruing on statutory termination pay in provinces where such amounts form a directors' and officers' liability and certain statutory termination pay in provinces where such amounts constitute statutory deemed

trusts; (v) amounts paid to purchase a one-year director and officer run-off insurance policy, and (vi) professional fees, which include amounts that were accrued but not yet paid at the time of Closing and which are comprised of amounts paid to the Applicant's legal counsel, KPMG LLP in association with its analysis of the Working Capital, the Monitor, the Monitor's legal counsel, other professionals associated with these CCAA Proceedings, and the equivalent of US\$853,000 paid to Houlihan Lokey, Inc. in its capacity as Financial Advisor to the Applicant in connection with the SISP and under the terms of its engagement with the Applicant.

5.5 In addition to the receipts and disbursements up to May 20, 2016 described above, the Monitor has applied for refunds in respect of HST totaling approximately \$174,000. On April 27, 2016, the Monitor received a notice from Canada Revenue Agency ("CRA") indicating that the HST returns filed by the Monitor have been selected by CRA for examination and requesting certain supporting information in respect of same, which the Monitor is in the process of providing to CRA. The notice from CRA does not indicate the anticipated time required for CRA to complete its examination.

6.0 EXTENSION OF THE STAY PERIOD

6.1 The Applicant is requesting an extension of the Stay Period to October 31, 2016 to allow a sufficient period of time for CRA to complete the above referenced examination of Comark's HST returns and for the Monitor and the Applicant to respond to any further enquiries arising from such examination.

6.2 Resolving matters relating to the HST described above is the only material remaining matter to be addressed in completing the administration of the Comark estate. In addition,

the Monitor is working to obtain the release of approximately \$6,600 of cash collateral supporting expired letters of credit issued by the Company to certain utility service providers prior to the commencement of these CCAA proceedings.

- 6.3 The Monitor believes that the Applicant has acted and continues to act in good faith and with due diligence during these CCAA proceedings. Given that the Transaction has closed and the Applicant is no longer operating, the Applicant has not prepared an extended cash flow forecast through the expiry of the requested extension to the Stay Period. On behalf of the Applicant, the Monitor intends to satisfy any amounts properly incurred in respect of the ongoing administration of the estate. The Monitor anticipates that such amounts will be primarily limited to professional fees and expenses and other incidental fees and costs. The funds the Monitor is holding in its estate bank accounts are expected to be sufficient to satisfy such amounts.

7.0 MONITOR'S ACTIVITIES SINCE THE DATE OF THE EIGHTH REPORT

- 7.1 In addition to the Monitor's activities described above, the activities of the Monitor since the date of the Eighth Report have included the following:
- a) 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;
 - b) maintaining estate bank accounts, overseeing and accounting for the Applicant's post-Closing receipts and disbursements;

- c) posting non-confidential materials filed with the Court to the website established by the Monitor for the CCAA Proceedings;
- d) communicating with Salus in respect of the Remaining Salus Secured Claim;
- e) communicating with TD regarding cash collateral held in respect of certain outstanding letters of credit;
- f) assisting the Company in respect of its obligations under the APA and the Transition Services Agreement and, in conjunction with the Company and its legal counsel attending to post-Closing matters;
- g) attending the hearing held on February 23, 2016 regarding the motion in respect of the Stay Extension Order;
- h) working with the Applicant, the Applicant's legal counsel and the Monitor's legal counsel in connection with the Applicant's motion returnable May 31, 2016; and
- i) preparing this Ninth Report in consultation with the Monitor's legal counsel.


8.0 MONITOR'S RECOMMENDATIONS

8.1 The Monitor believes that an extension to the Stay Period until October 31, 2016 is appropriate, as it should allow sufficient time for the Monitor, in consultation with the Applicant to deal with the remaining matters related to the Applicant's estate described herein. Accordingly, the Monitor recommends that this Court grant the requested extension of the Stay Period.

- 8.2 The Monitor views its professional fees and disbursements, as well as those of its legal counsel, as described in the fee affidavits, as fair and reasonable in the circumstances and requests that this Court approve such fees and disbursements.
- 8.3 For the reasons set out in this Ninth Report, the Monitor hereby respectfully recommends that this Court grant the relief requested by the Monitor and the Applicant in their respective Notices of Motion.

All of which is respectfully submitted to this Court this 25th day of May, 2016.

**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

**NINTH REPORT OF THE MONITOR
(Dated May 25, 2016)**

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