

**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.**

**SEVENTH REPORT OF THE MONITOR
ALVAREZ & MARSAL CANADA INC.
NOVEMBER 25, 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 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 seven 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 (“**Pacific West**”) 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 (the “**Distribution 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 (the “**Salus Distribution**”), 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 (the “**Assignment 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 (the “**Fourth Report**”), both of which had been sealed by the Approval and Vesting Order; and (ii) extending the Stay Period to November 30, 2015.

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

1. an update in respect of the Transaction;
2. information regarding:

- a) the Company's receipts and disbursements for the period August 20, 2015 to November 21, 2015;
 - b) the activities of the Monitor since the date of the Monitor's Sixth Report to the Court dated October 28, 2015 (the "**Sixth Report**");
 - c) the Applicant's motion returnable November 30, 2015 (the "**D&O Claims Procedure Motion**") seeking, among other things:
 - i. an order (the "**D&O Claims Procedure Order**") 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
 - ii. an order:
 - 1) extending the Stay Period to February 29, 2016; and
 - 2) approving the Sixth Report, this Seventh 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 Seventh 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 Seventh 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 Seventh Report are as defined in the Sixth Report, the Affidavit of Gerald Bachynski sworn November 23, 2015, the Initial Order and the APA, as applicable.

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

3.0 UPDATE ON THE SALE TRANSACTION

Working Capital Adjustment

3.1 As discussed in the Fourth Report, the APA provides a mechanism to adjust the Purchase Price to reflect changes in working capital from a specified target amount which was set at historical normalized annual average level of working capital as compared to the actual Working Capital at Closing (the “**Working Capital Adjustment**”). In association with this, the APA required that the Monitor hold back an amount equal to \$5 million (the “**Holdback Amount**”) from the Sale Proceeds, to be held in trust in the event that a Working Capital Adjustment is in favour of the Purchaser.

3.2 The APA provides that, to the extent the Working Capital at Closing exceeds the Estimated Working Capital, the Purchaser is to pay the amount of the difference to the Monitor and such amount will be credited to the Applicant on account of the Purchase Price and the Purchase Price is to be adjusted accordingly. If the Working Capital is less than the Estimated Working Capital, the Applicant is to pay the amount of the difference to the Purchaser and the Purchase Price will be adjusted accordingly.

- 3.3 In connection with the determination of the Working Capital Adjustment, the Purchaser prepared and delivered to the Applicant and the Monitor the Working Capital Statement on November 4, 2015.
- 3.4 Upon receipt of the Working Capital Statement, the Applicant and the Monitor, with the full cooperation of the Purchaser, commenced a review of the assumptions and calculations supporting the statement. On the basis that the Applicant and the Monitor required additional time to complete their review and for the parties to then agree to any changes, the Applicant, in accordance with the terms of the APA, filed a Notice of Dispute with the Purchaser on November 18, 2015.
- 3.5 Based on its review to date, the Monitor is of the view that the Working Capital Adjustment in favour of the Purchaser as set forth in the Working Capital Statement is too high. The Applicant, the Monitor and the Purchaser continue to work diligently together to complete the review process and reach agreement as to any changes to the Working Capital Adjustment.
- 3.6 Should the parties not reach an agreement on the Working Capital Statement within 20 Business Days after the Notice of Dispute, being December 16, 2015, the APA provides that the dispute be referred to the Independent Auditor for determination within 20 Business Days of such referral. It is expected that the Working Capital Adjustment will be finalized prior to December 16, 2015.

The Transition Services Agreement

- 3.7 As further described in the Sixth Report, in accordance with the APA, the Company, the Purchaser and the Monitor entered into the Transition Services Agreement. To date, both

the Company and the Purchaser have performed their respective obligations under the Transition Services Agreement.

4.0 THE PROPOSED DIRECTOR AND OFFICER CLAIMS PROCEDURE

General

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

4.2 The Applicant has not commenced a claims process for creditor claims as, subject to the finalization of the Working Capital Adjustment, it appears there will be insufficient funds to pay any portion of unsecured claims after satisfying the remaining Lender Claims and any other priority obligations.

4.3 Since there are no further assets of the Company to dispose of, the Company, with the assistance of the Monitor has begun to wind down the Applicant's estate. Accordingly, it is the Applicant's view and the Monitor agrees that it is appropriate at this time to establish a procedure for the solicitation, determination and resolution of certain claims against the current and former directors and officers of the Applicant in the form of the draft D&O Claims Procedure Order attached to the Applicant's Notice of Motion.

Claims Bar Date

4.4 The Applicant proposes that any Claimant asserting a D&O Claim (Director or Officer Claim) be required to file the applicable Proof of Claim form with the Monitor by 5:00 p.m. EST on January 21, 2016 (the "**Claims Bar Date**"). The Monitor believes that a Claims Bar Date of January 21, 2016 is reasonable in that it provides sufficient time from the date of this motion for potential Claimants to investigate and submit any D&O Claim they may have against the Directors or Officers.

D&O Claims

4.5 As set out in greater detail in the draft Claims Procedure Order, the Applicant is soliciting any right or claim of any person:

(i) that may be asserted or made in whole or in part against one or more Directors or Officers that relates to a claim for which such Directors or Officers are by law liable to pay in their capacity as Directors or Officers; or

(ii) that may be asserted or made in whole or in part against one or more Directors or Officers, in that capacity, whether or not asserted or made, in connection with any indebtedness, liability or obligation of any kind, and any interest accrued thereon or costs payable in respect thereof; and in respect of (i) and (ii) above is: (A) based in whole or in part on facts prior to the Claims Bar Date, or (B) relates to a time period prior to the Claims Bar Date (collectively, the “**D&O Claims**”).

4.6 The definition of D&O Claims is broad and calls for both pre-filing and post-filing claims. The definition of Accepted Claims in the D&O Claims Procedure Order is limited to claims which arose or arise on or after March 26, 2015 (the date of the CCAA filing) and are subject to indemnity from Comark and secured by the charge in favour of the directors and officers in accordance with the Initial Order.

Notice

4.7 The draft D&O Claims Procedure Order provides for the following notifications of the D&O Claims Procedure:

(i) the Monitor shall cause the Notice to Claimants to be posted on the Monitor’s website no later than 5:00 p.m. EST on December 2, 2015;

(ii) the Monitor shall cause the Notice to Claimants to be published once in each of the Globe and Mail (National Edition) and La Presse no later than 5:00 p.m. EST on December 7, 2015; and

(iii) the Monitor shall, no later than 5:00 p.m. on December 7, 2015, send the Claims Package to:

- a) each party that appears on the service list in these CCAA Proceedings;
- b) each known or potential Claimant as evidenced by the books and records of the Applicant; and
- c) each person requesting a Claims Package prior to the Claims Bar Date.

Adjudicating D&O Claims

4.8 The Monitor, in consultation with the Applicant, will review each Proof of Claim that is received by the Claims Bar Date and may accept, revise or disallow all or any part of the D&O Claim.

4.9 If the Monitor, in consultation with the Applicant and the Directors and Officers named in such D&O Claim, determines to revise or disallow a D&O Claim, the Monitor, in consultation with the Applicant, will send a Notice of Revision or Disallowance to the Claimant.

4.10 Any Claimant who intends to dispute a Notice of Revision or Disallowance must deliver a Notice of Dispute so that it is received by the Monitor no later than 5:00 p.m. EST on the fifteenth day after the Notice of Revision or Disallowance is deemed to have been 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. Any Claimant who has delivered a Notice of Dispute and who wishes to continue to dispute the Notice of

Revision or Disallowance must, within 10 Business Days of delivery of the Notice of Dispute, file an application with the Court seeking determination of the D&O Claim (“**Dispute Application**”), which application shall be returnable within 7 Business Days of the filing of the application.

4.11 Any Claimant who either fails to deliver a Notice of Dispute by the required deadline, or who fails to file a Dispute Application within the required time, shall:

(i) be deemed to accept the amount of its D&O Claim as set out in the Notice of Revision or Disallowance and the D&O Claim as set out in the Notice of Revision or Disallowance shall constitute an Accepted Claim (or if the D&O Claim is disallowed in full, the applicable Claimant shall be deemed to accept such disallowance and the D&O Claim shall be deemed to be fully disallowed); and

(ii) have its respective D&O Claim, or any portion thereof, that is disallowed pursuant to a Notice of Revision or Disallowance forever extinguished, barred, discharged and released as against the Property and as against the Directors and Officers without any further act or notification.

5.0 POST-CLOSING RECEIPTS AND DISBURSEMENTS

5.1 The Applicant’s receipts and disbursements during the period August 20 to October 23, 2015 were filed with this Court as Confidential Appendix “B” to the Sixth Report in order to keep the Sale Proceeds confidential until the lifting of sealing orders previously obtained in respect of certain information, including the Sale Proceeds. As described in Paragraph 1.8 of this Seventh Report, an order lifting those sealing orders was issued by this Court on October 30, 2015. Accordingly, the Monitor has posted Appendix “B” to the Sixth Report on the Monitor’s website.

5.2 The receipts and disbursements of the Applicant during the post-Closing period August 20 to November 21, 2015 are summarized in the table below.

Comark Inc. Schedule of Receipts and Disbursements For the Post-Closing Period August 20 to November 21, 2015 (\$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 refunds	156
Other receipts	406
Total Receipts	85,596
Disbursements	
Salus Distribution	75,571
Payment to Purchaser of funds collected on its behalf	239
Bridging finance fees	280
General and administrative expenses	4
Outstanding cheques	206
Cure costs	1,011
GST/HST	139
Professional fees	2,196
Total Disbursements	79,646
Holdback Amount	5,000
Available Funds (note 2)	950
Note 1 Sale Proceeds include approximately \$663,500 of GST/HST and QST on the Transaction.	
Note 2 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.	

5.3 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, interest, and a tenant inducement that was refunded in association with a disclaimed lease.

5.4 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.

5.5 Disbursements consist primarily of: (i) the Salus Distribution, as further discussed in the Sixth Report; (ii) 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; and (iii) 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 work on the Working Capital Analysis, 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.

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

6.1 In addition to the Monitor's activities described above, the activities of the Monitor since the date of the Sixth Report have included the following:

- a) assisting the Applicant with communications with former employees, creditors, and other parties;

- b) 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;
- c) maintaining estate bank accounts, overseeing and accounting for the Applicant's post-Closing receipts and disbursements;
- d) posting non-confidential materials filed with the Court to the website established by the Monitor for the CCAA Proceedings;
- e) communicating with Salus in respect of the Lender Claims;
- f) participating in discussions with the Applicant, its legal counsel, and Toronto-Dominion Bank regarding various matters related to these CCAA Proceedings;
- g) 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;
- h) communicating with the Company's insurance broker in respect of insurance related matters, including the cancellation of certain insurance policies;
- i) reviewing and communicating with the Applicant, its legal counsel, and the Purchaser in respect of the Working Capital Statement and the Working Capital Adjustment;
- j) attending the hearing held on October 30, 2015 in respect of the extension of the Stay Period;
- k) working with the Applicant, the Applicant's legal counsel and the Monitor's legal counsel in connection with the D&O Claims Procedure Motion; and

- l) preparing this Seventh Report in consultation with the Monitor's legal counsel.

7.0 MONITOR'S RECOMMENDATIONS

- 7.1 The Monitor has worked with the Applicant to develop the proposed D&O Claims Procedure which is intended to provide sufficient time for Claimants to prove any D&O Claims they may have against the Directors and Officers. It is proposed that notice of the D&O Claims Procedure be published in La Presse and the Globe and Mail (National Edition) and posted on the Monitor's website. The D&O Claims Procedure Order provides for the Monitor to conduct the D&O Claims Procedure on behalf of and in consultation with the Applicant. The establishment of a D&O Claims Procedure to identify any claims against the Directors and Officers incurred during these CCAA Proceedings is an important next step in order to allow the Monitor to distribute the funds that it is holding and the Monitor supports the establishment of a D&O Claims Procedure in the form of the draft D&O Claims Procedure Order at this time.
- 7.2 The Applicant is requesting an extension of the Stay Period to February 29, 2016. The Monitor believes that the Applicant has acted and continues to act in good faith and with due diligence. 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. As discussed in further detail in the Sixth Report, at the time of Closing the Statutory Liabilities ceased to accrue and known amounts of these liabilities were paid. On behalf of the Applicant, the Monitor intends to satisfy any amounts properly incurred in respect of the ongoing administration of the estate, including with respect to administering the D&O Claims Procedure and paying any D&O Claims determined to be Accepted Claims, from the funds being held by the Monitor on behalf 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.

7.3 The Monitor believes that an extension to the Stay Period until February 29, 2016 is appropriate, as it is subsequent to the proposed Claims Bar Date under the draft D&O Claims Procedure Order and should allow sufficient time for the Monitor, in consultation with the Applicant, to review any D&O Claims received in order to be in a position to update the Court and potentially seek further directions from the Court with respect to the resolution of D&O Claims as necessary. The proposed extension will allow the Monitor to deal with any post-Closing issues related to the final resolution of the Working Capital Adjustment and other matters related to the Applicant's estate. Accordingly, the Monitor recommends that this Court grant the requested extension of the Stay Period.

7.4 For the reasons set out in this Seventh Report, the Monitor hereby respectfully recommends that this Court grant the relief requested by the Applicant in its Notice of Motion.

All of which is respectfully submitted to this Court this 25th day of November, 2015.

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

Per: 
John J. Walker

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**SEVENTH REPORT OF THE MONITOR
(Dated November 25, 2015)**

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