Court File No. _____

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 PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

FACTUM OF THE APPLICANTS

(Claims Procedure Order and Meetings Order)

GOODMANS LLP
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Robert J. Chadwick (LSUC#: 35165K)
Logan Willis (LSUC#: 53894K)
Bradley Wiffen (LSUC#: 64279L)

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants

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(Motion for the Claims Procedure Order and Meetings Order)

PART I - INTRODUCTION

1. Cline Mining Corporation ("**Cline**"), New Elk Coal Company LLC ("**New Elk**") and North Central Energy Company ("**North Central**" and, together with Cline and New Elk, the "**Applicants**") are in the business of locating, exploring and developing mineral resource properties, with a particular focus on gold and metallurgical coal (the "**Cline Business**").[1] The Applicants, along with their wholly-owned subsidiary, Raton Basin Group LLC, have interests in resource properties in Canada, the United States and Madagascar.

> Goldfarb Affidavit at paras. 5-6; Application Record of the Applicants ("**Application Record**"), Tab 4.

2. The Applicants have experienced financial challenges as a result of the suspension of full-scale operations at the New Elk Mine and a protracted and severe downturn in the

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[1] Any capitalized terms that are not defined herein shall have the meaning prescribed to them in the Affidavit of Matthew Goldfarb sworn on December 2, 2014 (the "**Goldfarb Affidavit**"), the proposed Plan, the proposed Claims Procedure Order and the proposed Meetings Order, as applicable. All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

global metallurgical coal market. The Cline Group's financial challenges have necessitated a recapitalization of the Applicants under the CCAA.

Goldfarb Affidavit at paras. 7, 85-101 and 114-117; Application Record, Tab 4.

3. With the assistance of their professional advisors, the Applicants have explored and considered a variety of alternatives to address their financial challenges with the goal of achieving a transaction that maximizes value for the Applicants' stakeholders and provides the Applicants with a stable financial footing and an improved capital structure. As part of these efforts, the Applicants' senior management and professional advisors have engaged in negotiations with Marret, which exercises all discretion and authority in respect of beneficial holders of the secured notes issued by Cline (the "**Secured Notes**"). These negotiations have resulted in a consensual going-concern recapitalization transaction (the "**Recapitalization**") that is to be implemented pursuant to a plan of compromise and arrangement under the CCAA (the "**Plan**").

Goldfarb Affidavit at paras. 11, 117, 123 and 127-128; Application Record, Tab 4.

4. The Recapitalization is a positive development for the Applicants and their stakeholders. The Recapitalization involves the cancellation of the Secured Notes in exchange for the issuance by Cline of consideration that includes new common shares in Cline and new indebtedness in favour of the Secured Noteholders, and the compromise of the Applicants' unsecured liabilities in exchange for consideration in the form of certain unsecured, non-interest-bearing entitlements to receive future cash consideration.

Goldfarb Affidavit at para. 124; Application Record, Tab 4.

5. If implemented, the Recapitalization would maintain the Cline Group as a unified corporate enterprise and would result in a reduction of over $55 million in secured interest-bearing debt.

Goldfarb Affidavit at paras. 12, 124 and 126; Application Record, Tab 4.

6. This factum is submitted concurrently with the commencement of the Applicants' CCAA proceedings in support of the Applicants' request for two Orders that are necessary to advance the Recapitalization: (a) an Order establishing a process for the identification and determination of claims against the Applicants and their present and former directors and officers (the "**Claims Procedure Order**"); and (b) an order authorizing the Applicants to file the Plan and to convene meetings of their affected creditors to consider and vote on the Plan (the "**Meetings Order**"). If this Court grants the Initial Order, the Applicants are requesting that this Court hear the motion for the Claims Procedure Order and the Meetings Order immediately following the granting of the Initial Order.

Goldfarb Affidavit at paras. 3-4; Application Record, Tab 4.

7. The Applicants are seeking the Claims Procedure Order and the Meetings Order at this stage because they wish to effectuate the Recapitalization as efficiently as possible. The Applicants submit that the "Comeback Clauses" included in the draft Claims Procedure Order and Meetings Order ensure that no party is prejudiced by the granting of such Orders at this time.

PART II - THE FACTS

A. RECAPITALIZATION AND PROPOSED PLAN

(1) Overview of the Recapitalization

8. The Applicants have been actively engaged in discussions with Marret, on behalf of the Secured Noteholders, regarding a possible recapitalization of the Applicants. The Applicants believe that that the Recapitalization, in the circumstances, is in the best interests of the Applicants and their stakeholders. The Recapitalization provides for, *inter alia*, the following:

(a) the Secured Noteholders Allowed Secured Claim will be compromised, released and discharged as against the Applicants upon implementation of the Plan (the "**Plan Implementation Date**") for new Cline common shares representing 100%

of the equity in Cline (the "**New Cline Common Shares**"), and new indebtedness in favour of the Secured Noteholders in the principal amount of $55 million (the "**New Secured Debt**");

(b) Cline will be the borrower and New Elk and North Central will be the guarantors of the New Secured Debt, which will be evidenced by a credit agreement with a term of seven (7) years, bearing interest at a rate of 0.01% per annum plus an additional variable interest payable only once the Applicants have achieved certain operating revenue targets;

(c) the claims of Affected Unsecured Creditors, which exclude the WARN Act Plaintiffs but include the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive $225,000 from Cline on the date that is eight (8) years from the Plan Implementation Date (the "**Unsecured Plan Entitlement**");

(d) notwithstanding the Secured Noteholders Allowed Unsecured Claim, the Secured Noteholders will waive their entitlement to the proceeds of the Unsecured Plan Entitlement, and all such proceeds will be available for distribution to the other Affected Unsecured Creditors with valid claims who are entitled to the Unsecured Plan Entitlement, allocated on a *pro rata* basis;

(e) all Affected Unsecured Creditors with Affected Unsecured Claims of up to $10,000 will, instead of receiving their *pro rata* share of the Unsecured Plan

Entitlement, be paid in cash for the full value of their claim and will be deemed to vote in favour of the Plan unless they indicate otherwise, provided that this cash payment will not apply to any Secured Noteholder with respect to its Secured Noteholders Allowed Unsecured Claim;

(f) all WARN Act Claims will be compromised, released and discharged as against the Applicants on the Plan Implementation Date in exchange for an unsecured, subordinated, non-interest bearing entitlement to receive $100,000 from Cline on the date this is eight (8) years from the Plan Implementation Date (the "**WARN Act Plan Entitlement**");

(g) certain claims against the Applicants, including claims covered by insurance, certain prior-ranking secured claims of equipment providers and the secured claim of Bank of Montreal in respect of corporate credit card payables, will remain unaffected by the Plan;

(h) existing equity interests in Cline will be cancelled for no consideration; and

(i) the shares of New Elk and North Central will not be affected by the Recapitalization and will remain owned by Cline and New Elk, respectively.

Goldfarb Affidavit at para. 124; Application Record, Tab 4.

9. Any Affected Creditor with a Disputed Distribution Claim will not be entitled to receive any distribution under the Plan with respect to such Disputed Distribution Claim unless and until such Claim becomes an Allowed Affected Claim. A Disputed Distribution Claim will be resolved in the manner set out in the Claims Procedure Order.

Plan, Section 3.6.

10. Unaffected Creditors will not be affected by the Plan and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

Plan, Sections 1.1, 2.3 and 3.5.

11. If implemented, the Recapitalization would result in a reduction of over $55 million in interest-bearing debt.

Goldfarb Affidavit at para. 126; Application Record, Tab 4.

12. The proposed Recapitalization is supported by Marret, which has the ability to exercise all discretion and authority of the Secured Noteholders. Consequently, the proposed Recapitalization is supported by 100% of the Secured Noteholders, both as secured creditors of the Applicants and as unsecured creditors of the Applicants in respect of the portion of their claims that is unsecured.

Goldfarb Affidavit at paras. 63, 67 and 145; Application Record, Tab 4.

(2) Classification for Purposes of Voting on the Plan

13. The only classes of creditors for the purposes of considering and voting on the Plan will be (i) the Secured Noteholders Class, (ii) the Affected Unsecured Creditors Class, and (iii) the WARN Act Plaintiffs Class.

Plan, Section 3.2.

Goldfarb Affidavit at para. 153; Application Record, Tab 4.

14. The Secured Noteholders Class consists of the Secured Noteholders in respect of the Secured Noteholders Allowed Secured Claim, being the portion of the Secured Noteholders Allowed Claim against the Applicants that is designated as secured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of that amount in the Secured Noteholders Class.

Goldfarb Affidavit at para. 154; Application Record, Tab 4.

15. The Affected Unsecured Creditors Class consists of the unsecured creditors of the Applicants who are to be affected by the Plan, excluding the WARN Act Plaintiffs (who are addressed in a separate class). The Affected Unsecured Creditors Class includes the Secured Noteholders in respect of the Secured Noteholders Allowed Unsecured Claim, being the portion of the Secured Noteholders Allowed Claim that is designated as unsecured. Each Secured Noteholder will be entitled to vote its *pro rata* portion of the Secured Noteholders Allowed Unsecured Claim in the Affected Unsecured Creditors Class.

Goldfarb Affidavit at para. 155; Application Record, Tab 4.

16. Within the Affected Unsecured Creditors Class, unsecured creditors with Affected Unsecured Claims of up to $10,000 will be paid in full and will be deemed to vote in favour of the Plan, unless they indicate otherwise.

Goldfarb Affidavit at para. 156; Application Record, Tab 4.

17. The WARN Act Plaintiffs Class consists of all WARN Act Plaintiffs in the WARN Act Class Action who may assert WARN Act Claims against the Applicants. Each WARN Act Plaintiff will be entitled to vote its *pro rata* portion of all WARN Act Claims.

Goldfarb Affidavit at para. 157; Application Record, Tab 4.

18. Unaffected Creditors and Equity Claimants are not entitled to vote on the Plan at the Meetings in respect of their Unaffected Claims and Equity Claims, respectively.

Plan, Sections 3.4(3) and 3.5.

19. The Plan provides that, if the Plan is not approved by the required majorities of both the Unsecured Creditors Class and the WARN Act Plaintiffs Class, or the Applicants determine that such approvals are not forthcoming, the Applicants are permitted to withdraw the Plan and file an amended and restated plan with the features described on

Schedule "B" to the Plan (the "**Alternate Plan**"). The Alternate Plan would provide, *inter alia*, that all unsecured claims and all WARN Act Claims against the Applicants would be treated as unaffected claims, the only voting class under the Alternate Plan would be the Secured Noteholders Class, and all assets of the Applicants would be transferred to an entity designated by the Secured Noteholders in exchange for a release of the Secured Noteholders Allowed Secured Claim.

Goldfarb Affidavit at para. 125; Application Record, Tab 4.

B. CLAIMS PROCEDURE

20. The Applicants wish to commence the Claims Procedure as soon as possible to ascertain all of the Claims against the Applicants for the purpose of voting and receiving distributions under the Plan.

21. Liabilities and claims against the Applicants that the Applicants are aware of, include, *inter alia*, secured obligations in respect of the Secured Notes, secured obligations in respect of leased equipment used at the New Elk Mine, contingent claims for damages and other amounts in connection with certain pending litigation claims against the Applicants, and unsecured liabilities in respect of accounts payable relating to ordinary course trade and employee obligations.

Goldfarb Affidavit at paras. 52-57; Application Record, Tab 4.

22. The draft Claims Procedure Order provides a process for identifying and determining claims against the Applicants and their directors and officers, including, *inter alia*, the following:

(a) Cline, with the consent of Marret, will determine the aggregate of all amounts owing by the Applicants under the 2011 Indenture and the 2013 Indenture up to the Filing Date, such aggregate amounts being the "**Secured Noteholders Allowed Claim**";

(b) the Secured Noteholders Allowed Claim will be apportioned between the Secured Noteholders Allowed Secured Claim and the Secured Noteholders Allowed Unsecured Claim (being the amount of the Secured Noteholders Allowed Claim that is designated as unsecured in the Plan);

(c) the Monitor will send a Claims Package to all Known Creditors, which Claims Package will include a Notice of Claim specifying the Known Creditor's Claim against the Applicants for voting and distribution purposes, as valued by the Applicants based on their books and records, and specifying whether the Known Creditor's Claim is secured or unsecured;

(d) the Claims Procedure Order contains provisions allowing a Known Creditor to dispute its Claim as set out in the applicable Notice of Claim for either voting or distribution purposes or with respect to whether such Claim is secured or unsecured, and sets out a procedure for resolving such disputes;

(e) the Monitor will publish a notice to creditors in The Globe and Mail (National Edition), the Denver Post and the Pueblo Chieftain to solicit Claims against the Applicants by Unknown Creditors who are as yet unknown to the Applicants;

(f) the Monitor will deliver a Claims Package to any Unknown Creditor who makes a request therefor prior to the Claims Bar Date, containing a Proof of Claim to be completed by such Unknown Creditor and filed with the Monitor prior to the Claims Bar Date;

(g) the proposed Claims Bar Date for Proofs of Claim for Unknown Creditors and for Notices of Dispute in the case of Known Creditors is January 13, 2015;

(h) the Claims Procedure Order contains provisions allowing the Applicants to dispute a Proof of Claim as against an Unknown Creditor and provides a procedure for resolving such disputes for either voting or distribution purposes and with respect to whether such claim is secured or unsecured;

(i) the Claims Procedure Order allows the Applicants to allow a Claim for purposes of voting on the Plan without prejudice to whether that Claim has been accepted for purposes of receiving distributions under the Plan;

(j) where the Applicants or the Monitor send a notice of disclaimer or resiliation to any Creditor after the Filing Date, such notice will be accompanied by a Claims Package allowing such Creditor to make a claim against the Applicants in respect of a Restructuring Period Claim;

(k) the Restructuring Period Claims Bar Date, in respect of claims arising on or after the date of the Applicants' CCAA filing, will be seven (7) days after the day such Restructuring Period Claim arises;

(l) for purposes of the matters set out in the Claims Procedure Order in respect of any WARN Act Claims: (i) the WARN Act Plaintiffs will be treated as Unknown Creditors since the Applicants are not aware of (and have not quantified) any bona fide claims of the WARN Act Plaintiffs; and (ii) Class Action Counsel shall be entitled to file Proofs of Claim, Notices of Dispute of Revision and

Disallowance, receive service and notice of materials and to otherwise deal with the Applicants and the Monitor on behalf of the WARN Act Plaintiffs, provided that Class Action Counsel shall require an executed proxy in order to cast votes on behalf of any WARN Act Plaintiffs at the WARN Act Plaintiffs' Meeting; and

(m) Creditors may file a Proof of Claim with respect to a Director/Officer Claim.

Goldfarb Affidavit at para. 151; Application Record, Tab 4.

23. As further discussed below, the Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order provides for the separate tabulation of votes cast in respect of Disputed Voting Claims and provides that the Monitor will report to the Court on whether the outcome of any vote would be affected by votes cast in respect of Disputed Voting Claims.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

24. The Claims Procedure Order includes a comeback provision providing interested parties who wish to amend or vary the Claims Procedure Order with the ability to appear before the Court or bring a motion on a date to be set by this Court.

Goldfarb Affidavit at para 149; Application Record, Tab 4.

C. MEETINGS OF CREDITORS

25. It is proposed that the Meetings to vote on the Plan will be held at Goodmans LLP, 333 Bay Street, Suite 3400, Toronto, Ontario on January 21, 2015 at 10:00 a.m. for the WARN Act Plaintiffs Class, 11:00 a.m. for the Affected Unsecured Creditors Class, and 12:00 p.m. for the Secured Noteholders Class.

Goldfarb Affidavit at para. 160; Application Record, Tab 4.

Meetings Order, Section 20.

26. The draft Meetings Order provides for, *inter alia*, the following in respect of the governance of the Meetings:

(a) an officer of the Monitor will preside as the chair of the Meetings;

(b) the only parties entitled to attend the Meetings are the Eligible Voting Creditors (or their proxyholders), representatives of the Monitor, the Applicants, Marret, all such parties' financial and legal advisors, the Chair, the Secretary, the Scrutineers, and such other parties as may be admitted to a Meeting by invitation of the Applicants or the Chair;

(c) only Creditors with Voting Claims (or their proxyholders) are entitled to vote at the Meetings; provided that, in the event a Creditor holds a Disputed Voting Claim as at the date of a Meeting, such Disputed Voting Claim may be voted at the Meeting but will be tabulated separately and will not be counted for any purpose unless such Claim is ultimately determined to be a Voting Claim;

(d) each WARN Act Plaintiff (or its proxyholder) shall be entitled to cast an individual vote on the Plan as part of the WARN Act Plaintiffs Class, and Class Action Counsel shall be permitted to cast votes on behalf of those WARN Act Plaintiffs who have appointed Class Action Counsel as their proxy;

(e) the quorum for each Meeting is one Creditor with a Voting Claim, provided that if there are no WARN Act Plaintiffs voting in the WARN Act Plaintiffs Class, the Applicants will have the right to combine the WARN Act Plaintiffs Class with the Affected Unsecured Creditors Class and proceed without a vote of the WARN

Act Plaintiffs Class, in which case there shall be no WARN Act Plan Entitlement under the Plan;

(f) the Monitor will keep separate tabulations of votes in respect of:

i. Voting Claims; and

ii. Disputed Voting Claims, if any;

(g) the Scrutineers will tabulate the vote(s) taken at each Meeting and will determine whether the Plan has been accepted by the required majorities of each class; and

(h) the results of the vote conducted at the Meetings will be binding on each creditor of the Applicants whether or not such creditor is present in person or by proxy or voting at a Meeting.

Goldfarb Affidavit at para. 161; Application Record, Tab 4.

27. The Applicants may elect to proceed with the Meetings notwithstanding that the resolution of Claims in accordance with the Claims Procedure may not be complete. The Meetings Order, if approved, authorizes and directs the Scrutineers to tabulate votes in respect of Voting Claims separately from votes in respect of Disputed Voting Claims, if any. If the approval or non-approval of the Plan may be affected by the votes cast in respect of Disputed Voting Claims, then the Monitor will report such matters to the Court and the Applicants and the Monitor may seek advice and directions at that time. This way, the Meetings can proceed concurrently with the Claims Procedure without prejudice to the Applicants' Creditors.

Goldfarb Affidavit at paras. 161(f)-(h) and 162; Application Record, Tab 4.

28. Like the Claims Procedure Order, the Meetings Order includes a comeback provision providing interested parties who wish to amend or vary the Meetings Order with the ability to appear before the Court or bring a motion on a date to be set by the Court.

Meetings Order, Section 68.

29. By seeking the Claims Procedure Order and the Meetings Order concurrently, the Applicants hope to move efficiently and expeditiously towards the implementation of the Recapitalization.

Goldfarb Affidavit at para. 148; Application Record, Tab 4.

D. FURTHER BACKGROUND FACTS

30. The facts relating to the Applicants, the Cline Business and the requested relief are more fully set out in the Goldfarb Affidavit.

PART III - ISSUES AND THE LAW

31. The issues to be considered on this motion are whether:

(a) it is appropriate to proceed with the Claims Procedure;

(b) it is appropriate to permit the Applicants to file the Plan and call the Meetings;

(c) the proposed classification of creditors is appropriate; and

(d) a consolidated Plan is appropriate in the circumstances.

A. IT IS APPROPRIATE TO PROCEED WITH THE CLAIMS PROCEDURE

32. The Court has the authority to grant the requested Claims Procedure Order and set a deadline for creditors to file claims for the purposes of voting and receiving distributions under the Plan.

CCAA, Section 12.

33. The timeline and procedures contemplated by the proposed Claims Procedure Order will enable the Applicants to ascertain the Claims that may exist against the Applicants and their current and former directors and officers in a timely manner in order to allow the Applicants to move forward with the Recapitalization and the Plan.

Goldfarb Affidavit at paras. 148 and 151-152; Application Record, Tab 4.

34. While it is not the usual practice for applicants to request claims procedure and meetings orders concurrently with an initial CCAA application, the Court has granted such relief in appropriate circumstances. The support for a restructuring proposal from the only creditors with an economic interest, and the existence of a comeback hearing at which any issues in respect of the Orders can be addressed, are two factors that militate in favour of granting the claims procedure and meetings orders concurrently with the initial CCAA application.

Re SkyLink Aviation Inc., 2013 ONSC 1500 at para. 35 (Ont. Sup. Ct. J. [Commercial List]); Book of Authorities of the Applicants (the "**Book of Authorities**"), Tab 1.

35. Both the Claims Procedure Order and the Meetings Order provide that any interested party that wishes to amend the Claims Procedure Order or the Meetings Order, as applicable, can bring a motion before the Court on a comeback date to be set by the Court.

Goldfarb Affidavit at para. 149; Application Record, Tab 4.

36. In addition, most of the Applicants' Known Creditors are familiar with the Applicants and the Cline Business, and the determination of most of the Claims against the Applicants will be carried out proactively by the Applicants using the Notice of Claim procedure described above, where each Known Creditor's Claim will be valued by the Applicants and set out on the Notice of Claim sent to the Known Creditor, subject to any dispute by such Known Creditor. As such, the Applicants submit that a claims bar date of January 13, 2015 will provide sufficient time for creditors of the Applicants to assert their Claims and will not result in any prejudice to such creditors.

Goldfarb Affidavit at para. 151; Application Record, Tab 4.

37. Accordingly, the Applicants respectfully submit that the Court ought to exercise its jurisdiction to grant the requested Claims Procedure Order at this time.

B. IT IS APPROPRIATE TO PERMIT THE APPLICANTS TO FILE THE PLAN AND CALL THE MEETINGS

(1) The Threshold for Filing a Plan and Calling Meetings of Creditors is Met

38. The Court has authority under Sections 4 and 5 of the CCAA to order a meeting of creditors or class of creditors:

> Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> CCAA, Section 4.

> Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> CCAA, Section 5.

39. The threshold to be satisfied for the filing of a plan and the calling of a meeting of creditors is low. In *Nova Metal Products Inc. v. Comiskey (Trustee of)*, the Ontario Court of Appeal held that:

> I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of

> ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made [emphasis added].
>
> *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 at para. 90 (Ont. C.A.); Book of Authorities, Tab 2.

40. The Court is not required to address the fairness and reasonableness of the Plan at this stage. Unless it is obvious that a plan would not be approved by the affected creditors, a debtor company should not be prevented from presenting a plan to its creditors at a meeting.

> *ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205 at paras. 4-7; Book of Authorities, Tab 3.

41. The Applicants respectfully request that the Meetings Order be granted at this time in order to allow the Meetings procedure to proceed concurrently with the Claims Procedure, with a view to completing the Recapitalization as efficiently as possible.

C. THE PROPOSED CLASSIFICATION OF CREDITORS FOR VOTING PURPOSES IS APPROPRIATE

(1) Creditors with a Commonality of Interest Should Be Placed in the Same Class for Voting Purposes

42. Section 22(1) of the CCAA provides that:

> A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.
>
> CCAA, Section 22(1).

43. Section 22(2) of the CCAA further provides that, for the purposes of Section 22(1), creditors with a "commonality of interest" may be included in the same class.

> CCAA, Section 22(2).

44. Creditors must be classified with the underlying purpose of the CCAA in mind – to facilitate successful restructurings. A fragmentation of classes that would render it excessively difficult to obtain approval of a CCAA plan would be contrary to the purpose of the CCAA and ought to be avoided.

> *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, [1988] A.J. No. 1226 [*Norcen Energy*] at paras. 21-28 (Alta. Q.B.); Book of Authorities, Tab 4.

45. Case law dealing with the classification of creditors for the purposes of voting on a plan indicates that while a class must be confined to those persons whose legal rights in relation to the debtor company are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, classification must not be so fine that it renders plan approval impossible.

> *Norcen Energy, supra* at paras. 26-27; Book of Authorities, Tab 4.
>
> *SemCanada Crude Co., Re*, 2009 ABQB 490, 57 C.B.R. (5th) 205 [*SemCanada*] at paras. 20-21; Book of Authorities, Tab 5.

46. Prior to the 2009 amendments to the CCAA, the Ontario Court of Appeal endorsed the following principles for assessing commonality of interest:

(a) commonality of interest should be viewed on the basis of a "non-fragmentation" test, not on an "identity of interest" test;

(b) the interests to be considered are the legal interest that the creditor holds *qua* creditor in relationship to the debtor, prior to and under the plan as well as on liquidation;

(c) the commonality of these interests is to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible;

(d) in placing a broad and purposive interpretation on the CCAA, the Court should be careful to resist classification approaches that might jeopardize viable plans;

(e) absent bad faith, the motivations of creditors to approve or disapprove a plan are irrelevant; and

(f) the requirement that creditors can consult together means they can assess their legal entitlements as creditors before or after the plan in a similar manner.

> *Stelco Inc, Re.* (2005), 78 O.R. (3d) 241, 15 C.B.R. (5th) 307 [*Stelco*] at paras. 23-24 (Ont. C.A.), Book of Authorities, Tab 6, citing *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), application for leave to appeal dismissed (2000), 19 C.B.R. (4th) 33 (Alta. C.A.) [*Canadian Airlines*]; Book of Authorities, Tab 7.
>
> *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 at para. 73 (Ont. Sup. Ct. J. [Commercial List]), aff'd (2008), 45 C.B.R. (5th) 163 (Ont. C.A.); Book of Authorities, Tab 8.

47. The Ontario Court of Appeal in *Stelco* cautioned that the very flexibility at the heart of the CCAA precludes the adoption of fixed rules governing classification and held that the circumstance of the individual case needed to be considered:

> It is clear that classification is a fact-driven exercise, dependent upon the circumstances of each particular case. Moreover, given the nature of the CCAA process and the underlying flexibility of that process – a flexibility which is its genius – there can be no fixed rules that apply in all cases.
>
> *Stelco, supra* at para. 22; Book of Authorities, Tab 6.

48. The factors to be considered in determining whether creditors have a "commonality of interest" have been codified in Section 22(2) of the CCAA. These factors do not change in any material way or exclude the factors that were articulated in the case law prior to the amendments:

> (a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (*a*) to (*c*), that are prescribed.

CCAA, Section 22(1).

SemCanada, supra at paras. 44 and 45; Book of Authorities, Tab 5.

(2) Holders of the 2011 Notes and the 2013 Notes

49. Holders of the 2011 Notes and the 2013 Notes have a commonality of interest in respect of their *pro rata* share of the Secured Noteholders Allowed Secured Claim and should be placed in the same class for voting purposes. In particular:

(a) both the 2011 Notes and the 2013 Notes are a first-ranking secured obligation of Cline and are guaranteed by New Elk and North Central;

(b) the security interests granted to the Trustees by the Applicants in order to secure the payment of the 2011 Notes and the 2013 Notes are the same;

(c) the Intercreditor Agreement provides that the security interests of Secured Noteholders in respect of the 2011 Notes and the 2013 Notes rank *pari passu* for all purposes; and

(d) Marret has confirmed that there is universal support for the Recapitalization among the Secured Noteholders.

Goldfarb Affidavit at paras. 9, 12, 61, 65, 74 and 81; Application Record, Tab 4.

Plan, Section 3.4(1).

50. Accordingly, it is appropriate for the Secured Noteholders to vote in the same class in respect of their Secured Noteholders Allowed Secured Claim.

(3) The Affected Unsecured Creditors

51. The Affected Unsecured Creditors Class includes Creditors with unsecured claims against the Applicants, including the Secured Noteholders in respect of their Secured Noteholders Allowed Unsecured Claim and, if applicable, Marret in respect of the Marret Unsecured Claim. The Affected Unsecured Creditors have a commonality of interest and should be placed in the same class for voting purposes. In particular:

(a) the Affected Unsecured Creditors have no security enforcement remedy in respect of their Affected Unsecured Claims, either because such claims were never secured or because such claims were secured but there is a deficiency in the realizable value of that security, which deficiency is being treated as unsecured for purposes of the Plan; and

(b) the Affected Unsecured Creditors would remain unpaid in the event of a security enforcement or liquidation scenario.

Goldfarb Affidavit at paras. 155 and 158; Application Record, Tab 4.

52. Secured creditors have previously been permitted to vote as unsecured creditors in respect of their deficiency claims in the context of both CCAA proceedings and proceedings under the *Bankruptcy and Insolvency Act*.

Canadian Airlines, *supra*; Book of Authorities, Tab 7. See also *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, 20 C.B.R. (4th) 1 at para. 103; Book of Authorities, Tab 9.

Re SkyLink Aviation Inc., Claims Procedure Order granted March 8, 2013 (Ont. Sup. Ct. J. [Commercial List]) at para. 24; Book of Authorities, Tab 10.

53. The results of the Sale Process conducted by Moelis confirm that the fair value of the Cline Business at this time is not sufficient to satisfy the obligations in respect of the Secured Notes. If the Secured Noteholders were to enforce their security, there would be a shortfall in the amounts owed to them and there would be no residual value left over to pay the Applicants' unsecured creditors.

Goldfarb Affidavit at paras. 112-113; Application Record, Tab 4.

54. The determination of the Secured Noteholders Allowed Unsecured Claim has been determined by the Applicants and Marret and, for purposes of voting at the Secured Noteholders Meeting, is set at $17,500,000.

Plan, Section 1.1 ("Secured Noteholders Allowed Unsecured Claim")

55. In a liquidation scenario, the Secured Noteholders, in respect of their Secured Noteholders Allowed Unsecured Claim, and Marret, in respect of its Marret Unsecured Claim, if any, would have the same rights as other unsecured creditors as against the Applicants. Consequently, the Secured Noteholders, in their unsecured capacity, have a commonality of interest with the other Affected Unsecured Creditors and any distinctions that may exist among the creditors in this class do not negate their underlying commonality of interest or render the proposed classification inappropriate. Accordingly, it is appropriate to permit the Secured Noteholders to vote as part of the Affected Unsecured Creditors Class with respect to the Secured Noteholders Allowed Unsecured Claim.

Goldfarb Affidavit at para. 155 and 158; Application Record, Tab 4.

(4) The WARN Act Plaintiffs

56. The WARN Act Plaintiffs Class consists of potential members of an uncertified class action proceeding. The WARN Act Claims have been asserted by only two WARN Act Plaintiffs on behalf of other potential members of the class. These claims have not been proven and are contested by the Applicants. It is not possible at the present time to ascertain the likelihood that the WARN Act Plaintiffs will become creditors of the

Applicants, and the aggregate amount the WARN Act Claims is not known at this time, since the representative plaintiffs in the WARN Act Class Action have not particularized the amounts alleged to be owing by the Applicants. Due to the unique nature and status of these claims, the Applicants have offered the WARN Act Plaintiffs consideration that is different than the consideration offered to the Affected Unsecured Creditors.

Goldfarb Affidavit at paras. 56-57, 157 and 159; Application Record, Tab 4.

57. By virtue of being in their own class for voting purposes, a vote against approval of the Plan by the WARN Act Class would result in the Plan not becoming effective. Consequently, the WARN Act Plaintiffs are not prejudiced by being placed in the WARN Act Plaintiffs Class.

58. Based on the foregoing, the Applicants submit that the proposed class structure in the Meetings Order and the Plan addresses the classification standards for commonality of interest, facilitates the viable restructuring of the Applicants and is appropriate in the circumstances.

(5) It is appropriate for holders of "Equity Claims" to be prohibited from voting on the Plan

59. Pursuant to Section 22.1 of the CCAA, holders of equity claims are prohibited from voting on a plan, unless the court orders otherwise. Section 22.1 of the CCAA provides as follows:

> Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not as members of that class, vote at any meeting unless the court orders otherwise.
>
> CCAA, Section 22.1.

60. Section 6(8) of the CCAA provides expressly for the subordination of equity claims and prohibits a distribution to equity claimants prior to payment in full of all non-equity claims. Section 6(8) provides as follows:

> No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.
>
> CCAA, Section 6(8).

61. Consistent with the provisions of the CCAA, (i) the Meetings Order provides that any Person with a Claim that meets the definition of "equity claim" under Section 2(1) of the CCAA will have no right to, and will not, vote at the Meetings; and (ii) the Plan provides that Equity Claimants will not receive a distribution under the Plan or otherwise recover anything in respect of their Equity Claims or Equity Interests.

> CCAA, Section 2(1).
>
> Meetings Order, Section 42.
>
> Plan, Section 3.4(4).

62. Given the financial situation of the Applicants and the deficiency faced by the first-lien Secured Noteholders and other creditors, the Equity Claimants do not have an economic interest in the Applicants. Consequently, it is appropriate for the Equity Claimants to be prohibited from voting on the Plan.

D. A CONSOLIDATED PLAN OF ARRANGEMENT IS APPROPRIATE IN THE CIRCUMSTANCES

63. The Plan is a consolidated plan of arrangement that addresses the combined claims against all of the Applicants. Courts will authorize a consolidated plan of arrangement to be filed for two or more related companies in appropriate circumstances. The filing of a consolidated plan of arrangement has been authorized on numerous occasions.[2]

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[2] See, for example: *Re Northland Properties Ltd.* (1988), 69 C.B.R. (N.S.) 226 (B.C.S.C.); *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Re Global Light Telecommunications Inc.* (2004), 2 C.B.R. (5th) 210 (B.C.S.C.); *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 43 (N.S.T.D.); *Re Canwest Global Communications Corp. et al.*, Restated Consolidated Plan of Compromise, Arrangement and Reorganization dated as of June 23, 2010 (sanctioned by Ont. Sup. Ct. J. [Commercial List] on July 28, 2010); *HSBC Bank of Canada v. Bear Mountain Master Partnership*, 2010 BCSC 957; *Atlantic Yarns Inc. (Re)*, 2008 NBQB 144, 42 C.B.R. (5th) 107; and *Re Teleglobe Inc.*, Plan of Compromise or Arrangement dated as of January 26, 2005 (sanctioned by the Ont. Sup. Ct. J. (Commercial List) on Feb. 8, 2005).

Re Canwest Global Communications Corp. et al., Restated Consolidated Plan of Compromise, Arrangement and Reorganization dated as of June 23, 2010 (sanctioned by Ont. Sup. Ct. J. [Commercial List] on July 28, 2010); Book of Authorities, Tab 11.

Re Teleglobe Inc., Plan of Compromise or Arrangement dated as of January 26, 2005 (sanctioned by the Ont. Sup. Ct. J. (Commercial List) on Feb. 8, 2005) at para. 3.1 of the Plan of Compromise or Arrangement; Book of Authorities, Tab 12.

64. A consolidated Plan is appropriate in the within proceedings because:

(a) New Elk is a wholly-owned subsidiary of Cline, and North Central is a wholly-owned subsidiary of New Elk;

(b) the Applicants are integrated members of the Cline Group and there is significant sharing of business functions within the Cline Group, including corporate-level decision making, cash management functions, general accounting, financial reporting and budgeting;

(c) the Applicants prepare consolidated financial statements;

(d) all three of the Applicants are obligors in respect of the Secured Notes;

(e) the Secured Noteholders are the only Creditors with an economic interest in any of the three Applicants and have a first-ranking security interest over all or substantially all of the assets, property and undertakings of each of the Applicants;

(f) the WARN Act Claims are asserted against Cline and New Elk under a "single employer" theory of liability;

(g) North Central has no known liabilities other than its obligations in respect of the Secured Notes;

(h) unsecured creditors of the Applicants would receive no recovery outside of the Plan, such as in an involuntary debt enforcement scenario; and

(i) the filing of a consolidated Plan does not prejudice any Affected Unsecured Creditor or WARN Act Plaintiff, since a consolidated Plan will not eliminate any veto position with respect to approval of the Plan that such creditors would have if separate plans of arrangement were filed in respect of each of the Applicants.

Goldfarb Affidavit at paras. 9, 15, 45-47 and 56; Application Record, Tab 4.

65. For all of the above reasons, the Applicants submit that a consolidated Plan addressing all of the Applicants is appropriate in the circumstances.

PART IV - RELIEF REQUESTED

66. The Applicants submit that the procedures that provide for the identification and resolution of Claims in the Claims Procedure Order are fair and reasonable and the Applicants' creditors will not be prejudiced as a result.

67. The Applicants submit that the threshold for filing of the Plan and entry of the Meetings Order has been met, and that the notice, voting and other terms and procedures of the Meetings Order are fair and reasonable and the contemplated timeline is appropriate.

68. By seeking the Claims Procedure Order and the Meetings Order concurrently, the Applicants hope to move more expeditiously towards the implementation of the Recapitalization and the conclusion of the CCAA proceedings. The Applicants submit that no party is prejudiced by the issuance of the Claims Procedure Order and the Meetings Order at this time since all parties in these proceedings will benefit from the "Comeback Clause" that is included in both the Claims Procedure Order and the

Meetings Order. These clauses allow parties to comeback before this Court to amend or vary the Claims Procedure Order or the Meetings Order on a date to be set by this Court.

69. For the reasons set out above, the Applicants request that this Court grant the proposed forms of Claims Procedure Order and Meetings Order at this time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 2, 2014

Robert J. Chadwick

Logan Willis

Bradley Wiffen

SCHEDULE A - LIST OF AUTHORITIES

1. *Re SkyLink Aviation Inc.*, 2013 ONSC 1500 (Ont. Sup. Ct. J. [Commercial List])
2. *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, 1 C.B.R. (3d) 101 (Ont. C.A.)
3. *ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205
4. *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20, [1988] A.J. N. 1226 (Alta. Q.B.)
5. *SemCanada Crude Co., Re*, 2009 ABQB 490, 57 C.B.R. (5th) 205
6. *Stelco Inc, Re.* (2005), 78 O.R. (3d) 241, 15 C.B.R. (5th) 307 (Ont. C.A.)
7. *Re Canadian Airlines Corp.* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal dismissed (2000), 19 C.B.R. (4th) 33 (Alta. C.A.)
8. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. Sup. Ct. J. [Commercial List]), aff'd (2008), 45 C.B.R. (5th) 163 (Ont. C.A.)
9. *Re Canadian Airlines Corp. (Re)*, 2000 ABQB 442, 20 C.B.R. (4th) 1
10. *Re SkyLink Aviation Inc.*, Claims Procedure Order granted March 8, 2013 (Ont. Sup. Ct. J. [Commercial List])
11. *Re Canwest Global Communications Corp. et al.*, Restated Consolidated Plan of Compromise, Arrangement and Reorganization dated as of June 23, 2010 (sanctioned by Ont. Sup. Ct. J. (Commercial List) on July 28, 2010)
12. *Re Teleglobe Inc.*, Plan of Compromise or Arrangement dated as of January 26, 2005 (sanctioned by the Ont. Sup. Ct. J. (Commercial List) on Feb. 8, 2005)

SCHEDULE B – STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
R.S.C. 1985, c. C-36, as amended

s. 4

Compromise with unsecured creditors - Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 5

Compromise with secured creditors - Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

s. 6(8)

Payment – equity claims - No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

s. 12

Fixing deadlines - The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement s.5.6

s. 22(1)

Company may establish classes - A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

s.22(2)

Factors - For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

s. 22.1

Class – creditors having equity claims - Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

Applicants

Court File No: _____

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM
(Claims Procedure Order and Meetings Order)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC# 35165K
Logan Willis LSUC #53894K
Bradley Wiffen LSUC #64279L

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants