Court of Appeal File No. M53250
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

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 OR ARRANGEMENT OF **JUST ENERGY GROUP INC.,** JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., JUST ENERGY FINANCE HOLDING INC., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

(each, an "**Applicant",** and collectively, the "**Applicants")**

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Court of Appeal File No. M53250
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Tab 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
DANIELLE BELL, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

GATEWAY ENERGY SERVICES CORP.,

Defendant.
----------X

DECISION & ORDER (Motion #12)

Index No.: 31168/2018

EISENPRESS, J.

The following papers numbered 1-7 were read on this motion by Plaintiff Danielle Bell, for an Order granting Class Certification and appointing Plaintiff and her counsel as Class Representative and Class Counsel:

PAPERS	**NUMBERED**
NOTICE OF MOTION/MEMORANDUM OF LAW IN SUPPORT/AFFIRMATION IN SUPPORT/EXHIBITS 1-19	1-3
MEMORANDUM OF LAW IN OPPOSITION/AFFIRMATION IN OPPOSITION/ EXHIBITS A-P	4-5
MEMORANDUM OF LAW IN REPLY/AFFIRMATION IN REPLY/EXHIBITS 1-6	6-7

Upon the foregoing papers, these motions are determined as follows:

Plaintiff Danielle Bell, a resident of New City, New York, commenced this putative class action by Summons and Verified Complaint dated March 1, 2018, alleging that defendant Gateway Energy Services Corporation ("Gateway"), of Montebello, New York, overcharged her and thousands of New York consumers for natural gas and/or electricity, in violation of General Business Law ("GBL") Section 349. Plaintiff seeks to certify the following class:

> All Gateway customers who were charged on a fixed rate plan at any time and were converted to a variable rate plan for natural gas and/or electricity services in New York from May of 2014 to

the present. [1]

Plaintiff's claims, and those of the proposed class, arise from an alleged unlawful and deceptive misrepresentation made by Gateway Energy Services Corporation ("Gateway") regarding the competitiveness of its variable rate energy pricing plans made in the "Welcome Letter" and/or "Renewal Letter" provided by Gateway to its customers before they entered into a contract with Gateway.

"CPLR article 9, which authorizes class action suits in New York, and sets forth the criteria to be considered in granting class action certification, is to be liberally construed. The determination to grant class action certification rests in the sound discretion of the Supreme Court, 'and any error should be resolved in favor of allowing the class action. [internal citations omitted]'" Kidd v Delta Funding Corp., 289 AD2d 203, 734 N.Y.S.2d 848 (2d Dept 2001) "The primary issue on a motion for class certification is whether the claims as set forth in the complaint can be efficiently and economically managed by the court on a classwide basis. The class representative has the burden of establishing the prerequisites of certification. [internal citations omitted]" Globe Surgical Supply v GEICO Ins. Co., 59 AD3d 129, 136-37, 871 N.Y.S.2d 263 (2d Dept 2008).

CPLR Section 901(a) states:

> "One or more members of a class may sue or be sued as representative parties on behalf of all if: (1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

---

[1]Excluded form the Class are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which any Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of a Defendant.

These CPLR Sec. 901(a) criteria, which are commonly referred to a numerosity, commonality, typicality, adequacy of representation, and superiority, are to be "liberally construed" by the reviewing Court. Wilder v. May Dept. Stores Co., 23 A.D.3d 646, 649, 804 N.Y.S.2d 423 (2d Dept. 2005).

Numerosity. Plaintiff contends that the class is so numerous that joinder of all members is impracticable. According to Plaintiff, Gateway's records indicate that the proposed Class encompasses more than 8,000 gas and electricity accounts with service addresses in New York. Defendant Gateway disputes numerosity and argues that Ms. Bell has produced no evidence that the same letters were sent to anyone else in the putative class. Gateway argues that even if on reply Plaintiff shows evidence that others received the letters, she cannot show that all persons who received the letter were influenced by it. Upon reply, Plaintiff points out that defense counsel on August 6, 2019, produced spreadsheets affixed with Bate stamps, which contained the entire charge history of all accounts meeting the putative class definition in the Verified Class Action Complaint dated March 1, 2018, and more specifically, those New York customers who enrolled with Gateway on a fixed rate and were later charged a variable rate because they failed to cancel or renew on or after May 23, 2014. Additionally, Defendant produced a multitude of documents which al contain the same "competitive" representation. In the instant case, the Court finds that the numerosity requirement has been met with some 8,223 proposed class members. See Pruitt v. Rockefeller Center Properties, Inc., 167 A.D.2d 14, 21, 574 N.Y.S.2d 672 (1st Dept. 1991)(action involving thousands of class members clearly meets the statute's numerosity requirement.)

Commonality. Plaintiff argues that the requirement of commonality is met here since there are at least two common questions that are determinative of every class member's claim. First, common to every class member's claim is whether Gateway represented that its variable rate would be competitive and second is a determination of the proper amount of damages, i.e. the difference between what Gateway charged or what customers would have

paid had they been utility customers. Plaintiff argues that the entire proposed class' claims can be adjudicated using a common set of proof, including the Welcome and Renewal Letters based upon the documents themselves. Damages can be adjudicated using common proof, to wit, Gateway's business records as compared to publicly available date regarding utility rates.

Defendant contends that there is no commonality because Ms. Bell offers no method of determining the "net impression" of Gateway's statements on a class-wide basis. Gateway contends that Plaintiff must prove that the challenged statements were made to all 8,000 plus putative class members and she fails to show there is some common thread running through the communications sent to all class members that would enable the jury to assess the "net effect" of the statements. Gateway further argues that there is no workable damages model, as comparison to utility rates is not proper.

To meet the standard of commonality, class members' claims need only be substantially similar, not identical in every aspect. Freeman v. Great Lakes Energy Partners, LLC, 12 A.D.3d 1170, 1171, 785 N.Y.S.2d 640 (4th Dept. 2004). "[I]ndeed, [the commonality] rule requires predominance, not identity or unanimity, among class members." Id. Moreover, the mere presence of a question of individual reliance does not preclude class action certification. Super Glue Corp v. Avis Rent A Car System, Inc., 132 A.D.2d 604, 607, 517 N.Y.S.2d 764 (2d Dept. 1987)

In the instant matter, the Court finds that Plaintiff has met the commonality standard. Although some of the letters and terms and conditions may vary somewhat, each contains the representation that Gateway's rates would be competitive, thus posing a common question. Additionally, the Court finds that comparison to the local utility rates is appropriate given the fact that Orange and Rockland had approximately 80% of the market and Defendant's own employee, Sam Gifford, compared Gateway's rates to the local utility, finding that Gateway's rates were 190% above the local utility.

Typicality.

Plaintiff argues that typicality is satisfied because all class members were victims of the same misconduct, i.e. Gateway's deceptive representations regarding its variable rate, and they suffered the same injury, i.e. paying a rate that was higher than they would have paid had Gateway not misrepresented that its variable rate would be competitive. Additionally, the Complaint contains allegations of plan-wide misrepresentations and non-disclosures, which she alleges, by definition, were not individualized.

In opposition, Defendant Gateway contends that typicality is not present because Ms. Bell was not influenced or injured by Gateway's statement that its variable rates would be competitive, since she never wanted variable rates. Defendant further argues that Ms. Bell is subject to unique rebuttals and defenses that preclude her from serving as a class representative, including that she had easily navigated the renewal process on three prior occasions; was aware variable rates could go up and down each month; and Gateway's action in sending a "no-strings attached" un-cased check and partially used gift card, means Ms. Bell has no standing.

To be typical, "it is not necessary that the claims of the named plaintiff be identical to those of the class." Super Glue Corp v. Avis Rent A Car System, Inc., 132 A.D.2d 604, 607, 517 N.Y.S.2d 764 (2d Dept. 1987). The requirement is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class. Pruitt, 167 A.D.2d at 22. Typicality is satisfied by establishing that the claims representative parties arise "out of the same course of conduct and are based on the same theories as the other class members." Ackerman v. Price Waterhouse, 252 A.D.2d 179, 201, 683 N.Y.S.2d 179 (1st Dept. 1998). Moreover, the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, and the claim that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification. Vickers v. Home Federal Sav. And Loan Ass'n of East Rochester, 56 A.D.2d

62, 65, 390 N.Y.S.2d 747 (4th Dept. 1977).

Here, whether or not Ms. Bell may have navigated the renewal process better than other proposed class members, or whether she did not intentionally seek to be placed on the variable rate, does not negate typicality where Ms. Bell's claims arise out of the same course of conduct- i.e. the representation that Gateway's energy rates would be competitive-as other class members. Moreover, contrary to Gateway's contentions, there are no unique defenses related to lack of standing. The Court made a finding with respect to the summary judgment motions that there exists a live controversy sufficient to confer standing. The Court noted that defendant' s reliance on a single 78 year old case, Tractor & Equipment Corp v. Chain Belt Co., 50 F. Supp. 1001, 1004 (S.D.N.Y. 1942), for the proposition that her retention of a check for an unreasonable period of time constitutes acceptance of an offer, is simply misplaced. In Tractor and Equipment Corp., the Court did not rule that plaintiff had accepted the offer based upon retention of the check, but rather, that this raised a triable issue of fact to be determined by the jury. In the instant matter, however, a plain reading of the letter accompanying the check and gift cards- which stated that there were "no-strings attached"- make clear that no settlement offer was being made. If there was no settlement offer being made, Plaintiff's failure to cash the check could not constitute an acceptance of an offer, rendering the Tractor and Equipment Corp. case inapplicable to the instant facts.

Adequacy and Superiority. The Court finds that Plaintiff and her counsel will fairly and adequately protect the class, as there does not appear to be any conflicts which exists between class representatives and class members; the representative appears to have familiarity with the lawsuit and financial resources; and counsel has demonstrated both competence and experience as class counsel. Additionally, the Court finds that the class action is superior to other available methods for the fair and efficient adjudication of this controversy, particularly given the modest value of each individual claim and the cost of individual litigation. Additionally, Plaintiff represents that she is unaware of any other litigation concerning class

members' claims.

CPLR Sec. 902. Once the Court has determined the prerequisites set forth in CPLR Sec. 901 have been met, the Court must then consider the additional factors set forth in CPLR Sec. 902. Among the matters which the court shall consider in determining whether the action may proceed as a class action are (1)The interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) The impracticability or inefficiency of prosecuting or defending separate actions; (3) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) The desirability or undesirability of concentrating the litigation of the claim in the particular forum; (5) The difficulties likely to be encountered in the management of a class action." CPLR §902.

Here, the Court finds that these additional factors, called "feasibility considerations," favor certification in this case. There is no evidence that individual class members are seeking to control their own action, as it does not appear that there is other pending litigation which seeks to raise the same claims. Additionally, New York is the most desirable and suitable forum since the claims arise under New York law, the suit arises from Gateway's conduct in New York and all of the class members and accounts are, or were, maintained in New York. Additionally, the class action will conserve judicial resources and prevent inconsistent adjudications.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion to Certify the Class is GRANTED in its entirety; and it is further

ORDERED that the certified class will consist of: "All Gateway customers who were charged on a fixed rate plan at any time and were converted to a variable rate plan for

natural gas and/or electricity services in New York from may of 2014 to the present. [2]"; and it is further

ORDERED that Danielle Bell is appointed as Class Representative and Kohn, Swift & Graf, P.C. and the Frederick Law Group, PLLC are appointed as Plaintiff's counsel; and it is further

ORDERED that the parties are directed to appear for a conference via Microsoft Teams on February 18, 2021 at 2 p.m. The Court shall provide the link for the conference the day prior.

The foregoing constitutes the Decision and Order of this Court on Motion #10.

Dated: New City, New York
January 8, 2021

HON. SHERRI L. EISENPRESS, A.J.S.C.

To: All Counsel via NYSCEF

[2]Excluded form the Class are Defendant; any parent, subsidiary, or affiliate of Defendant; any entity in which any Defendant has or had a controlling interest, or which Defendant otherwise controls or controlled; and any officer, director, legal representative, predecessor, successor, or assignee of a Defendant.

Tab 2

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** IAS MOTION 17EFM

Justice

----------X

BLT STEAK LLC,BLT FISH LLC

Plaintiff,

- v -

LIBERTY POWER CORP, L.L.C., LIBERTY POWER HOLDINGS LLC,

Defendant.

----------X

INDEX NO. 151293/2013

MOTION DATE N/A

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is

ORDERED, that the motion is granted to the extent stated on the record today. Submit Order.

8/12/2020
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			X	SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

Tab 3

2016 WL 7009062
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Julie CLARIDGE and Helen Marsh, Plaintiffs,
v.
NORTH AMERICAN POWER & GAS, LLC, Defendant.

15-cv-1261 (PKC)
|
Signed 11/30/2016

Attorneys and Law Firms

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Douglas Gregory Blankinship, Finkelstein Blankinship, Frei-Pearson & Garber, LLP, White Plains, NY, Joanna Marie Doherty, Chronakis Siachos & Kaplan, LLC, Hoboken, NJ, Peter George Siachos, Gordon & Rees, LLP, Morristown, NJ, for Defendant.

MEMORANDUM AND ORDER

CASTEL, U.S.D.J.

***1** Plaintiffs Julie Claridge and Helen Marsh move, pursuant to Rule 23, Fed. R. Civ. P., to certify a class of New York consumers who paid a variable monthly rate for electricity that they purchased from defendant North American Power & Gas, LLC ("North American"). (Docket # 50.) Plaintiffs assert that the proposed class was commonly bound by a sales agreement that North American distributed to all customers, and that this agreement misleadingly described the "variable market based rate" used to calculate monthly electricity bills. Plaintiffs bring claims for breach of contract, breach of the implied covenant of good faith and fair dealing and deceptive trade practices in violation of New York General Business Law sections 349 and 349-d.

For the reasons explained, the plaintiffs' motion for class certification is granted.

BACKGROUND.
North American is an energy services company ("ESCO") that supplies electricity to its customers, with the actual delivery of that electricity managed by local utilities. (Felder Report at 3.) North American first began selling electricity to New York consumers in or around June 2011. (Kinneary 4/7/16 Dep. at 19.)

When customers began their subscriptions to North American, they generally paid either a promotional rate for two months, or a fixed monthly rate for a set term. (Kinneary 4/7/16 Dep. at 23; Pl. Mem. at 4.) Once the promotional rate or fixed rate expired, customers paid North American for monthly electricity calculated under North American's "variable market based rate." (Id.)

All new customers received a "Welcome Packet" consisting of a "Welcome Letter" and "Sales Agreement," which included a "Customer Disclosure Statement and Terms and Conditions." (Blankenship Dec. Ex. 4.) The Disclosure Statement described North American's variable monthly rate. (Blankenship Dec. Ex. 4.) Under the heading "Open Price," it stated that customers would be charged a "variable market based rate" that "will be calculated on the method stated above to include any market prices for commodity, transportation, balancing fees, storage charges, NORTH AMERICAN POWER fees, profit, line losses

plus applicable taxes, and any other charges or fees imposed by the utility or other entity having such authority to impose any such charges." (Blankenship Dec. Ex. 4.) There is no dispute that North American distributed a uniform version of the Sales Agreement to all new customers.

As this Court discussed in its decision denying North American's motion to dismiss, the Complaint plausibly alleged that the Sales Agreement's description of the "variable market based rate" was "incomplete and confusing," including a reference to a "method stated above" when no such method was described. See Claridge v. N. Am. Power & Gas, LLC, 2015 WL 5155934, at *4 (S.D.N.Y. Sept. 2, 2015). This Court concluded that, according to the Complaint's allegations, "[a] reasonable consumer acting reasonably would not know whether 'variable market based rates' refers to rates charged by competing ESCOs or the market prices that North American paid to others. A reasonable consumer acting reasonably could be deceived into believing that the rates he or she would be charged under the Agreement would approximate the market price, i.e., what other ESCOs charged their customers." Id. at *5. Plaintiffs assert that North American's variable monthly rates charged them prices that were "substantially higher" than those of competing ESCOs and local utilities. Id. at *2.

***2** According to plaintiffs, during the time that North American has sold electricity in New York, it has determined its rates by forecasting customer demand for the coming month and then using a hedging strategy to purchase electricity in advance. (Kinneary Dep. at 67-68.) North American would then purchase additional electricity, as needed, on the short-term or "spot" market, to make up for any differences between its advance purchase and the actual demand of its New York customers. (See Pl. Mem. at 4.)

CLASS CERTIFICATION STANDARD.

Rule 23 governs the certification of a class action. The party seeking class certification must satisfy Rule 23(a) and "at least one of the three requirements listed in Rule 23(b)." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345 (2011). Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

"The Rule's four requirements—numerosity, commonality, typicality, and adequate representation—effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." Dukes, 564 U.S. at 349 (quotation marks omitted). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id. at 350 (emphasis in original).

Plaintiffs seek to certify a class under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." A court must "bear[ ] firmly in mind that the focus of Rule 23(b)(3) is on the predominance of common questions...." Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194 (2013). It "does not require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof," but instead to prove that "common questions predominate over any questions affecting only individual class members." Id. at 1196 (emphasis in original; alterations and quotation marks omitted); accord Sykes v. Mel S. Harris & Associates LLC, 780 F.3d 70, 87 (2d Cir. 2015) ("The mere existence of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate.").

"[A] plaintiff must satisfy all of the requirements of Rule 23, by a preponderance of the evidence, to obtain class certification...." Novella v. Westchester Cnty., 661 F.3d 128, 148-49 (2d Cir. 2011). The "class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim' ...." Amgen, Inc., 133 S. Ct. at 1194. At the same time, "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Id. at 1195. A claim's merits may be relevant if, for instance, the failure of proof as to one element would require individualized determinations for each class member, and would not affect all class members. See id. at 1195-96.

DISCUSSION.

A. Rule 23(a).

1. Numerosity.

***3** Rule 23(a)(1) requires plaintiffs to show that "the class is so numerous that joinder of all members is impracticable." Plaintiffs' expert, Frank Felder, Ph.D., estimates that there are more than 40,000 members of the proposed class. (Felder Report at 12.) In opposition, North American does not dispute that plaintiffs have shown numerosity.

The Court concludes that the plaintiffs have satisfied the numerosity requirement.

2. Commonality.

Rule 23(a)(2) requires plaintiffs to show that "there are questions of law or fact common to the class." It "requires the plaintiff to demonstrate that the class members have suffered the same injury," which must turn "upon a common contention." Dukes, 564 U.S. at 350. "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id. "Consideration of this requirement obligates a district court to determine whether plaintiffs have 'suffered the same injury.' " Sykes, 780 F.3d at 84.

"[C]laims based on uniform misrepresentations to all members of a class are appropriate subjects for class certification" because "uniform misrepresentations" can be adjudicated with "no need for a series of mini-trials." In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 118 (2d Cir. 2013) (quotation marks omitted). In U.S. Foodservice, the Second Circuit affirmed certification of a RICO class whose members paid invoices containing allegedly unlawful markups. Id. It explained that "[w]hile each invoice obviously concerned different bills of goods with different mark-ups, the material misrepresentation—concealment of the fact of a mark-up inserted by the [billing entity]—was the same in each." Id.; see also Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) ("The common factual basis is found in the terms of the contract, which are identical for all class members.").

Plaintiffs contend that North American misleadingly described to its New York customers the "variable market based rate" set forth in the Terms and Conditions portion of its Sales Agreement. The claims of the proposed class turn on common contentions of whether North American's description of its rate-setting practices was accurate and truthful, including whether North American misleadingly described its method for setting the variable market-based rate and whether its method was consistent with the factors specified in the Sales Agreement. Plaintiffs also point to common questions on damages, including whether damages should be calculated according to the difference between North American's rates and those of other market participants, or whether damages should instead reflect the difference between North American's actual charged rate and a hypothetical rate calculated pursuant to the factors described in the Sales Agreement. There is also the common question of whether, if the plaintiffs succeed on their claims, class members should be awarded $500 in statutory damages under New York General Business Law section 349-d.

North American argues that plaintiffs' claims require individualized adjudication because customers had different, subjective understandings of terms like "market rate," "daily market price" and "market value." (Opp. Mem. at 12.) It points out that Claridge testified in her deposition that she did not understand the distinction between the terms "market rate" and "wholesale rate," and that Marsh testified that variable prices should have been determined by "the commodity rate, the competitive rate of other electric energy sources ...." (Id., citing Claridge Dep. at 41, Marsh Dep. at 12.) But plaintiffs assert that North American's disclosures about the "variable market based rate" were themselves misleading and imprecise. Commonality is not defeated because consumers interpreted arguably vague and misleading language in different ways.

***4** The claims of the proposed class turn on the "common contention" that North American misleadingly described its method for calculating variable monthly rates, a claim that "is capable of classwide resolution ...." Dukes, 564 U.S. at 350. Plaintiffs have therefore shown common questions of law and fact under Rule 23(a)(2).

3. Typicality.

Rule 23(a)(3) requires plaintiffs to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "To establish typicality under Rule 23(a)(3), the party seeking certification must show that 'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.' " In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009) (quoting Robidoux v. Celani, 987 F.2d 931, 936 (2d Cir. 1993)). "Typicality requires that 'the disputed issue[s] of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.' " Mazzei v. Money Store, 829 F.3d 260, 272 (2d Cir. 2016) (quoting Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999)). "One purpose of the typicality requirement is 'to ensure that ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " Id. at 272 (quoting Marisol A. ex rel. Forbes v. Giuliani, 126 F.3d 372, 376 (2d Cir. 1997)).

Plaintiffs assert that their claims are typical because, like all proposed class members, they assert that North American misrepresented the "variable market based rates" used to calculate monthly electricity bills. North American contends that Marsh and Claridge cannot show typicality because, prior to paying the monthly variable rate, they were offered introductory fixed rates for different periods of time, and that the initial fixed rates varied widely. (Opp. Mem. at 15.) It also asserts that customers received differing sales pitches from North American, which informed their decisions to become North American customers. (Id. at 16-17.) But the plaintiffs' proposed class consists of "customers who paid [North American's] variable rate," (Docket # 50) and not its fixed rate. Further, their claims are directed toward North American's statements made in a widely dispersed document and a uniform contract; oral representations by North American to solicit new customers do not lie at the heart of their claims. Because plaintiffs' claims turn on North American's written disclosure concerning the "variable market based rates," its arguments concerning other marketing practices do not defeat typicality. See, e.g., In re Polaroid ERISA Litig., 240 F.R.D. 65, 76 (S.D.N.Y. 2006) ("Defendants' argument that Plaintiffs' claims for misrepresentation and nondisclosure inherently require an individualized analysis is also insufficient to defeat typicality. The Complaint contains allegations of plan-wide misrepresentations and nondisclosures which, by definition, were not individualized.").

North American also argues that plaintiffs cannot show typicality because its "fixed and variable rates are calculated based upon a complex algorithm of variables unique to each customer," including a customer's "zone and/or subzone," weather, renewable energy credits, customer complaints and "[l]ocal, national and global news." (Opp. Mem. at 15-16.) As support, North American cites different fixed rates (as opposed to variable rates) that it charged to Marsh and Claridge. (Id. at 16.) Assuming that these assorted factors informed North American's calculation of variable market based rates, they do not defeat typicality, but instead reflect that Marsh and Claridge, like other customers, were charged at rates based on numerous factors, including some that seemingly were not disclosed in the Sales Agreement.

***5** Because Marsh and Claridge have made a showing that their claims are typical of the proposed class members, the Court concludes that they satisfy the typicality requirement of Rule 23(a)(3).

4. Adequacy.

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." "[A]dequacy is satisfied unless 'plaintiff's interests are antagonistic to the interest of other members of the class.' " Sykes, 780 F.3d at 90 (quoting Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 60 (2d Cir. 2000)); see also In re Flag Telecom, 574 F.3d at 35 (determining adequacy "entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation.") (quotation marks omitted). [1]

North American does not assert that Marsh or Claridge have interests antagonistic to the class. It again points to the named plaintiffs' failure in their depositions to provide a consistent definition of the phrase "wholesale market prices," and argues that "a plaintiff who does not understand the definition or scope of a term that is at the heart of a litigation cannot adequately represent the interests of a class the plaintiff seeks to certify." (Opp. Mem. at 18.) But again, the failure of the two named plaintiffs to articulate in their depositions a consistent interpretation of allegedly misleading terms does not render plaintiffs inadequate class representatives.

The Court concludes that plaintiffs satisfy the adequacy requirement of Rule 23(a)(4).

B. Rule 23(b)(3).

Rule 23(b)(3) requires plaintiffs to show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It requires "a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." Amgen Inc., 133 S. Ct. at 1191 (emphasis in original). "Predominance is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.' " 7Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015) (quoting In re U.S. Foodservice Inc., 729 F.3d at 118).

1. Plaintiffs' Claims under the New York General Business Law.

Plaintiffs' claims under the New York General Business Law can be adjudicated through common proof, and the use of generalized proof is more substantial than the issues potentially subject to individual proof. New York General Business Law section 349(a) makes it unlawful to use "[d]eceptive acts or practices in the conduct of any business, trade or commerce ...." New York General Business Law section 349-d(3) specifically governs the deceptive practices of ESCOs, and states that "[n]o person who sells or offers for sale any energy services for, or on behalf of, an ESCO shall engage in any deceptive acts or practices in the marketing of energy services." The parties agree that sections 349(a) and -d(3) have identical elements. See Claridge, 2015 WL 5155934, at *4. The scope of section 349 is "intentionally broad" and requires a plaintiff to prove "a deceptive act or practice directed toward consumers and that such act or practice resulted in actual injury to a plaintiff." Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 205-06 (2004). "Justifiable reliance by the plaintiff is not an element of the statutory claim." Koch v. Acker, Merrall & Condit Co., 18 N.Y.3d 940, 941 (2012).

***6** Here, liability can be determined on a class-wide basis because the plaintiffs' claims are directed toward uniform terms that were contained in a common Sales Agreement distributed to all new customers. Individualized evidence is not required.

Rather, plaintiffs must prove whether North American employed "a deceptive act or practice" by misleading consumers about its method for calculating a "variable market based rate." In large measure, plaintiffs' claims will succeed or fail based on a determination of whether the Sales Agreement was deceptive in its description of the "variable market based rate"—an issue that can be adjudicated through the use of common proof, and not individualized proof. A class-wide determination is superior to an individualized determination because the latter would simply entail repeated adjudications of identical provisions of the Sales Agreement. Cf. In re U.S. Foodservice, 729 F.3d at 118 ("[F]raud claims based on uniform misrepresentations to all members of a class 'are appropriate subjects for class certification' because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create 'no need for a series of mini-trials.' ") (quoting Moore v. PaineWebber, Inc., 306 F.3d 1247, 1253 (2d Cir. 2002)).

The Court therefore concludes that, under Rule 23(b)(3), common questions of law and fact predominate over plaintiffs' General Business Law claims, and that a classwide resolution is superior to individual actions to adjudicate the merits.

2. Plaintiffs' Contract Claims.

Plaintiffs also seek certification for their claims asserting breach of contract and breach of the covenant of good faith and fair dealing. "[T]he essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." U.S. Bank Nat'l Ass'n v. Lieberman, 98 A.D.3d 422, 423 (1st Dep't 2012). In New York, all contracts contain an implied covenant of good faith and fair dealing, under which "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995).

Contract claims satisfy Rule 23(b)(3) when the claims of the proposed class "focus predominantly on common evidence ...." In re U.S. Foodservice Inc., 729 F.3d at 125. The Second Circuit has affirmed certification of a contract claim when minor variations existed in the language of the disputed contracts because the underlying claim was directed to a "substantially similar" terms. Id. at 124. Plaintiffs claimed that defendants were in breach because they concealed the true nature of their fuel-pricing practices, and that they therefore did not know and understand the defendants' true course of performance. Id. at 125. Questions of whether a defendant acted in good faith under the contract also were deemed "common to all class members." Id. at 125. "To be clear, courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language." Id. at 124. Individual issues may predominate when, for instance, contract claims turn on material differences in state law. See Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 147-48 (2d Cir. 2015) (because contract claims were intertwined with different state-law malpractice standards, common questions did not predominate).

Plaintiffs' claims for breach of contract and breach of the covenant of good faith and fair dealing are largely directed to language in the Sales Agreement that was distributed to all members of the proposed class. The claims predominantly focus on common evidence. In opposition to plaintiffs' motion, North American again cites to subjective interpretations of the phrase "wholesale market rate," and argues that each customer may have had a unique and individual interpretation of the underlying billing practices. However, there is no dispute that North American distributed a uniform Sales Agreement that governed customers' subscriptions and described the calculation of variable market based rates. To the extent that North American argues that customers' subjective understanding may have been informed by loosely scripted conversations with telemarketers or by other marketing materials (Opp. Mem. at 20), the Sales Agreement contains an integration clause that states, "This agreement and the Enrollment Form or Welcome Letter reflect Customer's entire agreement with [North American] and supersede any oral or written statements made in connection with this agreement or Customer electricity supply." (Blankinship Dec. Ex. 4 at 7.) External marketing about North American's billing rates would not go toward plaintiffs' breach claim, and North American has not pointed to any ambiguity that would make parol evidence relevant to resolving plaintiffs' claims.

***7** Plaintiffs' claims for breach of contract and breach of the covenant of good faith and fair dealing are directed to the text of a uniform Sales Agreement that was distributed to all members of the proposed class. Common issues susceptible to generalized proof substantially predominate over individualized issues, if any. The Court therefore concludes that plaintiffs have satisfied Rule 23(b)(3) as to these claims.

C. Rule 23(g).

Rule 23(g)(1) states that "[u]nless a statute provides otherwise, a court that certifies a class must appoint class counsel." The Court must consider the work of counsel in identifying or investigating potential claims; counsel's experience in litigating class actions; counsel's knowledge of applicable law; and the resources available to counsel. Rule 23(g)(1)(A). Class counsel "must fairly and adequately represent the interests of the class." Rule 23(g)(4). "The purpose of this requirement is to protect the interests of absent class members, who will be bound by the results of the action under res judicata." Kulig v. Midland Funding, LLC, 2014 WL 5017817, at *2 (S.D.N.Y. Sept. 26, 2014). " '[I]n determining the adequacy of counsel, the court looks beyond reputation built upon past practice and examines counsel's competence displayed by present performance.' " Id. (quoting Bolanos v. Norwegian Cruise Lines Ltd., 212 F.R.D. 144, 156 (S.D.N.Y. 2002)). Although North American opposes the motion for class certification, it "does not dispute the competence of class counsel ...." (Opp. Mem. at 17.)

Plaintiffs are represented by three law firms: Finkelstein, Blankinship, Frei-Pearson & Garber, LLP ("Finkelstein"); Mazie Slater Katz & Freeman, LLC ("Mazie"); and McCuneWright LLP ("McCune"). Attorneys from Finkelstein and Mazie have been counsel of record to plaintiffs since the commencement of this action. Matthew D. Schelkopf, an attorney at McCune, also has been counsel of record to plaintiffs since the action was commenced, but was employed by different law firm at commencement. The three firms jointly move to be appointed co-class counsel.

Based on their performance in this action, the Court concludes that the plaintiffs' attorneys have fairly and adequately represented the interests of the class, and there is no indication that they will not continue to do so. Counsel successfully opposed the defendant's motion to dismiss the Complaint pursuant to Rule 12(b)(6), and have advocated for plaintiffs' interests throughout a discovery process that has been contentious at times. Their submissions to the Court have reflected knowledge of the law governing plaintiffs' claims and familiarity with class action procedures. Their present performance has demonstrated competence to protect the interests of the class and to pursue the class's claims. See generally Kulig, 2014 WL 5017817, at *2.

Based on the declarations submitted by counsel and their supporting exhibits, the Court also concludes that plaintiffs' counsel have adequate resources to litigate this action and are experienced in litigating class actions. Finkelstein has been appointed class counsel in several consumer class actions, including cases in this District that were brought against electricity providers and other utilities. (Blankinship Dec. Ex. 7.) Greg Blankinship, a partner at Finkelstein, has practiced law since 2003 and has been appointed class counsel in at least five class actions, including actions against utilities that asserted deceptive pricing practices. (Blankinship Dec. Ex. 7.) Mazie has been appointed class counsel in at least eight class actions, principally in cases that involve products liability. (Mendelsohn Dec. ¶ 5) Matthew R. Mendelsohn, a partner at Mazie, has practiced law since 2005, and has been class counsel in consumer class actions, primarily involving products-liability claims. (Mendelsohn Dec. Ex. A.) In 2013, he was appointed class counsel in a products-liability action brought in this District. (Mendelsohn Dec. ¶ 6.) McCune has been appointed class counsel in class actions involving products liability and consumer fraud claims. (Schlkopf Dec. ¶¶ 8-14 & Ex. A.) Matthew D. Schelkopf, a partner at McCune, has practiced law since 2002, and has been class counsel in at least seven class actions, all of them involving products-liability claims. (Schelkopf Dec. ¶¶ 8-14.)

***8** Based on their performance in this case, the experience of the law firms and of the attorneys of record, and of the resources available to those attorneys, the Court appoints the Finkelstein, Mazie and McCune firms as co-class counsel in this case.

D. Class Period.

Plaintiffs' notice of motion seeks to certify a class "of all New York North American Power & Gas, LLC customers who paid North American Power & Gas, LLC's variable rate ...." (Docket # 50.) This proposed class is overbroad and does not account for the relevant limitations periods.

This action was filed on February 20, 2015. New York General Business Law sections 349(a) and 349-d(3) has a three-year limitations period. CPLR 214(2); Gaidon v. Guardian Life Ins. Co. of Am., 96 N.Y.2d 201, 209-10 (2001). For claims under the General Business Law, the plaintiff class is limited to consumers who paid North American's variable rate on or after February 20, 2012.

Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing are governed by the six-year limitations period of CPLR 213(2). North American first began selling electricity to New York consumers in or around June 2011. (See Kinneary 4/7/16 Dep. at 19.) For the claims alleging breach of contract and breach of the covenant of good faith and fair dealing, the class includes consumers who paid North American's variable market based rates in or after June 2011.

CONCLUSION.
Plaintiffs' motion for class certification is GRANTED. (Docket # 50.) The Clerk is directed to terminate the motion.

The law firms of Finkelstein, Blankinship, Frei-Pearson & Garber, LLP, Mazie Slater Katz & Freeman, LLC and McCuneWright LLP are jointly appointed to act as class counsel.

Within 21 days, class counsel shall submit a proposed form of notice to class members and a proposed plan for distributing notice.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7009062

Footnotes

1 The Court addresses the qualification of plaintiffs' counsel under Rule 23(g) below.

Tab 4

2022 WL 306437
Only the Westlaw citation is currently available.
United States District Court, N.D. New York.

Antonio MARTINEZ, in his capacity as executor of Naomi Gonzales' estate, Plaintiff,

v.

AGWAY ENERGY SERVICES, LLC, Defendant.

5:18-CV-00235 (MAD/ATB)

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Signed 02/02/2022

Attorneys and Law Firms

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MEMORANDUM-DECISION AND ORDER

Mae A. D'Agostino, United States District Judge:

I. INTRODUCTION

***1** Naomi Gonzales ("Decedent") commenced this putative class action against Defendant Agway Energy Services, LLC, on December 6, 2017, in the United States District Court for the District of Delaware. *See* Dkt. No. 1. Decedent purported to bring this action on her own behalf and on behalf of (1) a class consisting of Defendant's New York and Pennsylvania customers charged a variable rate for residential electricity services from November 2011 to the present (the "New York/Pennsylvania Class"); and (2) a sub-class of Defendant's New York customers charged a variable rate for residential electricity services from November 2011 to the present (the "New York Sub-Class"). *See id.* at 13. Plaintiff asserted five claims against Defendant: (1) violations of New York General Business Law ("GBL") § 349 on behalf of the New York Sub-Class; (2) violations GBL § 349-d on behalf of the New York Sub-Class; (3) breach of contract on behalf of the New York/Pennsylvania Class; (4) breach of implied covenant of good faith and fair dealing on behalf of the New York/Pennsylvania Class; and (5) unjust enrichment on behalf of the New York/Pennsylvania Class. *See id.* at 15-21.

On January 29, 2018, Defendant filed a motion to dismiss and the case was transferred to the United States District Court for the Northern District of New York by stipulation of the parties. On October 22, 2018, this Court granted Defendant's motion to dismiss in part and denied it in part, dismissing Plaintiff's breach of implied covenant of good faith and fair dealing and unjust enrichment claims. *See* Dkt. No. 81. Decedent subsequently passed away and, on April 1, 2021, U.S. Magistrate Judge Andrew T. Baxter granted a motion to substitute Antonio Martinez, in his capacity as the executor of Decedent's estate, as Plaintiff. *See* Dkt. No. 125.

Currently before the Court is (1) Plaintiff's motion for class certification, *see* Dkt. No. 136; (2) Defendant's motion for summary judgment or, in the alternative, to strike Plaintiff's proposed expert, *see* Dkt. No. 137; (3) Defendant's motion to deny class certification, *see* Dkt. No. 138; (4) Plaintiff's motion to strike Defendant's motion to deny class certification, *see* Dkt. No. 139; and (5) Defendant's motion to strike Plaintiff's statement of additional material facts, *see* Dkt. No. 156. For the reasons that follow, Plaintiff's motion for class certification is granted in part and denied in part and Defendant's motion to deny class certification is granted in part and denied in part; Plaintiff's motion to strike Defendant's motion to deny class certification is denied; Defendant's motion for summary judgment is granted in part and denied in part; Defendant's motion to strike Plaintiff's proposed expert is granted; and Defendant's motion to strike Plaintiff's statement of additional material facts is denied.

II. BACKGROUND

In the electricity industry, traditionally, local incumbent utilities maintained monopoly control over electricity distribution systems within set geographic zones. However, in the late 1990s, regulators in New York and Pennsylvania deregulated the electricity market and allowed Energy Supply Companies ("ESCOs") to buy or generate electricity wholesale for resale or sale to customers by, for example, owning electricity production facilities, purchasing electricity from wholesale brokers, or purchasing futures contracts for the delivery of electricity at a predetermined price. Many ESCOs offer variable prices, promotional rates, guarantees that energy will come from renewables, and incentives like cash rebates and gift cards. Utilities are still delivered to customers using the incumbent utilities' transmission or distribution systems, but customers pay the cost of the utility to the ESCO. Defendant is a limited liability Delaware corporation and an ESCO eligible to sell electricity to residential and commercial customers in New York and Pennsylvania.

***2** Decedent was a resident of New York and received electricity from her local utility, Central Hudson. In December 2015, Decedent decided to switch her electricity provider to Defendant, who confirmed her enrollment via a recorded Third-Party Verification ("TPV") call. *See* Dkt. No. 152-6 at ¶ 29. During the TPV call, Defendant's representative informed Decedent that she would "be placed on [Defendant's] monthly variable rate Electricity Program with [her] first month introductory price being 4.4 cents per kilowatt hour." Dkt. No. 137-9 at 7. Defendant's representative explained that she would "continue to receive [Defendant's] competitive market based monthly variable rate until [she] notif[ied] [Defendant] of [her] wish to cancel" and that, as part of the electricity program, she would "also automatically receive the ... Energy Guard Repair Program that provides coverage for [the] [central] air conditioning unit and electric wiring in [her] home." *Id.* Finally, the representative informed her that participation in Defendant's electricity program was "not a guarantee of future savings." *Id.*

After completing the TPV call, Defendant mailed Decedent a Customer Disclosure Statement, Welcome Letter, and EnergyGuard brochure. *See* Dkt. No. 152-6 at ¶ 30. The Customer Disclosure Statement stated that

> the price for all electricity sold under this Agreement shall be a variable rate which shall each month reflect the cost of electricity acquired by [Defendant] from all sources (including energy, capacity, settlement, ancillaries), related transmission and distribution charges and other market-related factors, plus all applicable taxes, fees, charges or other assessments and [Defendant's] costs, expenses and margins.

Dkt. No. 137-10 at 3. The Customer Disclosure Statement further provided that "Savings are NOT guaranteed." *Id.* Decedent's Welcome Letter stated as follows:

> For being an ... electricity customer, [Defendant] also include[s] the peace of mind and added value of [the] Energy Services EnergyGuard Repair Program.... EnergyGuard provides you with protection in the

> event of a breakdown of your residential central air conditioning unit or a problem with the electrical wiring in your home. It provides up to a maximum of $1000 for parts and labor per each service plan every calendar year that you're a customer.

Id. at 2. The EnergyGuard brochure stated that, "[a]s an ... Energy Services electricity customer[,] you automatically receive all the benefits of our ... EnergyGuard repair program" and provided further specifics on the program. *Id.* at 5. Decedent's enrollment in Defendant's electricity program commenced in February 2016 and continued until October 2017, when Decedent cancelled her contract. *See* Dkt. No. 152-6 at ¶ 31; Dkt. No. 137-12 at ¶ 26. Decedent had been provided an introductory rate of $0.044 per kilowatt hour for her first two months in the electricity program, and then she was switched to Defendant's variable rate for the remainder of her time.

The New York Public Service Commission ("NYPSC") is the New York regulatory agency with supervisory authority over all ESCOs in New York. In December 2019, the NYPSC issued an "Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process" ("NYPSC order") to "strengthen[ ] protections for residential and small commercial customers (mass-market customers) in the retail energy market." Dkt. No. 137-5 at 2, 3. The NYPSC order was the result of a ten-day evidentiary hearing before two administrative law judges and involved the testimony and cross-examination of twenty-two witnesses and panels of witnesses. *See id.* at 5-6. The NYPSC ultimately determined that:

> any product marketed by an ESCO after the effective date of ... this Order must meet at least one of three criteria, with one exception noted below: (a) it must include guaranteed savings; (b) it must be a fixed-rate product compliant with a price limit; or, (c) it must be a renewably sourced product compliant with rules regarding content, sourcing, and transparency.

Id. at 17. The single exception to this rule was Defendant, who was provided with "a limited opportunity to continue to offer its EnergyGuard service" because it was the only ESCO to provide "detailed evidence" demonstrating that its value-added and energy related product or service "provide[d] a unique benefit that may be reasonably comparable to its costs." *Id.* at 21. As an ESCO validly offering an value-added energy related product or service, Defendant was "permitted to charge prices higher than the utility default supply rate." *Id.* at 22. Other ESCOs had a "limited opportunity" to apply for a similar exception. *Id.* at 19.

***3** Plaintiff now argues that his motion for class certification should be granted because he has satisfied all of the requirements under Rule 23(a) of the Federal Rules of Civil Procedure, as well as the requirements of Rule 23(b)(2) and 23(b)(3). *See* Dkt. Nos. 136, 149, 155. Defendant opposes class certification, arguing that Plaintiff cannot show by a preponderance of the evidence that the commonality, typicality, or adequacy requirements of Rule 23(a), or the requirements of Rule 23(b)(2) and 23(b)(3), have been met. *See* Dkt. Nos. 138, 150, 154. [1] Defendant also argues that its motion for summary judgment should be granted against Plaintiff because (1) Plaintiff cannot establish that it breached its contract with Decedent as a matter of law because it complied with the actual terms of that contract; (2) Plaintiff's GBL claims must be dismissed because they are duplicative of the breach of contract claim and the NYSPC orders definitively determined that Defendant's variable rates are reasonable. *See* Dkt. Nos. 137, 156. Defendant further argues that the opinion of Plaintiff's proposed expert, Dr. Felder, must be struck because his proffered testimony is unsupported and without a reliable foundation and therefore inadmissible under Rule 702 of the Federal Rules of Evidence, *see id.*, and that Plaintiff's Statement of Additional Material Facts should be struck for failure to comply with Local Rule 56.1, *see* Dkt. No. 156. Plaintiff opposes these motions. *See* Dkt. Nos. 151, 157.

III. DISCUSSION

A. Class Certification [2]

1. Standard

"In evaluating a motion for class certification, the district court is required to make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' and must resolve material factual disputes relevant to each Rule 23 requirement." *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010) (quoting *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)). "A district court enjoys broad discretion when it comes to resolving questions of class certification because it 'is often in the best position to assess the propriety of the class and has the ability ... to alter or modify the class, create subclasses, and decertify the class whenever warranted.' " *V.W. by and through Williams v. Conway*, 236 F. Supp. 3d 554, 572 (N.D.N.Y. 2017) (quoting *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001)).

Rule 23(a) sets forth four threshold requirements for class certification:

> (1) the class is so numerous that joinder of all members is impracticable, (2) questions of law and fact are common to the class, (3) the claims or defenses of the representative parties are typical of the claims of defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). After the threshold requirements in Rule 23(a), "[t]he district court must also determine whether the action can be maintained under Rule 23(b)(1), (2), or (3)." *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 238 (2d Cir. 2012). Additionally, "courts have written a third, 'implied requirement' into the Rule: a party seeking certification must demonstrate that the proposed class is 'ascertainable.' " *V.W.*, 236 F. Supp. 3d at 573 (quotation omitted).

"A party seeking class certification must affirmatively demonstrate [its] compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) ("Rule 23 does not set forth a mere pleading standard"). "The party seeking class certification bears the burden of establishing by a preponderance of the evidence that each of Rule 23's requirements has been met." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (citations omitted). Although "a court's class-certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim, Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans and Tr. Funds*, 568 U.S. 455, 465-66 (2013) (citations omitted). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 466.

***4** "In sum, '[c]lass certification is appropriate where the proposed class meets, by a preponderance of the evidence following a court's "rigorous analysis," the requirements of Rule 23(a) and the proposed class constitutes one of the types of classes enumerated in Rule 23(b).' " *V.W.*, 236 F. Supp. 3d at 573 (quoting *Stinson*, 282 F.R.D. at 367).

2. Numerosity

The first element of certification under Rule 23 requires a plaintiff to demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). As "the bearer[ ] of the burden to show joinder is impracticable," a plaintiff need only " 'show some evidence of or reasonably estimate the number of class members' " and " 'need not show the exact number.' " *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (quotation omitted).

The Court concludes that Plaintiff has satisfied the numerosity requirement. Plaintiff asserts—and Defendant does not dispute—that Defendant "had many thousands of residential electricity customers on a variable rate during the relevant class period." Dkt.

No. 136-1 at 26; *see also* *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (holding that "numerosity is presumed" where a putative class has forty or more members).

3. Commonality

The second element of certification under Rule 23 requires Plaintiff to demonstrate that there "are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This element "does not require all questions of law or fact to be common"; indeed, "even a single common question will suffice." *Sykes v. Mel Harris & Assocs., LLC*, 285 F.R.D. 279, 286 (S.D.N.Y. 2012), *aff'd* 780 F.3d 70 (2d Cir. 2015) (citing *Wal-Mart*, 564 U.S. at 359). However, the mere "existence of a 'common contention' is not sufficient; rather, '[t]hat common contention, ... must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.' " *Callari v. Blackman Plumbing Supply, Inc.*, 307 F.R.D. 67, 75 (E.D.N.Y. 2015) (quoting *Wal-Mart*, 564 U.S. at 350). "Therefore, what matters is 'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.' " *Sykes*, 285 F.R.D. at 286 (quoting *Wal-Mart*, 564 U.S. at 350). "Plaintiffs may satisfy the commonality requirement with 'significant proof' that a general policy or practice caused the alleged violations of class members' rights." *J.B. v. Onondaga Cnty.*, 401 F. Supp. 3d 320, 331 (N.D.N.Y. 2019) (quoting *Wal-Mart*, 564 U.S. at 353).

Plaintiff has met his burden with respect to the commonality requirement. The entire New York Sub-Class shares the claim that Defendant made deceptive representations, statements, and omissions about its variable rate in violation of GBL §§ 349 and 349-d. This common contention rests on facts that are consistent across the entire class—Plaintiff has provided significant proof that the contracts and documentation given to Defendant's customers were substantially uniform across the whole class, *see* Dkt. No. 151-4 at 5; and that the variable rate set by Defendant was similarly consistent, *see id.* at 5-6. Accordingly, a classwide proceeding should generate common answers apt to drive the resolution of the GBL claims. In opposition, Defendant makes a number of arguments concerning the ultimate merits of Plaintiff's claims, *see* Dkt. No. 150 at 8-13, but does not directly address whether this proceeding would generate common answers, *see* *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F.3d 52, 58 (2d Cir. 2000) (" 'Nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action' ") (quotation omitted).

4. Typicality

***5** Rule 23(a)(3) requires plaintiffs to show that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "To establish typicality[,] ... the party seeking certification must show that 'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.' " *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). "Typicality requires that 'the disputed issue[s] of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.' " *Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016) (quoting *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999)). "One purpose of the typicality requirement is 'to ensure that ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " *Id.* at 272 (quoting *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997)). Thus, the typicality requirement is met (1) if the "claims of [the] representative plaintiffs arise from [the] same course of conduct that gives rise to claims of the other class members," (2) "where the claims are based on the same legal theory," and (3) "where the class members have allegedly been injured by the same course of conduct as that which allegedly injured the proposed representative." *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 375 (S.D.N.Y. 2000) (citing *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992)).

Here, Plaintiff's GBL claims are typical of the claims of the New York Sub-Class. Plaintiff's GBL claims arise from the same representations and contractual agreements as the class claims, depend on the same legal theories as the class claims, and request the same relief as the class claims. Defendant argues that Plaintiff cannot show typicality because Plaintiff was never personally a customer of Defendant, and has no actual knowledge the facts underlying Decedent's individual claim. *See* Dkt. No. 150 at

13-17. However, Plaintiff is not bringing this claim in his individual capacity; he was substituted into the action as executor of Decedent's estate, and accordingly occupies the same position as Decedent did. *See Harrow v. Prudential Ins. Co. of Am.*, 279 F.3d 244, 248 n.7 (3d Cir. 2002) ("When an executor or administrator continues with a decedent's claim, she 'stands in the shoes of the decedent' ") (quotation omitted). His individual knowledge and experiences with Defendant are therefore irrelevant to the determination of whether Decedent's "claims or defenses ... are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). [3] Defendant does not address the typicality of Decedent's claims generally. Thus, the Court finds that Plaintiff has met his burden under Rule 23(a)(3).

5. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "Under Rule 23(a)(4), adequacy of representation is measured by two standards. First, class counsel must be 'qualified, experienced and generally able' to conduct the litigation. Second, the class members must not have interests that are 'antagonistic' to one another." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992), *cert. dismissed* 506 U.S. 1088 (1993) (quotation omitted). When determining whether the proposed class representative's interests are antagonistic to the interests of other class members, [4] "[a] conflict or potential conflict alone will not ... necessarily defeat class certification—the conflict must be 'fundamental.' " *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) (quotation omitted). Furthermore, although class representatives cannot satisfy Rule 23(a)(4)'s adequacy requirement if they have " 'so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys,' " *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (quotation omitted), " 'it is well established that "in complex litigations ... a plaintiff need not have expert knowledge of all aspects of the case to qualify as a class representative, and a great deal of reliance upon the expertise of counsel is to be expected," ' " *In re NTL, Inc. Securities Litig.*, No. 02-CIV-3013, 2006 WL 330113, *11 (S.D.N.Y. Feb. 14, 2006) (quotation omitted).

***6** "There is no *per se* rule that an estate administrator cannot be a class representative, and courts have found estate administrators to be adequate class representatives notwithstanding the possible evidentiary and discovery challenges this might cause." *Allen v. Holiday Universal*, 249 F.R.D. 166, 186 (E.D. Pa. 2008) (citations omitted); *see also Jie Zhang v. Wen Mei, Inc.*, No. CV14-1647, 2015 WL 6442545,*6 (E.D.N.Y. Oct. 23, 2015); *Kamerman v. Ockap Corp.*, 112 F.R.D. 195, 196 (S.D.N.Y. 1986). However, "a proposed class representative may not satisfy the adequacy prong if his or her case involves problems that 'could become the focus of cross-examination and unique defenses at trial, to the detriment of the class.' " *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 177 (S.D.N.Y. 2008) (quotation omitted).

Plaintiff will fairly and adequately protect the interests of the New York Sub-Class. Initially, Plaintiff has demonstrated sufficient knowledge of this case to vigorously represent the interests of the class and protect those interests against any competing interests of his attorneys. Plaintiff petitioned the Surrogate's Court for limited letters of administration for the sole purpose of taking over the instant action on behalf of Decedent's estate, "regularly engaged with counsel," sat for a deposition, and "understands that [he is] to remain engaged in each part of litigation, consider any settlement offers, and have knowledge of the case." Dkt. No. 149-1 at ¶¶ 4, 8. [5] Defendant, however, argues that Plaintiff cannot adequately protect the interests of the class due to his lack of personal knowledge about the facts underlying Decedent's individual claim. *See* Dkt. No. 138-1 at 17. Defendant identifies a number of alleged deficiencies in Plaintiff's knowledge, including: (1) the details of Decedent's enrollment with Defendant, including the phone call and the various contract documents; (2) what Decedent's state of mind and expectations were when she enrolled with and subsequently left Defendant's energy program; (3) Decedent's understanding of the contract terms; and (4) Plaintiff's personal knowledge and experience in enrolling with Defendant's energy program. *See* Dkt. No. 138-1 at 13-14.

The Court finds that this alleged lack of knowledge will not become a material issue at trial to the detriment of the class as a whole. The Court notes that the critical evidence in Plaintiff's claims—such as the contents of the key documents and the transcript of the phone call with Decedent—are uncontroverted. Plaintiff's lack of personal experience enrolling with Defendant's energy program or switching energy providers is wholly irrelevant given that Plaintiff is here in his capacity as the executor of Decedent's estate, not in an individual capacity. As to Decedent's state of mind and her subjective expectations,

Defendant fails to explain why testimony on these issues would be necessary at trial. Indeed, as Plaintiff argues, the surviving GBL claims do not require an individualized examination of the Decedent's subjective state of mind or expectations; instead, they depend on generalized, objective evidence. *See In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409 (S.D.N.Y. 2015) ("Materiality under Section 349 of the GBL is an objective inquiry; a deceptive act is defined as one 'likely to mislead a reasonable consumer acting reasonably under the circumstances.' ... Plaintiffs' GBL claims thus depend on generalized evidence") (quoting *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000)).

***7** Defendant also argues that Plaintiff cannot adequately represent the class because his personal interests as executor and someone who never individually received Defendant's services "directly contradict[s] those of every class member who deliberately chose [Defendant] in order to receive EnergyGuard." Dkt. No. 138-1 at 17. Specifically, Defendant argues that, due to his position as "an executor for a former customer," Plaintiff is "uninterested" in the continued viability of the EnergyGuard service, *id.* at 16, and "cannot perceive [EnergyGuard-specific] avenues for relief because he does not stand in the shoes of a present customer." Dkt. No. 154 at 10. However, the Court finds that even though Plaintiff—as the representative of a former customer's estate—might not personally care about the future financial viability of the EnergyGuard service, this speculative conflict does not rise to the level of a "fundamental" conflict that would preclude the formation of a class. *Denny*, 443 F.3d at 268; *see also Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 767 (8th Cir. 2020), *cert. denied* 141 S. Ct. 2551 (2021) ("[The defendant's] purported conflict is entirely speculative and is insufficient to render class certification inappropriate because it relies on nothing more than conjecture about how this lawsuit will affect [the defendant]'s future dealings with current policyholders"); *Allen v. Holiday Universal*, 249 F.R.D. 166, 181-82 (E.D. Pa. 2008) (holding that a purported conflict between former health club members, who seek only to recover damages, and current members, who potentially have an interest in maintaining their memberships, was "not substantial and [was] overly speculative and, thus, [did] not preclude a finding of the Plaintiffs' adequacy to represent the class"); *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144, 152 (E.D.N.Y. 1996) ("While active and retired employees may have some divergent interests ... [a]ll participants seek the same 'make-whole' relief claimed by the named plaintiffs").

6. Rule 23(b)(2)

Under Rule 23(b)(2), certification is appropriate where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' " *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (quotation omitted). "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.*

Here, certification of a New York Sub-Class for injunctive relief is appropriate. The injunctive relief sought by Plaintiff—an order enjoining Defendant from undertaking any further unlawful conduct under GBL §§ 349 and 349-d with respect to its variable rate—would apply to all or none of the New York Sub-Class. *See* Dkt. No. 1 at ¶¶ 57, 65. However, Defendant correctly notes that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Wal-Mart Stores, Inc.*, 564 U.S. at 360-61. Here, the GBL claims seek trebled compensatory damages, trebled statutory damages, and punitive damages, *see* Dkt. No. 1 at ¶¶ 56, 58, 64, which are far from "incidental to a final injunctive or declaratory remedy." *Amara v. CIGNA Corp.*, 775 F.3d 510, 520 (2d Cir. 2014). Nevertheless, " '[w]here a plaintiff seeks both declaratory and monetary relief, the court may separately certify a damages-seeking class under Rule 23(b)(3), and an injunction-seeking class under Rule 23(b)(2).' " *Tomassini v. FCA US LLC*, 326 F.R.D. 375, 387 (N.D.N.Y. 2018) (quotation omitted). Accordingly, the Court certifies a New York Sub-Class solely for injunctive relief under Rule 23(b)(2), and will address a separate New York Sub-Class for damages under Rule 23(b)(3), below.

7. Rule 23(b)(3)

A Rule 23(b)(3) class may be certified if "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "This 'predominance' requirement is satisfied if: (1) resolution

of any material 'legal or factual questions ... can be achieved through generalized proof,' and (2) 'these [common] issues are more substantial than the issues subject only to individualized proof.' " *In re Petrobras Secs.*, 862 F.3d 250, 270 (2d Cir. 2017) (quoting *Mazzei v. Money Store*, 829 F.3d 260, 272 (2d Cir. 2016)). The presence of individualized damage issues cannot, by itself, defeat class certification under Rule 23(b)(3). *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70, 81 (2d Cir. 2015). Once predominance is established, the Court must determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating" the claims at issue. Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) lists four factors pertinent to a court's consideration:

***8** (A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). "[M]anageability 'is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication.' " *Sykes*, 780 F.3d at 82 (quotation omitted).

Here, common questions of law and fact predominate in the New York Sub-Class for Damages. As discussed above, the GBL claims depend on generalized, objective evidence (*e.g.*, the standardized customer agreements and representations made to Defendant's customers), and depend on common questions of law (*e.g.*, whether Defendant's representations were likely to mislead a reasonable consumer acting reasonably under the circumstances). Although some individualized issues may arise with respect to calculating damages, they do not predominate over the issues of law and fact that are common across the class. The Court also finds that a class action is a superior means of adjudication for these claims. Due to the predominating common questions of law and fact, the Court will foster economies of time, effort, and expense by prosecuting this action as a class, and avoid the risk of inconsistent or varying adjudications. *See Zhang v. Ichiban Group, LLC*, No. 1:17-CV-148, 2021 WL 3030052, *8 (N.D.N.Y. May 21, 2021) ("[A]lthough the damages may differ depending on the class member, the claims all involve the same policies and practices. Forcing the proposed class members to litigate nearly identical grievances in individual actions 'would risk disparate results among those seeking redress, ... would exponentially increase the costs of litigation for all, and would be a particularly inefficient use of judicial resources' ") (quotation omitted).

8. Ascertainability

Under the implied element of ascertainability, " '[a]n identifiable class exists if its members can be ascertained by reference to objective criteria.' " *Id.* at *2 (quoting *Stinson v. City of N.Y.*, 282 F.R.D. 360, 367 (S.D.N.Y. 2012)). Plaintiff has satisfied this requirement. The members of the class are readily identifiable pursuant to objective criteria, including, but not limited to, the records maintained by Defendants.

Accordingly, Plaintiff's motion for class certification is granted to the extent it sought class certification for a New York Sub-Class, and the New York Sub-Class is divided into the New York Sub-Class for Damages and a New York Sub-Class for Injunctive Relief. Plaintiff's motion for class certification is otherwise denied. Defendant's motion to deny class certification is accordingly granted in part and denied in part.

B. Defendant's Motion to Strike Plaintiff's Statement of Additional Material Facts

In its reply brief, Defendant asks the Court to strike portions of Plaintiff's Statement of Additional Material Facts because those portions "completely disregard [Local Rule 56.1] to the point that they cannot remotely be considered good faith compliance." Dkt. No. 156 at 8. Local Rule 56.1 states that the "Statement of Material Facts shall set forth, in numbered paragraphs, a short and concise statement of each material fact about which the moving party contends there exists no genuine issue."

***9** Although Plaintiff's lengthy Statement of Additional Material Facts does contain some disputed opinions and legal arguments, the Court does not believe that the drastic measure sought by Defendant is warranted in this case. Instead, the Court will disregard any improper assertions and consider the statements in Plaintiff's Statement of Additional Material Facts only to the extent they are supported by the record. *See ScentSational Techs., LLC v. PepsiCo, Inc.*, No. 13-CV-8645, 2017 WL 4403308, *7 (S.D.N.Y. Oct. 2, 2017) ("The Court will consider the facts contained in Plaintiff's Rule 56.1 Statement to the extent that they are not conclusory and are supported by the record"); *Ross U. Sch. of Med., Ltd. v. Brooklyn-Queens Health Care, Inc.*, No. 09-CV-1410, 2012 WL 6091570, *6 (E.D.N.Y. Dec. 7, 2012) ("[C]ourts in this Circuit frequently deny motions to strike paragraphs in Rule 56.1 statements, and simply disregard any improper assertions"), *report and recommendation adopted in part*, 2013 WL 1334271 (E.D.N.Y. Mar. 28, 2013); *Mihalik v. Credit Agricole Cheuvreux N.A., Inc.*, No. 09 CIV. 1251, 2011 WL 3586060, *4 (S.D.N.Y. July 29, 2011) ("[F]ollowing the practice of several other courts in the district, this Court will disregard any statements that lack support or are otherwise inadmissible"), *vacated and remanded on other grounds*, 715 F.3d 102 (2d Cir. 2013).

Accordingly, Defendant's motion to strike Plaintiff's Statement of Additional Material Facts is denied.

C. Defendant's Motion for Summary Judgment

1. Standard of Review

A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the movant as a matter of law. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir. 1994) (citations omitted). When analyzing a summary judgment motion, the court " 'cannot try issues of fact; it can only determine whether there are issues to be tried.' " *Id.* at 36-37 (quotation and other citation omitted). Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). In assessing the record to determine whether any such issues of material fact exist, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *See Chambers*, 43 F.3d at 36 (citing *Anderson*, 477 U.S. at 255) (other citations omitted). Irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute. *See Anderson*, 477 U.S. at 258.

The moving party bears the initial burden of establishing that there is no genuine issue of material fact to be decided. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). With respect to any issue on which the moving party does not bear the burden of proof, it may meet its burden on summary judgment by showing that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325. Once the movant meets this initial burden, the nonmoving party must demonstrate that there is a genuine unresolved issue for trial. *See* Fed. R. Civ. P. 56(e). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

2. Plaintiff's Breach of Contract Claim

Defendant argues that it is entitled to summary judgment on Plaintiff's breach of contract claim because Plaintiff cannot, as a matter of law, show that there is a triable issue of fact. *See* Dkt. No. 137-15 at 18-30. Specifically, Defendant argues that it complied with the plain and unambiguous language of its contract when it set the variable rate, *see id.* at 24-25, and that Plaintiff cannot establish that Defendant abused its discretion when setting the variable rate, *see id.* at 29. In opposition, Plaintiff argues that there are questions of fact concerning whether Defendant (1) breached the contract's promise to "charge 'competitive' rates that reflect market costs" when it set the variable rates "substantially higher than [the] utilities[,] who are [the] primary competitors in the electricity market," Dkt. No. 152 at 19, 22; and (2) violated "the terms of the contract" by charging "additional amounts to customers for the EnergyGuard service" when "[n]othing in the contract permits Defendant to charge extra for the EnergyGuard service," *id.* at 20-21.

***10** "To prevail on a breach-of-contract claim in New York, a plaintiff must prove: '(1) the existence of a contract, (2) performance by the party seeking recovery, (3) nonperformance by the other party, and (4) damages attributable to the breach.'

" *Moreno-Godoy v. Kartagener*, 7 F.4th 78, 85 (2d Cir. 2021) (quotation omitted). " '[T]he initial interpretation of a contract "is a matter of law for the court to decide." ' " *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002) (quotations omitted). It is well accepted that courts should construe contracts according to the parties' intent as derived from the contracts' unambiguous terms. "Whether or not a writing is ambiguous is a question of law to be resolved by the courts." *W.W.W. Assocs., Inc.*, 77 N.Y.2d at 162 (citation omitted). "When an agreement is unambiguous on its face, it must be enforced according to the plain meaning of its terms." *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011) (citing *South Rd. Assocs., LLC v. IBM*, 4 N.Y.3d 272 (2005)). The parties' intent is derived " 'from the plain meaning of the language employed' in the agreements," *Crane Co. v. Coltec Indus., Inc.*, 171 F.3d 733, 737 (2d Cir. 1999) (quotation omitted), when the agreements are "read as a whole," *W.W.W. Assocs., Inc.*, 77 N.Y.2d at 162. Courts must avoid "interpretations that render contract provisions meaningless or superfluous." *Manley v. AmBase Corp.*, 337 F.3d 237, 250 (2d Cir. 2003) (citations omitted).

Here, after drawing all reasonable inferences in Plaintiff's favor as the nonmoving party, the Court concludes that there is no genuine issue of material fact as to whether Defendant breached the contract when setting the variable rate. Initially, nothing in the contract precludes Defendant from including the cost of the EnergyGuard Program in the variable rate. The contract explicitly states that the variable rate would reflect multiple factors, including Defendant's costs, expenses and margins. Dkt. No. 137-10 at 3. The EnergyGuard Program is part of the services provided to Plaintiff under the contract, and the expense of running it would clearly fall within Defendant's "costs [and] expenses." *Id.* Plaintiff nevertheless argues that certain statements in the contract *required* Defendant to offer its EnergyGuard service at no extra cost and that any additional charges for that service would constitute a breach of the contract. *See* Dkt. No. 151 at 20-21. The specific language that Plaintiff relies on is (1) a statement in the Welcome Letter that, "[f]or being [Defendant's] electricity customer," Defendant would "include" the EnergyGuard program, Dkt. No. 137-10 at 2, and (2) a statement made during the TPV call that Plaintiff would "automatically receive" the EnergyGuard program, Dkt. No. 137-9 at 7. However, a plain reading of this language reveals only that Defendant automatically includes EnergyGuard with its electricity services—not that it would do so free of charge.

Furthermore, Plaintiff cannot create a triable issue of fact by showing that Defendant's rates are not "competitive" compared solely against those of the incumbent utilities. Although Defendant was obligated to provide a "competitive market based monthly variable rate," Dkt. No. 137-9 at 7, and to "exercise [its] discretion in good faith" when doing so, *Richards v. Direct Energy Services, LLC*, 915 F.3d 88, 99 (2d Cir. 2019), the contract here is "replete with language giving [Defendant] discretion to set prices based on factors other than the rates charged by traditional electric utility companies," *Brown v. Agway Energy Services, LLC*, 822 Fed. Appx. 100, 103 (3d Cir. 2020). To allow Plaintiff to measure the competitiveness of Defendant's rates solely against the regulated rates of the incumbent utilities would, "in effect," make the utility's rates "binding on private electricity suppliers"—an outcome in direct conflict with "the entire point of electricity deregulation," which was "to allow the market, rather than [a Public Utilities Regulatory Authority], to determine rates." *Richards*, 915 F.3d at 99; [6] *see also Brown*, 822 Fed. Appx. at 103 (holding that "[t]he fact that [Defendant] provides [EnergyGuard] to [the plaintiff] undermines [the] comparison of [Defendant]'s prices to that of a traditional electric utility supplier, which may not provide such a service"). Thus, to determine whether Defendant's rates were competitive, the proper comparison must be against the rates charged by Defendant's ESCO competitors.

***11** Here, Defendant has met its initial burden of establishing that there is no genuine issue of material fact to be decided. Defendant submits the report of its expert, Dr. Aron, comparing Defendant's rates to the rates charged by other New York ESCO participants in the market using publicly available "historical pricing data reported quarterly by ESCOs that offer no energy-related value-added services." Dkt. No. 137-12 at ¶ 109. In certain utility territories from January 2013 through February 2015—where Defendant was not offering EnergyGuard as part of its energy service—Dr. Aron found that Defendant's "variable rate [wa]s never the highest variable rate charged" and, sixty-three percent of the time, Defendant's variable rate "was below the median rate" offered by other ESCOs. *Id.* at ¶ 114. For the remainder of utility territories during the relevant time period, where Defendant was offering EnergyGuard, Dr. Aron again concluded that Defendant's variable rate was "never the highest rate in any utility territory in any quarter" and, ninety-eight percent of the time, Defendant's variable rate was "below the median rate" offered by other ESCOs. Dkt. No. 137-12 at ¶ 120. It is worth stressing that, for the latter comparison, Defendant's service

included an energy-related value-added service, and its variable rates were *still* below the median rates offered by ESCOs that offer no such value-added service *ninety-eight percent* of the time.

Plaintiff's expert, Dr. Felder, does not attempt to make his own comparison between Defendant's variable rates and the variable rates of other ESCOs. Instead, Dr. Felder argues that Dr. Aron has not established Defendant's rates were "competitive" because "it defies common sense to claim that a particular vendor ... is competitive if there are on average numerous competitors with lower prices." Dkt. No. 151-3 at ¶ 80. Dr. Felder, however, offers no support for this strained interpretation of "competitive"—especially in light of the wide discretion afforded to Defendant in setting the variable rate—nor does Dr. Felder account for Defendant's unique position, in comparison to other ESCOs, as a provider of an additional energy-related value-added service. Thus, Dr. Felder has not demonstrated that there is a genuine issue of material fact concerning the competitiveness of Defendant's variable rates.

Accordingly, Defendant's motion for summary judgment on Plaintiff's breach of contract claim is granted.

3. Plaintiff's N.Y. General Business Law §§ 349 and 349-d Claims

a. Skidmore Deference

Defendant argues that, under the *Skidmore* Doctrine, this Court should defer to the NYSPC's "definitive determination [that] ESCO variable rates are 'just and reasonable,' " Dkt. No. 156 at 15, and dismiss Plaintiff's General Business Law §§ 349 and 349-d claims as a matter of law because "[b]oth counts are based on the false premise that [Defendant] misrepresented its pricing components and did not comply with the disclosure provisions ... for ESCO contracts." Dkt. No. 137-1 at 18. In opposition, Plaintiff argues that *Skidmore* "deference only applies to the interpretation of a statute the agency in question is authorized to administer." Dkt. No. 152 at 11. Plaintiff asserts that the NYSPC order did not interpret or apply General Business Law §§ 349 or 349-d with respect to Plaintiff's claims and that "[t]here is no dispute here regarding the meaning of any statutes." *Id.* Plaintiff also argues that, in any event, the NYSPC order "did *not* find that Defendant's rates are in fact reasonable in relation to EnergyGuard's costs" and "never held that Defendant could not be sued for charging variable rates in violation of its Customer Agreement and in contravention of its representations that it would charge competitive rates that reflect its actual costs." *Id.* at 11, 12.

In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court held that "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (internal citation omitted) (quoting *Skidmore*, 323 U.S. at 139). "*Skidmore* deference is a 'more limited standard of deference' than *Chevron* deference," *In re Bernard L. Madoff Inv. Securities LLC*, 779 F.3d 74, 82 (2d Cir. 2015) (quoting *In re New Times Securities Services, Inc.*, 371 F.3d 68, 83 (2d Cir. 2004)), that generally applies to agency interpretations such as "policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Such interpretations "are 'entitled to respect' under [the] decision in *Skidmore* ... but only to the extent that those interpretations have the 'power to persuade.' " *Christensen*, 529 U.S. at 587 (quoting *Skidmore*, 323 U.S. at 140).

***12** In determining whether to defer to an agency's interpretation under *Skidmore*, courts generally first determine whether the statutory language at issue is ambiguous and, where the statute is unambiguous, a court may conclude "that *Skidmore* deference is inappropriate or unnecessary." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Envtl. Protec. Agency*, 846 F.3d 492, 509 (2d Cir. 2017).[7] *Skidmore* then "requires consideration of an agency's 'thoroughness, ... the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.' " *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 227-28 (2d Cir. 2002) (quoting *Skidmore*, 323 U.S. at 140).

The Court declines to apply *Skidmore* deference to the NYSPC order. Not only does Defendant fail to identify an ambiguity in the meaning of a statute, the NYSPC orders themselves are not relevant to Plaintiff's GBL §§ 349 and 349-d claims. Indeed, those orders—to the extent they were provided by the parties—did not "unequivocal[ly] endorse[ ]" Defendant's "business model," Dkt. No. 137-15 at 7; nor did they determine Defendant could never engage in deceptive acts or practices in the marketing of its EnergyGuard service. Rather, the NYSPC orders merely held out Defendant's EnergyGuard service as an example of an energy-related value-added product or service that an ESCO could permissibly offer at a price above the utility default supply rate, "without the requirement of being paired with a compliant guaranteed savings, fixed-rate, or renewably sourced product." Dkt. No. 137-5 at 21. Such a determination does not preclude a material question of fact as to whether Defendant engaged in deceptive acts or practices in the marketing of its energy service by "charg[ing] an unconscionably high rate" and making "misrepresentations ... with regard to the rate being market based ... for the purpose of inducing consumers to sign up." Dkt. No. 1 at ¶ 58. [8]

b. Are Plaintiff's GBL Claims Duplicative

Defendant argues that Plaintiff's GBL claims must be dismissed as duplicative of Plaintiff's breach of contract claim because the loss alleged under the GBL claims is indistinguishable from the loss alleged under the breach of contract claim. Dkt. No. 137-1 at 30. Defendant relies on *Spagnola v. Chubb Corp.*, 574 F.3d 64 (2d Cir. 2009), which dismissed a GBL § 349 claim where the plaintiff alleged damages in the amount of the purchase price of his contract, but failed to allege that the defendants had denied him the services for which he had contracted. *See Spagnola*, 574 F.3d at 74.

***13** However, as Plaintiff argues, this case is distinguishable from *Spagnola*. Here, Plaintiff has alleged that, "[a]s a direct and proximate result of Defendant's unlawful deceptive acts and practices," Plaintiff and the proposed class "suffered and continue[d] to suffer an ascertainable loss of monies based on the difference in the rate they were charged versus the rate they would have been charged had Defendant charged a rate based on market conditions and the factors specified in the [contract]." Dkt. No. 1 at 16-17. Plaintiff's allegation of injury in the "form of an overpayment or 'price premium,' whereby [he] pays more than she would have but for the deceptive practice," is sufficient to establish he suffered injury under the GBL. *Donnenfeld v. Petro, Inc.*, 333 F. Supp. 3d 208, 223 (E.D.N.Y. 2018); *see also Orlander v. Staples, Inc.*, 802 F.3d 289, 302 (2d Cir. 2015). It is not a requirement under New York law that "any monetary GBL injury must be independent of alleged breach of contract damages." *Donnenfeld*, 333 F. Supp. 3d at 224; *see also Nick's Garage, Inc. v. Progressive Casualty Ins. Co.*, 875 F.3d 107, 125 (2d Cir. 2017).

Accordingly, Defendant's motion for summary judgment on Plaintiff's GBL §§ 349 and 349-d claims is denied.

D. Defendant's Motion to Strike Plaintiff's Proposed Expert

Defendant argues that the opinion of Plaintiff's expert, Dr. Felder, should be deemed inadmissible under Rule 702 of the Federal Rules of Evidence. *See* Dkt. No. 137-15 at 31-43; Dkt. No. 156 at 18-22. Broadly stated, Defendant asserts that Dr. Felder's report "presents numerous opinions that are completely unsupported" and, therefore, his methodology lacks a reliable foundation. Dkt. No. 137-15 at 34. In opposition, Plaintiff argues that Dr. Felder's opinions are reliable and, "[e]ven if there were merit to any of Defendant's contentions, they would constitute '[d]isputes regarding ... an expert's use or application of [his] methodology' and would accordingly 'go to the weight, not the admissibility of [Dr. Felder's] testimony.' " Dkt. No. 152 at 38 (quotation omitted).

The admissibility of expert testimony is governed by Rule 702 of the Federal Rules of Evidence. That Rule provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the

> testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In reviewing the admissibility of expert testimony, "the district court has a 'gatekeeping' function under Rule 702—it is charged with 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.' " *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993)). The rule set forth in *Daubert* applies to scientific knowledge, as well as technical or other specialized knowledge. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999). As the Second Circuit has explained:

> In fulfilling this gatekeeping role, the trial court should look to the standards of Rule 401 in analyzing whether proffered expert testimony is relevant, i.e., whether it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Next, the district court must determine whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered. In this inquiry, the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case. In short, the district court must make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

***14** *Amorgianos*, 303 F.3d at 265-66 (internal alterations, quotations, and citations omitted).

"In undertaking this flexible inquiry, the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Amorgianos*, 303 F.3d at 266 (citation omitted). "In deciding whether a step in an expert's analysis is unreliable, the district court should undertake a rigorous examination of the facts on which the expert relies, the method by which the expert draws an opinion from those facts, and how the expert applies the facts and methods to the case at hand." *Id.* at 267. "A minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible." *Id.* "The judge should only exclude the evidence if the flaw is large enough that the expert lacks good grounds for his or her conclusions." *Id.* (quotation and other citation omitted). Accordingly, "the rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702, Advisory Committee's Note; *see also E.E.O.C. v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 456 (S.D.N.Y. 2004); *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, 313 F. Supp. 2d 213, 226 (S.D.N.Y. 2004). "This principle is based on the recognition that 'our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony.' " *Melini v. 71st Lexington Corp.*, No. 07-CV-701, 2009 WL 413608, *5 (S.D.N.Y. Feb. 3, 2009) (quoting *Amorgianos*, 303 F.3d at 267).

Here, Dr. Felder's opinion is inadmissible under Rule 702 because its conclusions are not the product of reliable principles or grounded in sufficient data. Dr. Felder's report primarily consists of a calculation of the amount of money Defendant is alleged to have overcharged its customers, based on a comparison between Defendant's revenues and the cost to Defendant from purchasing electricity from the relevant public utilities. *See* Dkt. No. 137-4 at 10-18. The soundness of this calculation rests on Plaintiff's and Dr. Felder's argument that the proper comparison for Defendant's variable rate is solely the rates of the incumbent utilities. However, as addressed in the breach of contract section above, allowing Plaintiff to make this comparison would be in direct conflict with "the entire point of electricity deregulation." *Richards*, 915 F.3d at 99. Dr. Felder's report does not attempt to make any comparison against the rates charged by Defendant's ESCO competitors. Thus, Dr. Felder's opinion and

report—which rests upon an unreliable methodology and insufficient data—is "simply inadequate to support the conclusions reached." *Amorgianos*, 303 F.3d at 266.

Accordingly, Defendant's motion to strike Plaintiff's proposed expert, Dr. Felder, is granted.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

***15 ORDERS** that Plaintiff's motion for class certification (Dkt. No. 136) is **GRANTED in part** and **DENIED in part**; [9] and the Court further

ORDERS that the New York Sub-Class is divided into a New York Sub-Class for Damages and a New York Sub-Class for Injunctive Relief; and the Court further

ORDERS that Plaintiff's motion to strike Defendant's motion to deny class certification (Dkt. No. 139) is **DENIED**; and the Court further

ORDERS that Defendant's motion to deny class certification (Dkt. No. 138) is **GRANTED in part** and **DENIED in part**; and the Court further

ORDERS that Defendant's motion for summary judgment (Dkt. No. 137) is **GRANTED in part** and **DENIED in part**; and the Court further

ORDERS that Defendant's motion to strike Plaintiff's proposed expert (Dkt. No. 137) is **GRANTED**; and the Court further

ORDERS that Defendant's motion to strike Plaintiff's Statement of Additional Material Facts (Dkt. No. 156) is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Slip Copy, 2022 WL 306437

Footnotes

1 Plaintiff argues that Defendant's separate motion to deny class certification should be struck and the contents instead be included in Defendant's opposition to Plaintiffs motion for class certification. *See* Dkt. No. 139. The Court does not perceive Defendant's motion to deny certification to be a pretext to circumvent the page limit or gain the last word

through a *de facto* sur-reply, or to be otherwise unduly burdensome or impermissible. Accordingly, Plaintiff's motion to strike is denied.

2 As addressed more fully in the summary judgment section below, the Court is granting Defendant's motion for summery judgment on the breach of contract claim. This leaves the New York/Pennsylvania Class without any surviving claims. Accordingly, Plaintiff's motion for class certification is denied with respect to the New York/Pennsylvania Class, and this section will only address the New York Sub-Class.

3 Defendant's arguments concerning Plaintiff's position as the executor of Decedent's estate are discussed more throughly in the "Adequacy" section below, which deals more directly with the ability of the representative party to fairly and adequately protect the interests of the class.

4 Defendant does not challenge the competency of Plaintiff's attorneys to represent the interests of the class members.

5 This Court may rely on Plaintiff's affidavit to establish Rule 23(a)(4)'s adequacy requirement. *City of Westland Police and Fire Ret. System v. MetLife, Inc.*, No. 12-CIV-0256, 2017 WL 3608298, *9 (S.D.N.Y. Aug. 22, 2017) (collecting cases).

6 Indeed, in *Richards*, the Second Circuit characterized the plaintiff's breach of contract claim—which asserted that a private electricity supplier "must have abused its discretion because [its] variable rate was higher" than the public utility rate—as "near-frivolous." *Richards*, 915 F.3d at 99.

7 Alternatively, a court may choose to "engage in *Skidmore* analysis without answering this threshold question by considering the statutory text as one of several factors relevant to determining whether the agency interpretation has the 'power to persuade.' " *Catskill Mountains*, 846 F.3d at 509 (quoting *Skidmore*, 323 U.S. at 140).

8 The Court notes that Defendant does not claim that the NYSPC orders are entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001) (holding that *Chevron* deference generally applies to interpretations issued pursuant to the agency's exercise of its formal rule-making authority). To the extent *Chevron* deference might be more appropriate for the NYPSC order—which was issued according to the NYSPC's formal rule-making authority under the New York Public Service Law and involved a formal adjudication—the application of such deference would be inappropriate for the same reasons as *Skidmore* deference.

9 Plaintiff's motion is granted as to the New York Sub-Class.

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Tab 5

2017 WL 6601993

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford, Complex Litigation Docket at Hartford.

Shane C. ROBERTS
v.
VERDE ENERGY, USA, INC.

X07HHDCV156060160S
|
File Date: December 6, 2017

Moukawsher, J.

1. *Summary: Common violations may be dealt with in common.*

***1** Substitute plaintiff Constance Jurich and her husband sue Verde Energy. They claim Verde overcharged them for electricity in violation of their contract and state statutes. They claim Verde was required to charge rates linked to wholesale market electric rates but didn't. They want the court to certify a class of all the consumers who had these kinds of contracts with Verde. Verde opposes class certification focusing on its view that the issues are too individualized to be addressed in a class action. The court grants class certification because liability focuses on common questions of standard contract language and its conformity with the law. Conceivable individual issues are not an obstacle to class certification because they may not arise, may not overwhelm the litigation if they do arise, and if they overwhelm the litigation the court can modify or decertify the class.

2. *The potential class is numerous, shares common questions, and is represented by a typical class member who will adequately represent the class.*

Class certification is multi-layered. Practice Book § 9–7 permits representatives to bring suits on behalf of a class where:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Verde doesn't dispute that there are thousands of members of a potential class, so the court concludes it is impractical to join them all. There are common questions of law or fact to the class and they clearly predominate over any individual issues. A common contract is at issue. The parties hotly dispute what the contract means, the significance for its approval for use by the state, the significance of the statute mandating its content and the manner in which Verde sets rates for electricity. The resolution of all of these common issues would answer the common question of whether Verde violated its contract and any statutes.

Verde focuses on the complexity of its rate setting, including the fact that those rates reflect some individual determinations related to peak use and the inevitability that every customer has a different bill each month. Verde suggests that reconstructing any rate besides the one it charged would be impossible because of how it buys power, including its reliance on futures contracts, bulk rates, and incorporated peak use charges attributable to individual customers.

But Verde's concerns are at best premature. The class would have to prove liability first and then victory for the class would not necessarily require a reconstruction of the rates and Verde admits that while peak use charges are attributable to individuals they aren't billed to individuals but are extra charges that are spread over and paid by the entire class. Victory might consist solely of injunctive relief to abate any violations. It also might not involve any reconstruction of Verde's rates at all, but rely on setting an "appropriate" rate and comparing it to Verde's actual rates without reference to what batch of electricity was bought from whom and when. And if the only way to assess any form of relief after a decision on liability is either impossible or entirely individual, Practice Book § 9–9(b)(5) says the court's class certification orders "may be altered or amended as may be desirable from time to time." This means that if any of Verde's currently theoretical fears are realized the court can modify the class or even decertify it. Likewise, if it prevails on its claims that each class member would have to prove they read the contract and it caused them to do or refrain from doing something, this would call for a reordering of the class action management too. But there are certainly strong common issues and they predominate over individual issues that *might* affect some of the claims but in no case all of them.

***2** Constance Jurich is typical enough to be a class representative. Verde points out that she paid some of her bills late and got an undeserved credit and therefore Verde claims she sometimes had an atypical balance. But this doesn't matter on the question whether she was overcharged. She purchased electricity under the contract challenged. Verde also says she is atypical because the complaint is aimed at those with an alleged "teaser" rate that was artificially low and Jurich didn't have one. But the complaint claims Verde breached its promise to use market rates and violated state statutes in ways dependent on the departure from "appropriate" market rates. The complaint's reference to teaser rates doesn't make it dependent on teaser rates nor does its absence from Jurich's case make her atypical in terms of pressing the main claim about Verde's alleged abuse of the term "market rates."

Constance Jurich will fairly and adequately protect the interest of the class. There is no evidence she has any interest adverse to other class members. The evidence shows further that she is represented by counsel experienced and competent in both class action claims and claims of this specific type.

Niko Jurich, on the hand, has no basis to be a class representative. He was never a party to the contract at issue. He is merely Constance Jurich's husband. He would hardly be typical of parties contracting with Verde for this type of variable electric service when he never contracted with Verde at all. He is disapproved as a class representative.

3. *Common questions predominate and class action treatment is superior to other approaches*.

Constance Jurich seeks certification under Practice Book § 9–8(3). To win it, she must prove common questions of law or fact predominate over any purported individual questions. She must also prove a class action is superior to other available methods for the fair and efficient adjudication of the controversy. There is no point in repeating the analysis already performed on the commonality question. The common questions are real and numerous. The individual questions are contingent in character. They don't affect all claims for relief. And their impact may be judged and adjusted for as their character becomes clear.

A class action is superior to individual litigation. Consumer contracts affecting thousands of people but not necessarily yielding thousands of dollars to each class member are well suited for class certification. Without the class action method most claims like this wouldn't be brought, including claims with great social utility. Piecemeal litigation would be less workable. Given that much of the case depends on the central common legal issues surrounding the contract class members would have little interest in separately controlling the litigation and, as noted, if individual remedies appear to overwhelm the rest of the case, certification can be modified or withdrawn as may be justified. There is no other litigation the court knows that would compete with this litigation, so no disadvantage appears from that direction. This is a case about rates in Connecticut, so no other forum appears to have any advantages and barring the remedies possibilities alluded to, the central legal issues of this case are easily managed on a class basis. Therefore, the court finds the class method the superior method for the claims at issue.

4. *An opt-out class is certified, questions and the class are defined and notice is postponed*.

The court certifies a class defined as Jurich requests:

> All individual residential and small business consumers enrolled (either initially or through "rolling over" from a fixed rate plan) in a Verde Energy USA, Inc. variable rate electricity plan in connection with a property located within Connecticut at any time within the applicable statute of limitations preceding the filing of this action through and including the date of class certification, excluding persons whose *only* contract with Verde contained a "Governing Law and Arbitration" clause (as first introduced in or about October 2015).
>
> ***3** Specifically excluded from this Class are: the Defendant, the officers, directors and employees of Defendant; any entity in which Defendant has a controlling interest; any affiliate, legal representative of Defendant; the judge to whom this case is assigned and any member of the judge's immediate family; and any heirs, assigns and successors of any of the above persons or organizations in their capacity as such.

The court certifies as the class claims all claims set forth in the current version of the complaint. The court appoints as class representative Constance Jurich. The court appoints as class counsel the law firm of Izard Kindall & Raabe, LLP. As discussed on the record, the court will postpone any order of notice until the completion of legal challenges that may affect the class or eliminate this action. When the notice is given, Practice Book § 9–9(a)(2)(B)(v) provides that it must establish a way to "exclude from the class any member who requests exclusion ..." While the rule doesn't expressly state that this "opt-out" approach is exclusive, the court finds in any event that it is the best method in a case such as this where the complexity of the claims and the size of the individual amounts at stake may artificially depress participation and the significance of any remedy, thereby irrationally diluting the public benefit that might be gained from deterring any trade practice or other violations that might be found. Therefore, this class action will be an "opt-out" class action.

All Citations

Not Reported in Atl. Rptr., 2017 WL 6601993, 65 Conn. L. Rptr. 563

End of Document

Tab 6

2019 WL 1276501

Superior Court of Connecticut,
Judicial District of Hartford, Complex Litigation Docket at Hartford.

Shane C. ROBERTS

v.

VERDE ENERGY, USA, INC.

X07HHDCV156060160S

|

February 1, 2019

Opinion

Moukawsher, J.

***1** This court decided the consumer contract at issue in this case was illegally unclear about the rates consumers would be charged for electric power. It held that a statute specifically made this violation an automatic unfair or deceptive trade practice under CUTPA.

Verde now wants the court to decide summarily that the class certified in the case must fail or at least be ineligible for any kind of money award. Stripped of legalistic ornament, Verde protests paying money to people who haven't proved they were harmed by an inadequate rate disclosure. In its view, each class member should have to prove they relied on the disclosure at issue and were damaged by that reliance. Without monetary damage, Verde posits class members have no "ascertainable loss" of money or property as required by General Statutes § 42-110g(a) and therefore no cause of action. Verde further claims that even if the plaintiffs do prove monetary damages, the class cannot recover without proof of individual monetary losses. Verde also uses its claims about the individual character of the issue to undercut the continued treatment of this case as a class action.

But no dollar amount of ascertainable loss has to be alleged to bring a lawsuit. As the Connecticut Supreme Court held in 1981 in *Hinchliffe v. American Motors Corp.,* ascertainable loss may be shown merely by proving a purchase that is in part the product of an unfair or deceptive practice that results in a thing different from what was expected from the bargain. It also specifically held that consumers don't have to rely on misleading information to have a CUTPA claim.[1]

But Verde says that to prove the "ascertainable loss" prerequisite to prevailing under CUTPA—to get any equitable relief or money damages—requires proof that any claimed loss was legally caused by the wrongful act.

Indeed, there is some tension between the holding in *Hinchliffe* and a later 1994 holding in *Haesche v. Kissner* that says the deceptive practice must have caused harm.[2] The only way to reconcile them is to say that a plaintiff suffering no harm from a practice can receive no recovery, but qualifying harms need not be limited solely to harm caused by reliance on a misrepresentation.

After all, *Hinchliffe* said the loss doesn't have to be precise to be ascertainable. Here, it may be the value of the opportunity the class lost to benefit from better bargains that could have been chosen following adequate disclosure. This is, of course, a harder financial harm to qualify than individual harm, but it may prove a significant financial harm nonetheless.

There is a good reason courts don't require more precise and more individual determinations of detrimental reliance to meet the ascertainable loss threshold. It's Verde that deprived the class of its chance to make these determinations. Therefore, it's Verde not the class that for ascertainable loss purposes must bear the burden of not knowing who would have made what choice and what savings would have resulted. Nonetheless, if it turns out there weren't any financially better opportunities class members might have been chosen, the lost opportunity would not only be imprecise, it would be worthless, and thus it would mean that the class has suffered no ascertainable loss.

***2** The court cannot ignore the ascertainable loss requirement. But it must also avoid weakening the statute that makes unclear rate disclosures unfair trade practices. The purpose of that statute is to help ratepayers do something about unclear rate disclosures. It would defeat that purpose if our inability to say precisely how people would respond to a clear notice would stop people from complaining about an unclear notice. That would allow the party issuing the unclear notice to profit from its own wrong.

To the extent that ascertainable loss doesn't require individual reliance and individual calculations, this settles the summary

judgment and class legal issues raised. The rest will depend upon the facts.

The class says it did suffer money damages, but it complains that the court has stayed discovery, tying its hands in its quest to quantify these losses. Following discovery, it may appear that there is no way adequately to prove damages the court can award. This may mean the court could find the class made it over the ascertainable loss threshold but was tripped up by its failure to prove a specific credible damage amount. The result could be a judgment for the defendant or some other form of relief such as equitable relief.

But all that will have to wait for another day. In the meantime, the motions for summary judgment and to alter class certification are denied. The discovery stay is lifted.

All Citations

Not Reported in Atl. Rptr., 2019 WL 1276501, 67 Conn. L. Rptr. 761

Footnotes

1 184 Conn. 607, 614-17.

2 229 Conn. 213, 222-23.

Tab 7

See pp. 9-10

780 F.3d 70
United States Court of Appeals, Second Circuit.

Monique SYKES, Rea Veerabadren, Kelvin Perez, Clifton Armoogam, Individually and on behalf of all others similarly situated, Plaintiffs–Appellees,

v.

MEL S. HARRIS AND ASSOCIATES LLC, Mel S. Harris, Todd Fabacher, Michael Young, Kerry Lutz, Esq., LR Credit 18, LLC, L–Credit, LLC, Leucadia National Corporation, LR Credit, LLC, LR Credit 10, LLC, Samserv, Inc., William Mlotok, Benjamin Lamb, David Waldman, Joseph A. Orlando, Michael Mosquera, John Andino, LR Credit 14, LLC, LR Credit 21, LLC, Philip M. Cannella, Defendants–Appellants.[1]

Docket Nos. 13–2742–cv, 13–2747–cv, 13–2748–cv
|
Argued: Feb. 7, 2014.
|
Decided: Feb. 10, 2015.

Synopsis

Background: Debtors filed putative class action against debt-buying company, law firm, and process server alleging they had engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law. Plaintiffs moved for class certification, and the United States District Court for the Southern District of New York, Denny Chin, Circuit Judge, 285 F.R.D. 279, certified two classes. Defendants appealed.

Holdings: The Court of Appeals, Pooler, Circuit Judge, held that:

[1] district court did not abuse its discretion in determining that proposed class of debtors met commonality requirement for class certification;

[2] district court did not abuse its discretion in determining that common issues of law and fact predominated over any individual ones, as required for class certification;

[3] district court did not abuse its discretion in determining that class action was superior method for resolving debtors' claims;

[4] *Rooker-Feldman* doctrine did not bar debtors' action;

[5] Full Faith and Credit Act did not bar debtors' action; and

[6] district court did not abuse its discretion in certifying debtors' claims under provision of federal class action rule providing for injunctive relief if defendant acted or refused to act on grounds that apply generally to the class.

Affirmed.

Jacobs, J., filed separate dissenting opinion.

West Headnotes (22)

[1] Federal Courts Class actions

Court of Appeals reviews district court's decision to certify a class for abuse of discretion, the legal conclusions that informed its decision de novo, and any findings of fact for clear error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3 Cases that cite this headnote

[2] Federal Civil Procedure Class Actions

Class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

4 Cases that cite this headnote

[3] **Federal Civil Procedure** Evidence; pleadings and supplementary material

Party seeking class certification must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, and that other requirements of rule governing class actions are met. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

8 Cases that cite this headnote

[4] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Commonality requirement for class certification obligates plaintiff to demonstrate that the class members have suffered the same injury; this does not mean merely that they have all suffered a violation of the same provision of law. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

28 Cases that cite this headnote

[5] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

To satisfy the predominance criterion for class certification, individual questions need not be absent; the predominance rule requires only that those questions not predominate over the common questions affecting the class as a whole. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

44 Cases that cite this headnote

[6] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Common issues may predominate, as required for class certification, when liability can be determined on a class-wide basis, even when there are some individualized damage issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

39 Cases that cite this headnote

[7] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Meeting the class action predominance requirement requires plaintiffs to show that they can prove, through common evidence, that all class members were injured by the alleged conspiracy; that is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member, but court expects the common evidence to show all class members suffered some injury. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

46 Cases that cite this headnote

[8] **Racketeer Influenced and Corrupt Organizations** Elements of violation in general

Racketeer Influenced and Corrupt Organizations Business, property, or proprietary injury; personal injuries

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

To prevail on a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiffs must show (1) a substantive RICO violation; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation. 18 U.S.C.A. § 1962.

9 Cases that cite this headnote

[9] **Antitrust and Trade Regulation** Nature and Elements

Antitrust and Trade Regulation Public impact or interest; private or internal transactions

To maintain a cause of action for deceptive practices under New York law, a plaintiff must

show: (1) defendant's conduct is consumer oriented, (2) defendants is engaged in a deceptive act or practice, and (3) plaintiff was injured by this practice; first element may be satisfied by showing that the conduct at issue potentially affects similarly situated consumers. N.Y.McKinney's General Business Law § 349.

12 Cases that cite this headnote

[10] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in determining that proposed class of debtors met commonality requirement for class certification in action against debt-buying company, law firm, and process server, based on defendants' alleged conduct of systematically filing false affidavits of merit and, in many instances, false affidavits of service, in order to fraudulently procure default judgments against the debtors in civil court. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

2 Cases that cite this headnote

[11] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Commonality prerequisite for class certification is satisfied if there is a common issue that drives the resolution of the litigation such that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

27 Cases that cite this headnote

[12] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Determination as to whether class may be certified, on theory that questions common to class members predominate, may require a court to consider how a trial on the merits would be conducted if a class were certified. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

36 Cases that cite this headnote

[13] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in determining that common issues of law and fact predominated over any individual ones, as required for certification of debtors' putative class action against debt-buying company, law firm, and process server, since all claims were based on defendants' alleged uniform, widespread practice of filing automatically-generated, form affidavits of merit not based on personal knowledge and, in many instances false affidavits of service, to obtain default judgments against debtors in civil court. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[14] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

In determining whether class may be certified, fact that damages may have to be ascertained on an individual basis is a factor that the court must consider in deciding whether issues susceptible to generalized proof outweigh individual issues. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

8 Cases that cite this headnote

[15] **Federal Civil Procedure** Representation of class; typicality; standing in general

Class certification requirement that plaintiff be adequate representative of class is satisfied unless plaintiff's interests are antagonistic to the interest of other members of the class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

36 Cases that cite this headnote

[16] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in determining that class action was superior method for resolving debtors' claims against debt-buying company, law firm, and process server for violations of Racketeer Influenced and Corrupt Organizations Act (RICO), Fair Debt Collection Practices Act (FDCPA), and New York state law, even though defendants asserted that New York state court was superior forum; there was no basis to conclude that plaintiffs could proceed as a class in the state court, as that court had jurisdiction only over actions in which the value of the controversy was $25,000 or less, and New York law would provide plaintiffs no right of action, could not address the gravamen of the plaintiffs' allegations as it could only vacate the default judgments against them, and denied plaintiffs any control over the course of the litigation. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; McKinney's N.Y.City Civ.Ct.Act § 202; N.Y.McKinney's CPLR Rule 5015.

6 Cases that cite this headnote

[17] **Courts** Federal-Court Review of State-Court Decisions; Rooker-Feldman Doctrine

Rooker-Feldman doctrine bars the federal courts from exercising jurisdiction over claims brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

54 Cases that cite this headnote

[18] **Courts** Debtor and creditor; bankruptcy; mortgages, liens, and security interests

Rooker-Feldman doctrine did not bar debtors' putative class action alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, where consumers did not seek to overturn state court judgments, and claims sounding under FDCPA, RICO, and state law spoke not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487.

70 Cases that cite this headnote

[19] **Judgment** Full Faith and Credit

Full Faith and Credit Act did not bar debtors' putative class action alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in city civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, even though defendants asserted that the state courts treated judgments entitling them to recovery as valid; whatever was required in civil court would not decide the issue of liability for defendants, rather, the conduct of defendants, and the question of whether that conduct was ultimately fraudulent, would decide their liability. 28 U.S.C.A. § 1738; Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487.

9 Cases that cite this headnote

[20] **Federal Courts** Matters of Substance

Court of Appeals declined to decide, in the first instance, issue of whether Fair Debt Collection Practices Act (FDCPA) permitted plaintiff to assert claims for a false statement that was made to a party other than the debtor. Fair Debt Collection Practices Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.

17 Cases that cite this headnote

[21] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

District court did not abuse its discretion in certifying debtors' claims alleging debt-buying company, law firm, and process server engaged in fraudulent scheme to obtain default judgments against debtors in civil court, in violation of Fair Debt Collection Practices Act (FDCPA), Racketeer Influenced and Corrupt Organizations Act (RICO), and New York law, under provision of federal class action rule providing for injunctive relief if defendant acted or refused to act on grounds that apply generally to the class; although defendants asserted that individualized issues of service differentiated class members from one another and named plaintiffs would not benefit because they already had their default judgments vacated, relief to each member of the class did not require that the relief to each member of the class be identical, only that it be beneficial, and named plaintiffs might each still be subject to a further action by defendants. Fair Debt Collection Practices Act, § 802, 15 U.S.C.A. § 1692; 18 U.S.C.A. § 1961 et seq.; N.Y.McKinney's Judiciary Law § 487; Fed.Rules Civ.Proc.Rule 23(b)(2), 28 U.S.C.A.

28 Cases that cite this headnote

[22] **Federal Courts** Judgment and Relief

Court of Appeals declined to decide, in the first instance, issue whether Racketeer Influenced and Corrupt Organizations Act (RICO) permitted private injunctive relief. 18 U.S.C.A. § 1961 et seq.

1 Cases that cite this headnote

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Before: JACOBS, CALABRESI, and POOLER, Circuit Judges.

Judge JACOBS dissents in a separate opinion.

Opinion

POOLER, Circuit Judge:

These consolidated appeals are taken from the September 4, 2012 class certification opinion, *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279 (S.D.N.Y.2012) ("*Sykes II*"), and March 28, 2013 class certification order of the United States District Court for the Southern District of New York (Denny Chin, *Circuit Judge*). Defendants in this case comprise three entities: "(1) various subsidiaries of Leucadia National Corporation ("Leucadia") that purchase and collect consumer debt; (2) Mel S. Harris and Associates LLC ("Mel Harris"), a law firm specializing in debt collection litigation; [and] (3) Samserv, Inc. ("Samserv"), a process service company." ***75** *Sykes II,* 285 F.R.D. at 283. Defendants also include "associates of each of the foregoing entities," *id.,* and we respectively refer to them as the Leucadia defendants, Mel Harris defendants, and Samserv defendants (as did the district court).

The district court's March 28, 2013 order certified two classes. The first class, certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, comprises "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants ... assert[ing] claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961; New York General Business Law (GBL) § 349; and New York Judiciary Law § 487." Special App'x at 46.

The second class, certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, comprised "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in ... New York City Civil Court and where a default judgment has been obtained. Plaintiffs in the Rule 23(b)(3) class assert claims under RICO; the Fair Debt Collection Practices Act [(FDCPA)], 15 U.S.C. § 1692; GBL § 349; and New York Judiciary Law § 487." Special App'x at 47.

We conclude that the district court did not abuse its discretion in certifying either class.

Affirmed.

BACKGROUND

We draw our facts from the district court's class certification opinion, which depended on "the depositions, declarations, and exhibits submitted ... in connection with" the motion for class certification. *Sykes II,* 285 F.R.D. at 283. The district court, as was proper, only resolved "factual disputes to the extent necessary to decide the class certification issue." *Id.* citing *In re Initial Public Offerings Sec. Litig.,* 471 F.3d 24, 27, 41–42 (2d Cir.2006). It did not resolve "factual assertions relate[d] to the merits ... but state[d] them as the parties' assertions," and we will follow that practice. *Id.* Where we are required to supplement the background as laid out by the district court by virtue of the arguments of the parties on appeal, we will also refer to the depositions, declarations, and exhibits which formed the record before the district court at class certification.

I. Plaintiffs

"Monique Sykes, Rea Veerabadren, Kelvin Perez, and Clifton Armoogam are New York City residents who were each sued by various defendants in debt collection actions commenced in New York City Civil Court between 2006 and 2010." *Sykes II,* 285 F.R.D. at 283. Each plaintiff "denies being served with a summons and complaint in their respective action.... Defendants, nevertheless, were able to obtain default judgments against them." *Id.*

II. Defendants' Alleged Default Judgment Scheme

A. Default Judgments

These default judgments, in the words of plaintiffs, are the result of defendants' construction of a "default judgment mill." The "mill" operates in this fashion: first, by obtaining charged-off consumer debt; second, by initiating a debt-collection action by serving a summons and complaint on the purported debtor; and third, by submitting fraudulent documents to the New York City Civil Court in order to obtain a default judgment.

At the first step, "[p]laintiffs allege that the Leucadia and Mel Harris defendants entered into joint ventures to purchase ***76** debt portfolios, and then filed debt collection actions against the alleged debtors with the intent to collect millions of dollars through fraudulently-obtained default judgments." *Id.*

At the second step, Mel Harris would employ "a software program ... designed by [Mel Harris employee] Mr. [Todd] Fabacher." Appellees' App'x at 157. Fabacher is employed as a "director of information technology for Mel Harris." *Sykes II,* 285 F.R.D. at 284. His program "selects and organizes debts for the generation of a summons and complaint for each debt. These documents are signed by an attorney, and bundled together in batches of 50. Each batch is sent to a single process serving company." Appellees' App'x at 157. Further, the process serving company associated with each debt is saved by this computer program, so "the process serving company associated with any particular debt can be readily ascertained." Appellees' App'x at 157.

To effectuate this second step, Leucadia and Mel Harris defendants would hire a process server, often Samserv. *Sykes II,* 285 F.R.D. at 283. Plaintiffs allege that "Samserv routinely engaged in 'sewer service' whereby it would fail to serve the summons and complaint but still submit proof of service to the court." *Id.* This proof of service was first delivered to Mel Harris, which, "[a]fter process [wa]s allegedly served, ... receive[d] from the process serving company an electronic affidavit of service." Appellees' App'x at 157. After receiving this affidavit of service, the system designed by Fabacher "automatically organize[d] and print[ed] a motion for a default judgment [and] an affidavit of merit ... within approximately 35 days after the date of service of process." Appellees' App'x at 157–58.

Having generated these documents, at the third step, "[a]fter a debtor failed to appear in court for lack of notice of the action, the Leucadia and Mel Harris defendants would then apply for a default judgment by providing the court with ... an 'affidavit of merit' attesting to their *personal knowledge* regarding the defendant's debt and an affidavit of service as proof of service." *Sykes II,* 285 F.R.D. at 283 (emphasis added).

Before the district court at the class certification stage, there was substantial evidence of the scope and impacts of this alleged scheme. "Between 2006 and 2009, various Leucadia entities filed 124,838 cases," and Mel Harris represented Leucadia in 99.63 percent of those cases. *Id.* at 284. "The 'vast majority' of such cases were adjudicated without appearance by the defendant debtors, indicating the likelihood that a default judgment was entered." *Id.* Further, "[b]etween 2007 and 2010 various Leucadia entities obtained default judgments in 49,114 cases in New York City Civil Court." *Id.*

B. Affidavits of Service

The district court concluded that "[b]etween January 2007 and January 2011, Samserv defendants performed service of process in 94,123 cases filed by Mel Harris in New York City Civil Court, 59,959 of which were filed on behalf of Leucadia defendants." *Id.* In evaluating the evidence submitted by plaintiffs with respect to Samserv's practice of engaging in sewer service, the district court concluded that there was "substantial support for plaintiffs' assertion that defendants regularly engaged in sewer service." *Id.* This conclusion was based on the fact that "[r]ecords maintained by defendants reveal hundreds of instances of the same process server executing service at two or more locations at the same time," *id.,* as well as the fact that "[t]here were ... many other occasions where multiple services were ***77** purportedly made so close in time that it would have been impossible for the process server to travel from one location to the other as claimed." *Id.*

Plaintiffs point out that the record before the district court also included a number of other irregularities. For example, "in 2,915 instances, a process server claimed to have attempted or completed service *before* the date that the service was assigned to that process server—[a] physical impossibility." Appellees' App'x at 163. Additionally, process servers often reported 60 service attempts in a single day, Appellees' App'x at 183, and the six particular process servers who accounted for a majority of service performed by Samserv for Mel Harris "reported high volumes of service, including hundreds of days on which they claimed to have made more than 40 visits in a single day," Appellees' App'x at 165. However, an experienced process server attested to the fact that "based on [his] experience, ... it is unlikely that a process server could regularly make more than 25 service attempts at personal residences in one day." Appellees' App'x at 153. Finally, "[t]he six process servers also reported widely divergent rates of personal, substitute, and nail and mail service." Appellees' App'x at 165. There was no evidence in the record at class certification that would explain the divergent rates for the means of service. Plaintiffs finally point out that, despite the district court's order that Samserv defendants produce logbooks recording their service attempts by October 6, 2009, which could ostensibly confirm service, none have been turned over.

C. Affidavits of Merit

The district court provided a complete overview of the process for generating affidavits of merit, the facts of which are not challenged on appeal. "The affidavits of merit submitted by the Mel Harris and Leucadia defendants ... follow a uniform format." *Sykes II,* 285 F.R.D. at 284. Fabacher "attests that he is 'an authorized and designated custodian of records' for" one of the Leucadia entities that owns the charged-off debt, in New York City Civil Court. *Id.* He affirms that because he " 'maintain[s] the ... records and accounts ... including records maintained by and obtained from [the collection entity's] assignor' ... he is 'thereby fully and personally familiar with, and [has] *personal knowledge* of, the facts and proceedings relating to the [debt collection action].' " *Id.* (first, second, fourth, and fifth alterations in original) (emphasis added).

The district court explained the crux of the issue as follows:

> Typically, Fabacher does not receive the original credit agreements between the account holders and the creditors. Instead, he receives a bill of sale for the portfolio of debts purchased that includes 'sample' credit agreements and 'warranties' made by the seller regarding the debts in the portfolio. In many instances, such agreements do not exist. If they do exist, Fabacher's 'standard practice' does not entail reviewing them before endorsing an affidavit of merit. He instead relies on the warranties made by the original creditor....
>
> Fabacher produces the affidavits of merit for signature in batches of up to 50 at a time. He 'quality check[s]' one affidavit in each batch and if it is accurate, he signs the remaining affidavits in the batch without reviewing them. The quality check consists of ensuring that information printed on the affidavit matches the information stored in the Debt Master database.

Id. at 285 (alteration in original). Reviewing these allegations at an earlier stage in the proceedings, the district court concluded ***78** that "[a]ssuming 260 business days a year, Fabacher had to have personally (and purportedly knowledgeably) issued an average of twenty affidavits of merit per hour, i.e., one every three minutes, over a continuous eight-hour day." *Sykes v. Mel Harris & Assocs., LLC,* 757 F.Supp.2d 413, 420 (S.D.N.Y.2010) ("*Sykes I* ").

Plaintiffs point out that the practice of Leucadia defendants in purchasing these charged-off debts, which involves acquiring only limited information with respect to the character of this debt, is not uncommon in the secondary consumer debt market. Typical information transmitted in the purchase of a consumer debt will include the consumer's name, address, and the amount owed. *See* Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry,* 34–35 (Jan.2013), *available at* http://www.ftc. gov/sites/default/files/documents/reports/structure-andpractices-debt-buying-industry/debtbuyingreport.pdf (last visited Feb. 6, 2015). It is extremely rare, however, that the purchaser of the debt will receive any underlying documentation on the debt. *Id.*

III. Proceedings Below

Monique Sykes commenced this action against "some of the Leucadia, Mel Harris, and Samserv defendants" on October 6, 2009, alleging FDCPA and GBL claims. *Sykes II,* 285 F.R.D. at 285. Rea Veerabadren joined the action on December 28, 2009, and "class allegations and RICO claims were added." *Id.* Kelvin Perez joined the suit on March 31, 2010, at the filing of a second amended complaint, which added the New York Judiciary Law claim against Mel Harris. *Id.*

Defendants moved to dismiss, and the district court denied the motion. In adjudicating the motion to dismiss, the district court reasoned, inter alia, that the FDCPA claims were not time-barred under the relevant one-year statute of limitations for Sykes and Perez on the grounds that those claims had been equitably tolled. *Sykes I,* 757 F.Supp.2d at 421–22. This was because, the district court found, "sewer service purposefully ensures that a party is never served, [therefore] it is plausible that defendants' acts were 'of such character as to conceal [themselves]' to warrant equitable tolling." *Id.* at 422 (second alteration in original) (quoting *Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 349–50, 22 L.Ed. 636 (1874)).

For their part, Samserv defendants moved to dismiss the FDCPA claims on the grounds that they were not "debt collectors" for the purposes of the FDCPA. *Id.* at 423 (citing exemptions for process servers under 15 U.S.C. § 1692a(6)(D)). The district court disagreed, reasoning that the FDCPA "protects process servers only 'while' they serve process," and therefore "Samserv defendants' alleged failure to serve plaintiffs process and provision of perjured affidavits of service remove them from the exemption." *Id.*

Leucadia and Samserv defendants further argued that plaintiffs lacked standing to bring their claims under RICO. *Id.* at 427. This was because, according to defendants, plaintiffs could neither establish an injury to their property interest nor that "the RICO violations were [ ] the proximate cause of their injuries" *Id.* The district court disagreed,

reasoning that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused their injuries, *see Baisch v. Gallina,* 346 F.3d at 366, 373–74 (2d Cir.2003), which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *Id.* at 427–28.

Finally, Leucadia and Mel Harris defendants challenged the district court's subject ***79** matter jurisdiction under the *Rooker–Feldman* doctrine, "because plaintiffs are effectively appealing from a state-court judgment." *Id.* at 429. The district court rejected this argument as well. First, the district correctly noted that the doctrine would only apply if "a plaintiff invites a district court to review and reject an adverse state-court judgment." *Id.* (citing *Hoblock v. Albany Cnty. Bd. of Elections,* 422 F.3d 77, 85 (2d Cir.2005)). The district court then concluded that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them." *Id.*

Following the district court's decision, plaintiffs moved for class certification, as well as for another opportunity to amend their complaint. *Sykes II,* 285 F.R.D. at 285. The third amended complaint (the operative complaint on appeal) added Clifton Armoogam as plaintiff and an additional Leucadia entity as defendant. *Id.* The district court granted the motion for class certification on September 4, 2012. *Id.* at 294. Leucadia and Mel Harris defendants obtained new counsel after this decision.

On March 28, 2013, the district court adopted plaintiffs' proposed class certification order. The two classes certified are as follows.

> Pursuant to Federal Rule of Civil Procedure 23(b)(2), a class is certified of all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been or will be sought. Plaintiffs in the Rule 23(b)(2) class assert claims under [RICO], [GBL] § 349, and New York Judiciary Law § 487.
>
> Pursuant to Rule 23(b)(3), a class is certified of all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained. Plaintiffs in the Rule 23(b)(3) class assert claims under RICO; the [FDCPA]; GBL § 349, and New York Judiciary Law § 487.

Special App'x at 46–47.

JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 15 U.S.C. § 1692k(d). After certification, each defendant timely petitioned for leave to appeal the grant of certification pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. Our court granted these petitions July 19, 2013. We have jurisdiction pursuant to 28 U.S.C. § 1292(e).

STANDARD OF REVIEW

[1] "We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal conclusions that informed its decision *de novo,* and any findings of fact for clear error." *In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 116 (2d Cir.2013) ("*In re U.S. Foodservice* ").

DISCUSSION

I. Legal Standards

A. Class Certification

[2] "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' " *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 2550, 180 L.Ed.2d 374 (2011) (quoting *Califano v. Yamasaki,* 442 U.S. 682, 700–701, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Two classes of plaintiffs were certified in this case, under both Rule 23(b)(2) and ***80** Rule 23(b)(3) of the Federal Rules of Civil Procedure. As such, plaintiffs must meet both the requirements for the particular relief, injunctive or monetary, sought under those two rules, as well as the threshold requirements for class certification under Rule 23(a).

1. Rule 23(a) Prerequisites

[3] Rule 23(a) of the Federal Rules of Civil Procedure provides that a class may be certified only if four prerequisites have been met: numerosity, commonality, typicality, and adequacy of representation. *See Dukes,* 131 S.Ct. at 2550;

accord In re Nassau Cnty. Strip Search Cases, 461 F.3d 219, 225 (2d Cir.2006). Specifically, the Rule provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These remaining requirements "do[ ] not set forth a mere pleading standard. A party seeking class certification must ... be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes,* 131 S.Ct. at 2551.

[4] The Supreme Court has recently clarified the commonality requirement under Rule 23(a). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." *Id.* (internal quotation marks and citation omitted). Interpreting this requirement in the context of sexual discrimination claims in violation of Title VII of the Civil Rights Act, the Court instructed that such claims "must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve *an issue* that is central to the validity of each one of the claims in one stroke." *Id.* at 2551 (emphasis added). Furthermore, the Court noted that in certain "context [s] ... '[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' " *Id.* at 2551 n. 5 (alteration in original) (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157–58, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

2. Rule 23(b)(2) Requirements for Injunctive Relief

Beyond these prerequisites, Rule 23(b) provides additional considerations for a district court to consider prior to the certification of a class. Under Rule 23(b)(2), a class action may only be maintained if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief ... is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction ... would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

***81 3. 23(b)(3) Requirements**

Rule 23(b)(3) imposes two additional burdens on plaintiffs attempting to proceed by class action, namely, predominance and superiority. Specifically, a class may be certified only if the district court determines as follows:

> [T]he questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

In assessing the justifications for the creation of Rule 23(b)(3) classes the Supreme Court has observed as follows:

> While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring

> their opponents into court at all.... "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir.1997).

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (some internal quotation marks and citations omitted).

[5] With respect to common issues, Rule 23(b)(3), by its plain terms, imposes a "far more demanding" inquiry into the common issues which serve as the basis for class certification. *Id.* at 623–24, 117 S.Ct. 2231. While the inquiry may be more demanding, the Supreme Court has also instructed that Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." *Amgen Inc. v. Conn. Ret. Plans and Trust Funds,* —— U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013) (internal quotation marks omitted) (alterations in original). Rather, all that is required is that a class plaintiff show that "common questions 'predominate.' " *Id.* (quoting Fed.R.Civ.P. 23(b)(3)). That is, "[i]ndividual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Messner v. Northshore Uni. HealthSystem,* 669 F.3d 802, 815 (7th Cir.2012).

[6] **[7]** Furthermore, "[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig.,* 280 F.3d 124, 139 (2d Cir.2001); *see also Leyva v. Medline Indus. Inc.,* 716 F.3d 510, 514 (9th Cir.2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification ***82** under Rule 23(b)(3)."). The Supreme Court has explicitly determined that it is "clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes,* 131 S.Ct. at 2558. For the purposes of class certification, however, plaintiffs cannot "identif[y] damages that are not the result of the wrong." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1434, 185 L.Ed.2d 515 (2013). That is, "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva,* 716 F.3d at 514. Put another way,

> [t]he plaintiffs must ... show that they can prove, through common evidence, that all class members were ... injured by the alleged conspiracy.... That is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member. But we do expect the common evidence to show all class members suffered *some* injury.

In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252 (D.C.Cir.2013) (internal citations omitted).

Finally, the disjunctive inquiry that district courts must engage in prior to class certification requires analysis of the predominance of common issues, as well as a determination that class certification is the superior method for adjudicating these claims. Fed.R.Civ.P. 23(b)(3). Rule 23(b)(3) also lists four factors—individual control of litigation, prior actions involving the parties, the desirability of the forum, and manageability—which courts should consider in making these determinations. Fed.R.Civ.P. 23(b)(3)(A)-(D). By the structure of the rule, these factors seem to apply both to the predominance and superiority inquiry. However, while these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry. *See, e.g., Vega v. T–Mobile USA Inc.,* 564 F.3d 1256, 1278 (11th Cir.2009) ("In determining superiority, courts must consider the four factors of Rule 23(b)(3).").

While Rule 23(b)(3) sets out four individual factors for courts to consider, manageability "is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication." 2 William B. Rubenstein, Newberg on Class Actions § 4.72 (5th ed. West 2014). As a component of manageability, in determining whether a class action in a particular forum is a superior method of adjudication, courts have considered "when a particular forum is more geographically convenient for the parties ... or, for example, when the defendant is located in the forum state." *Id.* § 4.71.

B. Claims for Relief

1. FDCPA

Plaintiffs allege that Leucadia, Mel Harris, and Samserv defendants acted in violation of various provisions of the FDCPA. The FDCPA was enacted "to eliminate abusive debt

collection practices by debt collectors." 15 U.S.C. § 1692(e). The statute provides for civil liability for a wide range of abusive actions, and plaintiffs focus their claims on violations of Section 1692e and Section 1692f of the statute.

Section 1692e prohibits "false or misleading representations," and provides as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ... (2) The false representation of —(A) the character, amount, or legal status of any debt ... (8) Communicating or threatening to communicate to ***83** any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.... (10) The use of any false representation or deceptive means to collect or attempt to collect any debt....

15 U.S.C. § 1692e(2), (8), (10). Section 1692f, for its part, prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. The FDCPA limits actions to those brought "within one year from the date on which the violation occurs." *Id.* § 1692k(d).

Violations of these provisions expose a debt collector to civil liability. 15 U.S.C. § 1692k. The district court concluded, and defendants do not meaningfully challenge, that "[l]iability under the FDCPA can be established irrespective of whether the presumed debtor owes the debt in question." *Sykes II,* 285 F.R.D. at 292; *see also Baker v. G.C. Svcs. Corp.,* 677 F.2d 775, 777 (9th Cir.1982) ("The Act is designed to protect consumers who have been victimized by unscrupulous debt collectors, regardless of whether a valid debt actually exists."). In the case of a class action, named plaintiffs' damages are capped at $1,000. 15 U.S.C. § 1692k(a)(2)(A)-(B). Class damages are capped at $500,000 or 1 per centum of the net worth of the debt collector. *Id.* § 1692k(a)(2)(B). Prevailing plaintiffs are also entitled to costs and attorney's fees. *Id.* § 1692k(a)(3). The FDCPA instructs that, in the case of a class action, that damages should be assessed, inter alia, on the basis of "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional." *Id.* § 1692k(b)(2).

2. RICO

[8] To prevail on their civil RICO claims in this case, "plaintiffs must show (1) a substantive RICO violation under [18 U.S.C.] § 1962, (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." *In re U.S. Foodservice,* 729 F.3d at 117. Plaintiffs allege Leucadia, Mel Harris, and Samserv defendants together formed a RICO enterprise for the purposes of 18 U.S.C. § 1961(4), which the district court found plausible at the motion to dismiss stage. *Sykes I,* 757 F.Supp.2d at 426. Plaintiffs further allege here that defendants, as part of this enterprise, engaged in acts of wire and mail fraud in violation of 18 U.S.C. §§ 1341, 1344, which can serve as predicate acts for a violation of 18 U.S.C. § 1962(c). The district court concluded that plaintiffs had plausibly alleged that "defendants' pursuit of default judgments and attempts to enforce them against plaintiffs proximately caused their injuries, which include the freezing of personal bank accounts and incurring of legal costs to challenge those default judgments." *Sykes I,* 757 F.Supp.2d at 427–28.

3. State Law Claims

[9] Plaintiffs finally bring two claims under state law. First, plaintiffs bring claims pursuant to New York's General Business Law, which prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. L. § 349(a). "To maintain a cause of action under § 349, a plaintiff must show: (1) that the defendant's conduct is 'consumer oriented'; (2) that the defendants is engaged in a 'deceptive act or practice'; and (3) that the plaintiff was injured by this practice." *Wilson v. Nw. Mut. Ins. Co.,* 625 F.3d 54, 64 (2d Cir.2010) ***84** (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,* 85 N.Y.2d 20, 623 N.Y.S.2d 529, 532–33, 647 N.E.2d 741 (1995)). With respect to the first element, it "may be satisfied by showing that the conduct at issue 'potentially affect[s] similarly situated consumers.' " *Id.* (alteration in original) (quoting *Oswego Laborers' Local 214 Pension Fund,* 623 N.Y.S.2d at 533, 647 N.E.2d 741). The statute provides that an individual "may bring an action ... to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions." N.Y. Gen. Bus. L. § 349(h). The law also provides that a court may award

attorney's fees and also treble damages "up to one thousand dollars, if the court finds the defendant wilfully or knowingly violated this section." *Id.*

Second, plaintiffs bring a claim pursuant to the New York Judiciary Law against the Mel Harris defendants. New York law provides that "[a]n attorney ... who ... [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party ... [i]s guilty of a misdemeanor, and ... he forfeits to the party injured treble damages, to be recovered in a civil action." N.Y. Jud. L. § 487.

II. Application

A. The Proposed Classes Satisfy the Requirements of Commonality & Typicality Under 23(a)[2]

[10] **[11]** Rule 23(a)'s commonality prerequisite is satisfied if there is a common issue that "drive[s] the resolution of the litigation" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Consideration of this requirement obligates a district court to determine whether plaintiffs have "suffered the same injury." *Id.* (internal quotation marks omitted). The district court concluded that plaintiffs had satisfied the commonality requirement of Rule 23(a). Specifically, the district court reasoned as follows:

> [Plaintiffs'] overarching claim is that defendants systematically filed false affidavits of merit and, in many instances, false affidavits of service to fraudulently procure default judgments in New York City Civil Court. Whether a false affidavit of merit or a false affidavit of service or both were employed in a particular instance, the fact remains that plaintiffs' injuries derive from defendants' alleged unitary course of conduct, that is, fraudulently procuring default judgments.

Sykes II, 285 F.R.D. at 290 (internal quotation marks and citation omitted). The district court thus determined that the common injury in this case, which was the same for all plaintiffs, is a fraudulently procured default judgment. We conclude that this commonality determination was not an abuse of discretion.

1. Affidavits of Merit

At the outset, Leucadia and Mel Harris defendants principally argue that, by characterizing ***85** the common issue in this litigation as one involving the false and fraudulent affidavits of merit, the district court impermissibly discounted the importance of the affidavits of service. Thus, Leucadia defendants suggest that "the district court, by elevating the importance of the affidavits of merit and minimizing the importance of the affidavits of service, impermissibly rewrote Plaintiffs' substantive claims." Mel Harris, likewise, suggest that "the District Court elevated the importance of the affidavits of merit only by impermissibly rewriting plaintiffs' substantive claims to fit the class-action procedure." We disagree. The operative complaint in this case makes clear that both sewer service and false affidavits of merit are necessary to effectuating defendants' alleged scheme. Thus, while the operative complaint alleges that sewer service is "the primary reason" few defendants appear in New York City Civil Court to defend against debt collection actions, plaintiffs have made clear that this is but one component of the overarching debt collection plan effectuated by defendants. Thus, plaintiffs allege that "in order to secure an otherwise legally unobtainable judgment on default, Defendants fraudulently swear to the courts that they have actually served their victims, when they have not, and that they have admissible proof that a debt is owed, when they do not." Joint App'x at 54. We see nothing impermissible in the district court determining that defendants' scheme, which had multiple components, was a "unitary course of conduct" that depended on false affidavits of merit for its success. *Marisol A. v. Giuliani,* 126 F.3d 372, 377 (2d Cir.1997).

Second, such a framework makes sense, as it is not disputed that these false affidavits of merit are necessary to the scheme to procure fraudulently obtained default judgments based on what is required in state court. The New York City Civil Court has jurisdiction over debt collection actions that seek to recover damages of $25,000 or less. N.Y.C. Civ.Ct. Act § 202. Section 3215 of the New York Civil Practice Law and Rules governs the procedures for obtaining a default judgment in these courts. Section 3215(a) permits plaintiffs seeking "a sum certain" to make an application "to the clerk within one year after the default. The clerk, upon submission of the requisite proof, shall enter judgment for the amount demanded in the complaint...." N.Y. C.P.L.R. § 3215(a). Requisite proof, in turn, is defined in Section 3215(f) as "proof of service of the summons and the complaint ... and proof of the facts constituting the claim, the default and the amount due by affidavit made by the party." *Id.* § 3215(f). Thus, both affidavits of service, as well as affidavits of merit, are necessary to obtain default judgments, though neither, independently, is sufficient.

Plaintiffs' contention is that Fabacher's statement in each one of the affidavits of merit, that he is "personally familiar with, and [has] personal knowledge of, the facts and proceedings relating to" the default judgment action, *see, e.g.,* Appellees' App'x at 10, is false. The reason such statements are false is that Fabacher has not reviewed, nor do defendants actually possess, documents relevant to the underlying debt.

Resolving the question of whether this contention is false "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. With respect to the FDCPA, determining whether Fabacher's statement is indeed false resolves the central basis for FDCPA liability in this case, namely, the prohibition on making "any false, deceptive, or misleading representation ... in connection with the collection of any debt." 15 U.S.C. § 1692e. Similarly, ***86** the prohibition on "deceptive acts or practices," N.Y. Gen. Bus. L. § 349(a), and the prohibition on attorney's engaging in "deceit," N.Y. Jud. L. § 487, can fairly be said to turn on the falsity of Fabacher's representation of personal knowledge. Both wire and mail fraud, the predicate acts underlying plaintiffs' theory of RICO liability, may be established "by means of false or fraudulent ... representations." 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud). False affidavits of merit thus provide independent bases for liability for each of the claims advanced by plaintiffs. While the resolution of this question will not address each element of each of these claims, that is not required for there to be a common question under Rule 23. *See Amgen,* 133 S.Ct. at 1196. The district court did not abuse its discretion by finding that a fraudulently obtained state court judgment that depended on the filing of a false affidavit of merit could serve as a common issue satisfying Rule 23(a).

2. Affidavits of Service

[12] Moreover, even assuming that the district court was required to determine that the false affidavits of service were susceptible to class-wide proof, we would still conclude that the district court did not abuse its discretion in finding that the requirements of Rule 23(a) were satisfied. The district court found, on the basis of the evidence before it, that there was "substantial support for plaintiffs' assertion that defendants regularly engaged in sewer service." *Sykes II,* 285 F.R.D. at 284. Further, determining whether to certify a class may require a court "to consider how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp. v. AT & T Corp.,* 339 F.3d 294, 302 (5th Cir.2003) (internal quotation marks omitted) (discussing predominance requirement under Rule 23(b)(3)).

Plaintiffs articulate two distinct reasons why they will be able to bring forward at trial competent evidence which will prove the fraudulent nature of the affidavits of service. First, they suggest that the affidavits of service will not be entitled to credibility, given the district court's finding that "defendants regularly engaged in sewer service." *Sykes II,* 285 F.R.D. at 284. Absent the affidavits of service, the only other means that Samserv defendants would have at their disposal to prove service would be contemporaneous logbooks, which process servers are required to keep by law. N.Y. Gen. Bus. L. § 89cc. Absent these logbooks, the testimony of process servers cannot be credited. *First Commercial Bank of Memphis v. Ndiaye,* 189 Misc.2d 523, 733 N.Y.S.2d 562, 565 (N.Y.Sup.Ct.2001) ("Testimony of a process server who fails to keep records in accordance with statutory requirements cannot be credited.").

Second, plaintiffs aver that, because Samserv defendants have been ordered to turn over their logbooks to plaintiffs, but have not, they will be able to prove fraud by spoliation. Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure permits, in the case of a failure to comply with a discovery order, the district court to, inter alia, "direct[ ] that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims." Fed.R.Civ.P. 37(b)(2)(A)(i). Proof of fraudulent service might thus be achieved on a class-wide level. Defendants misread the requirements of Rule 23(a) when they suggest that these theories of class-wide proof fail to "affirmatively demonstrate [plaintiffs'] compliance with" Rule 23(a). *Dukes,* 131 S.Ct. at 2551. All that must be proven, at this stage, is that "there are *in fact* sufficiently ... common questions of law or fact." *Id.* Anticipating proof of failures of service in the manner suggested ***87** by plaintiffs is in keeping with demonstrating a common question of fact based on the district court's obligation to anticipate "how a trial on the merits would be conducted if a class were certified." *Bell Atl. Corp.,* 339 F.3d at 302 (internal quotation marks omitted).

In sum, the district court did not abuse its discretion in determining that plaintiffs had demonstrated sufficiently common questions of law or fact to satisfy the prerequisites of Rule 23(a).

B. The District Court did Not Abuse its Discretion in Certifying the 23(b)(3) Class

[13] While Rule 23(b)(3) also speaks in terms of commonality, it imposes a "far more demanding" inquiry. *Amchem,* 521 U.S. at 623–24, 117 S.Ct. 2231. By its terms, it anticipates the existence of individual issues: the class may only be certified if "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The mere existence of individual issues will not be sufficient to defeat certification. Rather, the balance must tip such that these individual issues predominate. But the district court must establish that a class action is superior to "other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). We conclude that the district court did not abuse its discretion in finding these requirements met, and thus certifying this class under Rule 23(b)(3).

1. Common Questions of Law and Fact Predominate

Defendants submit that individual issues will predominate over common issues in this case because the district court will be forced to confront individual issues with respect to damages, timeliness, and service. We conclude that the district court did not abuse its discretion in finding that these issues, even if they are individualized in certain respects, do not predominate over class issues.

a. Damages

In making its decision on the propriety of class certification, the district court reasoned as follows:

> Every potential class member's claim arises out of defendants' uniform, widespread practice of filing automatically-generated, form affidavits of merit based on 'personal knowledge' and, in many instances, affidavits of service, to obtain default judgments against debtors in state court. Whether this practice violates the FDCPA, New York GBL § 349, New York Judiciary Law § 487, and/or constitutes a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c) and (d) does not depend on individualized considerations.... The Court recognizes that should defendants be found liable on some or all of these claims, individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations. This, however, does not preclude a finding of predominance under Rule 23(b)(3).

Sykes II, 285 F.R.D. at 293.

Plaintiffs' operative complaint seeks three kinds of damages: statutory damages; "actual and/or compensatory damages ... in an amount to be proven at trial"; and what plaintiffs refer to as "incidental damages." Joint App'x at 219–20. It is not disputed that statutory damages under GBL § 349 can be assessed on the basis of common proof, as they are capped at $50. N.Y. Gen. Bus. L. § 349(h). Furthermore, Congress has devised a generally applicable formula for class action damages ***88** under the FDCPA, one which caps damages at $500,000 and provides that district courts consider, among other factors, the scope of the violations of the FDCPA as well as the number of individuals implicated by fraudulent debt collection practices. 15 U.S.C. § 1692k(b)(2).

The only individualized damages inquiries that "may exist," *Sykes II,* 285 F.R.D. at 293, are those that turn, in plaintiffs' words, on "the return of the money extracted from them as a result of ... fraudulent judgments," as well as incidental damages. We conclude that inquiries into these damages are not sufficient grounds on which to conclude that the district court's determination that individualized damages issues will not predominate in this case was an abuse of discretion. In the first place, plaintiffs point out that the amount of any money extracted from plaintiffs is stored by defendants themselves. Because the evidence necessary to make out such damages claims, while individual, is easily accessible, such individual damage considerations do not threaten to overwhelm the litigation. *See Leyva,* 716 F.3d at 514.

Second, defendants misstate the central holding of *Comcast* in an attempt to advance the argument that individual damages issues predominate in this case. It is true that the Court, in *Comcast,* reversed a grant of class certification on the grounds that individual damages issues precluded certification. But these damages claims were individual because, based on undisputed evidence, the plaintiffs' "model f[e]ll[ ] ... short of establishing that damages [were] capable of measurement on a classwide basis." 133 S.Ct. at 1433. This was only so, however, because the sole theory of liability that the district court determined was common in that antitrust action, overbuilder competition, was a theory of liability that the plaintiffs' model indisputably "failed to measure" when determining the damages for that injury. *Id.* This

is not the case here. The common theory of liability that plaintiffs advance is dependent on a fraudulent course of conduct that was allegedly engaged in by defendants, in violation of multiple federal and state statutes. That liability model is uniquely tied to the damages, which plaintiffs claim they are entitled to with respect to each claim that they advance, whether under the FDCPA, RICO, or state statutes. *Comcast* did not rewrite the standards governing individualized damage considerations: it is still "clear that individualized monetary claims belong in Rule 23(b)(3)." *Dukes,* 131 S.Ct. at 2558. All that is required at class certification is that "the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva,* 716 F.3d at 514. Plaintiffs in *Comcast,* admittedly, could not do so. Plaintiffs here have satisfied that standard.

[14] Third, defendants suggest that the district court did not engage in the "rigorous analysis" required at the class certification stage. In doing so, they emphasize that the district court's statement that individualized questions "do[ ] not preclude a finding of predominance under Rule 23(b)(3)" was not sufficient to make out the opposite conclusion, namely, that common questions did predominate. *Sykes II,* 285 F.R.D. at 293. Defendants' quest for magic words overlooks the vast number of common issues that the district court identified as necessary to resolve this litigation. It is true that the law of this Circuit is that the fact that "damages may have to be ascertained on an individual basis ... is ... a factor that we must consider in deciding whether issues susceptible to generalized proof 'outweigh' individual issues." *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 231 (2d Cir.2008), *abrogated on other* ***89** *grounds by Bridge v. Phx. Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008), *as recognized by In re U.S. Foodservice,* 729 F.3d at 119. However, from the above it is clear that individual damages did factor into the district court's analysis. The district court simply found that these individual considerations did not outweigh other issues which were common, such as the following:

> (1) whether defendants' practice of filing affidavits of merit and/or affidavits of service with respect to the plaintiff class members violates the FDCPA; (2) whether defendants collectively constitute a RICO enterprise within the meaning of 18 U.S.C. § 1961(4); (3) whether defendants have engaged in a pattern of racketeering activity in connection with the collection of debt in violation of 18 U.S.C. § 1962(c) and (d); (4) whether defendants have used deceptive acts and practices in the conduct of their businesses in violation of New York GBL § 349; and (5) whether the Mel Harris defendants have engaged in deceit and collusion with intent to deceive the courts and any party therein in violation of New York Judiciary Law § 487.

Sykes II, 285 F.R.D. at 293. Defendants concede that each of these questions is one that is common to the members of the class certified under Rule 23(b)(3). They merely quibble with the district court's assessment that, on balance, these ultimate issues of liability outweigh the individualized concerns that they raise. On reviewing the district court's certification order, this is not a sufficient contention on which we may rely to conclude that the district court abused its discretion in certifying this class.

b. Timeliness

The district court acknowledged, as well, that individualized issues of timeliness may inhere in the class "should defendants be found liable on some or all of these claims." *Id.* at 293. Defendants argue, again, that the district court was wrong to find that the presence of such individual issues did not indicate that individual issues would predominate. Plaintiffs respond that they do not invoke equitable tolling. Plaintiffs are correct: in support of their motion for class certification before the district court, plaintiffs averred that they "do not seek to include as class members persons whose claims accrued outside the statute of limitations for each substantive claim.... Indeed, only individuals whose claims accrued within one year prior to the filing of the Complaint will seek relief on the FDCPA claim." *Sykes v. Mel Harris & Assocs.,* No. 09–cv–8486 (DC), ECF No. 99, at 27.

Defendants point out that the district court had earlier relied on equitable tolling in order to determine that the claims of Sykes and Perez were timely under the FDCPA. They do not claim that plaintiffs are estopped from arguing that equitable tolling does not apply based on the district court's determination that Sykes and Perez could bring actions under the FDCPA on the basis of equitable tolling. *Sykes I,* 757 F.Supp.2d at 413. Rather, the only argument with any impact advanced by any of the defendants with respect to this matter is one made by Mel Harris defendants, who argue that disclaiming equitable tolling "simply trades (without eliminating) a serious Rule 23(b)(3) predominance problem for a Rule 23(a) adequacy problem: Class counsel's decision to abandon equitable tolling may render the remaining claims a marginally better 'fit' for class treatment. But that comes at

the expense of class members they represent who have claims that are timely only because of equitable tolling....”

***90** **[15]** We see no merit in this contention. Under Rule 23(a)(4) of the Federal Rules of Civil Procedure, adequacy is satisfied unless “plaintiff's interests are antagonistic to the interest of other members of the class.” *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 222 F.3d 52, 60 (2d Cir.2000). The fact that some class members may advance RICO, GBL, and Judiciary Law claims on the basis of the date that the complaint was filed (as they have longer statutes of limitations, *see Gaidon v. Guardian Life Ins. Co. of America,* 96 N.Y.2d 201, 727 N.Y.S.2d 30, 34, 750 N.E.2d 1078 (2001) (three years for GBL claims), *Lefkowitz v. Appelbaum,* 258 A.D.2d 563, 685 N.Y.S.2d 460, 461 (2d Dep't 1999) (three years for New York Judiciary Law); *Agency Holding Corp. v. Malley–Duff & Assocs.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (four years for RICO)) does not mean the interests of these class members are antagonistic to those other members of the class that also advance FDCPA claims.

While it may be true that disclaiming equitable tolling for Sykes and Perez may necessitate the district court to limit the sorts of claims that these named plaintiffs may bring, that is a determination for the district court to make in the first instance. It is certainly not a justification for reversing the district court's grant of class certification: at the most, if Sykes's and Perez's FDCPA claims are time-barred, this only means that they cannot assert claims under the FDCPA. The practical import of such a rule is that Sykes and Perez may be members of a subclass, advancing only a portion of the claims certified under Rule 23(b)(3). Such subclasses are contemplated by the Federal Rules, *see* Fed.R.Civ.P. 23(c)(5), and may be certified after the original certification order is upheld. *See Marisol,* 126 F.3d at 378 (holding that the district court did not abuse its discretion in certifying the class but suggesting that prior to trial the district court “ensure that appropriate subclasses are identified”).

It is within plaintiffs' prerogative to disclaim equitable tolling, and they may do so without sacrificing the adequacy of representation, especially as defendants make no actual attempt to show why such a disclaimer may be antagonistic. It is for the district court to determine the impact of this disclaimer on the specific claims particular plaintiffs may bring, but it may do that at a future date, without our disturbing the class certification order.[3]

c. Causation

The district court also determined that individual causation issues may exist in this case, *Sykes II,* 285 F.R.D. at 293, but nevertheless found that such causation issues would not predominate. We agree.

Individual issues related to causation in this case are formulated by defendants on appeal as individual issues related to service. Thus, for example, Mel Harris advance the argument that “a class member who was properly served and paid debts that he actually owed has sustained a radically ***91** different ‘injury’ from an unserved member subject to a default judgment for a debt he did not owe.” Likewise, Leucadia defendants submit that “where the entry of judgment resulted from a debtor's failure to appear despite adequate notice, the debtor must articulate a different theory of injury.” None of these contentions are availing.

First, with respect to the FDCPA claims, the district court concluded that the existence of an underlying debt was unnecessary in order to establish liability under that statute. *Sykes II,* 285 F.R.D. at 292. Affidavits of merit, submitted to the Civil Court, were allegedly fraudulent in attesting to “personal knowledge” of the existence of such underlying debt, and were also necessary to obtaining the default judgments that plaintiffs allege were fraudulently obtained. We fail to recognize any individualized causation issues with respect to plaintiffs' claims under the FDCPA. *See Baker,* 677 F.2d at 777 (actual debt is not necessary to bring claims under the FDCPA).

Second, where causation does seem most relevant to us, and where we presume the district court recognized such individualized causation issues, was with respect to plaintiffs' claims under RICO. This is because RICO requires that the alleged injury to plaintiffs' “business or property ... was by reason of the substantive RICO violation.” *In re U.S. Foodservice,* 729 F.3d at 117. This causation analysis will require the district court to identify (1) the property interest that is protected by RICO, as alleged by plaintiffs, and (2) whether the injury to that interest was caused by the RICO violation. The district court at least found that the injuries to plaintiffs included “freezing of personal bank accounts and incurring of legal costs to challenge those default judgments.” *See Sykes I,* 757 F.Supp.2d at 427–28. Defendants do not challenge that this is a sufficient property interest on appeal. Nor do they bring forward any evidence that the damage

to these property interests was not the result of default judgments. What they do argue, however, is that if a debt was actually owed, and a default judgment was achieved by means of proper service, a plaintiff cannot actually be an injured party under RICO to the extent that defendants extracted money based on a default judgment. The argument has force. But it remains a single arguably individual issue among the myriad common issues that we have already noted. We will not upset the district court's determination that plaintiffs have carried their burden to show that common issues predominate on the basis of defendants' construction of this hypothetical class plaintiff alleging one particular claim.

Third, none of the potential causation issues related to service suggest that Samserv is not a proper class defendant in this case. It is true that Samserv was kept in this litigation with respect to the FDCPA claims on the basis that it could not claim the benefits of the FDCPA's exemption for process servers on the grounds that the district court concluded, at the motion to dismiss stage, that plaintiffs adequately alleged that Samserv engaged in sewer service. *Sykes I,* 757 F.Supp.2d at 423. This does nothing to absolve Samserv of claims under RICO, however, which premises Samserv's liability on its participation in a RICO conspiracy. *See Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 495–97, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). Nor, based on our conclusions regarding the amenability of class claims regarding common proof of the falsity of Samserv's affidavits of service, *supra* at pp. 86–87, does it mean that Samserv is not a proper defendant with respect to plaintiffs' FDCPA claims.

***92** In short, the district court properly considered the evidence before it. It concluded that, while individual issues existed in this case, they did not predominate over common issues. Defendants wish the district court had performed this balancing equation differently. But that is not sufficient for us to find that the district court abused its discretion in certifying this class under Rule 23(b)(3).

2. Proceeding by Class is a Superior Method of Adjudication

a. Defendants' Theory of Superiority is Unpersuasive

[16] Mel Harris defendants raise, for the first time on appeal, the novel theory that the district court's superiority analysis was incorrect because it undervalued the obligation to consider the "desirability ... of concentrating the litigation of the claims in the particular forum." Fed.R.Civ.P. 23(b)(3)(C). In particular, Mel Harris suggest that "[i]f the gravamen of this case ... really were the adequacy of the affidavits of merits filed with the New York City Civil Court, surely *that* court is the superior forum to hear the complaint and devise any remedies."[4]

This is a fine rhetorical point that depends for its strength on a complete misreading of (1) the jurisdiction of the New York City Civil Court, (2) the requirements of Rule 23(b)(3), and (3) the gravamen of plaintiffs' complaint.

In the first place, there is no basis to assert that plaintiffs' claims even could be heard as a class in the New York City Civil Court. These courts have jurisdiction only over those actions in which the value of the controversy is $25,000 or less. N.Y.C. Civ.Ct. Act § 202. While individual plaintiffs might seek to bring their actions in such a court based on this amount-in-controversy limitation, there is no basis to conclude that plaintiffs could proceed as a class there. The argument amounts to little more than Mel Harris's expression of a preference that their alleged widespread fraudulent behavior be dealt with in a piecemeal fashion. That is not how plaintiffs have chosen to proceed. The fact that Mel Harris would have preferred plaintiffs to have advanced their claims differently cannot make it a requirement under Rule 23(b)(3).

Second, the forum analysis of Rule 23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court. Defendants' authorities on this issue, which are apparently the only authorities that have ever conducted a superiority analysis by reference to the availability of relief in a federal or state forum, have not considered claims analogous to those brought by ***93** plaintiffs here. *Kamm v. Cal. City Dev. Corp.,* 509 F.2d 205 (9th Cir.1975) dealt with a case in which putative class plaintiffs had already been represented by the State Attorney General in a prior action with putative class defendants. *Id.* at 207–08. The same was true of two other cases defendants rely on for the proposition that analysis of state court action is required to determine whether a federal forum is superior. *Cartwright v. Viking Indus., Inc.,* 2009 WL 2982887, at *14 (E.D.Cal. Sept. 14, 2009) (referencing ongoing state litigation); *Plant v. Merrifield Town Ctr., Ltd. P'ship,* 2008 WL 4951352, at *3 (E.D.Va. Nov. 12, 2008) (same). While there has been state court litigation in this case, it is not state court litigation which advances the claims that plaintiffs advance now. Further, we will not credit the statement of the United States District Court of the Eastern District of

Louisiana, that "strains on the state judicial system after Hurricane Katrina" supported a federal forum for particular plaintiffs' claims, as support for Mel Harris's contention that analysis of the superiority requires a consideration of the comparative merits of a state or federal court. *Turner v. Murphy Oil USA, Inc.,* 234 F.R.D. 597, 610 (E.D.La.2006). The *Turner* court purported to consider the value of state versus federal court writ large, but did so only in the context of resource strains on state court, which have not been alleged here. And this observation was far from necessary to the holding, given that the district court prefaced this observation by recognizing the value of certifying a class in order to "centralize these proceedings." *Id.* Defendants here seek the opposite of centralization: rather, they seek the fragmentation of each of plaintiffs' claims into, perhaps, hundreds of thousands of actions. The overwhelming weight of authority suggests that the forum requirement is one that centers on geography, rather than a comparative analysis of the benefits available under either federal or state law. Rubenstein, *supra,* § 4.71. Mel Harris's authorities have not convinced us otherwise.

Third, Mel Harris's argument depends on a misreading of the gravamen of plaintiffs' allegations. It is ultimately not the procedures of New York City Civil Court, or the ultimate default judgments, that are at issue in this case. It is, rather, the fraudulent means that defendants employed in order to obtain those judgments. These means are the basis of claims that sound both in federal and in state law. To the extent that the district court had jurisdiction to entertain these claims, we see no basis for rewriting Rule 23(b)(3)(C) to impose a limit on the district court's power.

Even if we were to credit Mel Harris's argument that forum analysis requires us to consider state fora as opposed to federal fora, we would not conclude that the district court abused its discretion in concluding that proceeding by class is superior to alternatives for adjudicating these claims. Fed.R.Civ.P. 23(b)(3). Defendants engage in no other consideration of the 23(b)(3) factors. They do not even engage with the district court's conclusions that a class action "is, without question, more efficient than requiring thousands of debtors to sue individually." *Sykes II,* 285 F.R.D. at 294. Echoing the Supreme Court's concerns in *Amchem,* 521 U.S. at 617, 117 S.Ct. 2231, the district court concluded that "class members' interest[ ] in litigating separate actions is likely minimal given their potentially limited means with which to do so and the prospect of relatively small recovery." *Sykes II,* 285 F.R.D. at 294 (citing Fed.R.Civ.P. 23(b)(3)(A)).

Nor are we convinced that proceeding in state court is, as the dissent suggests, "superior in every way" to class action. *See infra* Op. pp. 98, 101–02. New York law provides for the en masse vacatur of ***94** default judgments obtained through fraud or other illegal means upon the application of an administrative judge, who "*may* bring a proceeding to relieve a party or parties" from such judgments. N.Y. C.P.L.R. § 5015(c) (emphasis added). Having initiated this proceeding, the administrative judge, rather than the judgment defaulter, acts as the petitioner before a different judge who is to decide the application. *See,* N.Y. C.P.L.R. § 5015 (McKinney), Practice Commentaries, C5015:13; *see also, Mead v. First Trust & Deposit Co.,* 90 Misc.2d 930, 397 N.Y.S.2d 295, 297 (N.Y.Sup.Ct.1977) (acknowledging denial of amicus curiae status to legal services corporation that requested proceedings under forerunner provision to § 5015(c) because it "was interested in the outcome of the proceeding"). Notwithstanding its remedial purposes, this discretionary procedure (1) provides plaintiffs no right of action, (2) cannot address the gravamen of the plaintiffs' allegations here as it could only vacate the default judgments against them, and (3) denies plaintiffs any control over the course of the litigation. The dissent's distaste for "hungry lawyers," and aversion to awarding attorneys' fees in class actions, *see infra* Op. pp. 101-02, 103, cannot justify requiring plaintiffs, under the guise of Rule 23(b)(3)'s superiority analysis, to pass through the threshold of the state courthouse to seek relief that cannot seriously be entertained as an adequate, let alone superior, substitute for proceeding by class on these claims.

b. Defendants' *Rooker–Feldman* and Full Faith & Credit Arguments are Unavailing at the Class Certification Stage

Just how far Mel Harris's superiority arguments fall from the mark of requiring reversal of the district court's class certification order under Rule 23(b)(3)(C) becomes even clearer when considered in light of the two doctrinal bases on which defendants argue that class certification was inappropriate in light of federalism concerns, namely, the *Rooker–Feldman* doctrine and the Full Faith and Credit Act. We take these arguments in order.

[17] *Rooker–Feldman* bars the federal courts from exercising jurisdiction over claims "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of

those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). We have clarified that in order to satisfy the requirements of *Rooker–Feldman*, the defendant must satisfy the following four requirements:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must complain of injuries caused by a state-court judgment. Third, the plaintiff must invite district court review and rejection of that judgment. Fourth, the state-court judgment must have been rendered before the district court proceedings commenced.

Hoblock, 422 F.3d at 85 (internal quotation marks and modifications omitted). The causation requirement is only satisfied if "the third party's actions are produced by a state court judgment and not simply ratified, acquiesced in, or left unpunished by it." *Id.* at 88.

[18] The district court concluded, at the motion to dismiss stage, that "plaintiffs assert claims independent of the state-court judgments and do not seek to overturn them." *Sykes I,* 757 F.Supp.2d at 429. We agree. As explained previously, claims sounding under the FDCPA, RICO, and state law speak not to the propriety of the state court judgments, but to the ***95** fraudulent course of conduct that defendants pursued in obtaining such judgments.

Leucadia defendants, for their part, offer the more subtle argument that the causation components of *Rooker–Feldman* required the district court to exclude from its class certification order "remittance" damages, by which Leucadia means the compensatory damages that plaintiffs claim defendants have extracted as a result of the entry of a default judgment. We disagree.

The crux of the issue, as identified by Leucadia, is not simply *Rooker–Feldman*, but rather the requirement that the district court's certification order "define the class and the class claims, issues, or defenses, and must appoint class counsel." Fed.R.Civ.P. 23(c)(1)(B). Leucadia's argument is that the certification order under Rule 23(b)(3), which identifies all of the above but does not exclude the certain category of damages that Leucadia believes is not cognizable under *Rooker–Feldman*, finds no basis in the text of Rule 23, nor in the class certification decisions that we have identified.

Even if we credited Leucadia's contention that the state court judgment satisfied the causal requirements of *Rooker–Feldman*, rather than acting as ratification of a harm that resulted from fraudulent conduct on behalf of defendants, *Hoblock,* 422 F.3d at 85, the contention would have no merit. There is no textual basis to endorse Leucadia's view that certain categories of damages must be carved out of a class certification order under Rule 23(c)(1)(B). The requirements are that the class, the class claims, and issues, be identified. Fed.R.Civ.P. 23(c)(1)(B). The district court's class certification order did just that: it identified a class of individuals that it defined as "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants." Special App'x at 47. It further identified the claims as those arising under RICO, the FDCPA, GBL § 349, and New York Judiciary Law § 487. Special App'x at 47.

There are good reasons for these limited requirements. The district court's order is not a final statement of the merits, just as class certification is not an opportunity to "engage in free-ranging merits inquiries." *Amgen,* 133 S.Ct. at 1194–95. We see no use in a class certification order that is required to list all possible defenses to all possible damage claims, nor do we see, in the text of Rule 23, any requirement for it.

[19] Nor, in our view, do defendants' arguments sounding under the Full Faith and Credit Act fare much better. The act requires that state court proceedings must be afforded "the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken." 28 U.S.C. § 1738. Defendants urge that such doctrine bars us from considering plaintiffs' damages claims seeking the return of default judgments, because state courts treated judgments entitling them to recovery as valid. We decline to consider this argument, however, for the same reasons that the district court declined to carve out specific damages that might be available to the class based on its certification order: such a determination is simply not required under Rule 23(c)(1)(B).[5]

***96** A word may be in order, however, to illustrate how far afield defendants' arguments sounding in federalism require us to go from the ultimate merits of plaintiffs' claims. The parties remonstrate over whether or not Fabacher's declaration as to "personal knowledge" was in fact required to make out an application for a default judgment in New York Civil Court. Thus, Mel Harris in particular have asked us to consider a Directive of the New York Civil Court, issued in 2009. This directive imposes burdens on third-party creditors seeking default judgments in addition to those imposed under Section 3215 of the CPLR. N.Y.C. Civ.Ct. Directive DRP–182 (May 2009). This Directive requires, in particular, that a third-party debt collector include "[a]n Affidavit of a Witness

of the Plaintiff, which includes a chain of title of the accounts, completed by the plaintiff/plaintiff's witness." *Id.* This form affidavit only requires the witness to attest to the chain of title "to the best of [his or her] knowledge." *Id.* Plaintiffs, for their part, point to a checklist prepared by the New York City Civil Court, which directs parties pursuing a default judgment to submit "an Affidavit of Facts from a person with personal knowledge of the facts." New York City Civil Court, *Entering Civil Judgments,* http://www.courts.state.ny.us/COURTS/nyc/civil/judgments_atty.shtml #checklist (last visited Feb. 6, 2015).

Whether or not Fabacher was required to attest to personal knowledge of the underlying debt in his affidavit of merit, as plaintiffs contend, or whether a more lax standard governs his affidavits, as Mel Harris contend, is ultimately irrelevant to adjudicating liability under any of the claims that plaintiffs have brought. What matters is that, in hundreds of thousands of forms, he did attest to this knowledge, despite the undisputed fact, at the class certification stage, that he did not in fact actually review underlying documentation related to these loans. Whatever was required in New York City Civil Court will not decide the issue of liability for these defendants. The conduct of defendants, and the question of whether this conduct was ultimately fraudulent, will decide their liability. The federal system, with its guarantees of concurrent jurisdiction, and the federal laws under which plaintiffs seek relief, permit as much.

3. We Decline to Decide, in the First Instance, Whether the FDCPA Permits Claims for the False Statements Alleged Here

Defendants raise a final issue related to the propriety of class certification, namely, the question of whether or not the FDCPA permits a plaintiff to assert claims for a false statement that was made to a party other than the debtor.

[20] We must determine the propriety of making a decision on this issue at this stage in the proceedings. Plaintiffs point out that we are not to "engage in free-ranging merits inquiries at the certification stage." *Amgen,* 133 S.Ct. at 1194–95. And it is undisputed that the question of whether false statements, such as those made by Fabacher in his affidavits of merit, made to third parties are actionable under the FDCPA is a question common to the class under both Rule 23(a) and 23(b)(3): resolving that such statements are not actionable would "resolve an issue that is central to the validity" of the FDCPA claim "in one stroke." *Dukes,* 131 S.Ct. at 2551. Indeed, the district court's class certification decision stated that "there is a question of law as to whether ***97** making false representations in court, rather than to a debtor, violates the FDCPA," *Sykes II,* 285 F.R.D. at 290, but ultimately did not pass on the issue. We think this the proper determination, as it is unlikely that the Federal Rules, which require a plaintiff to identify a common question at the class certification stage, also require the district court to resolve that question at the same stage in the litigation. The district court did not commit error in declining to rule definitively on whether the FDCPA covers the false statements at issue in this case.

We decline to address this question, in the first instance,[6] on appeal. *See Dardana Ltd. v. Yuganskneftegaz,* 317 F.3d 202, 208 (2d Cir.2003) ("It is this Court's usual practice to allow the district court to address arguments in the first instance."). We leave it to the district court to decide this issue at a later stage of the litigation.

C. The District Court Did Not Abuse its Discretion in Certifying the Rule 23(b)(2) Class

1. Proposed Injunctive Relief Benefits All Class Members

[21] Injunctive relief is appropriate if "the party opposing the class has acted or refused to act on grounds that apply generally to the class." Fed.R.Civ.P. 23(b)(2). The district court concluded that such relief was appropriate because of "defendants' uniform filing of false affidavits in state court to fraudulently procure default judgments against putative class members." *Sykes II,* 285 F.R.D. at 293. This injunction, as currently sought by plaintiffs, includes four elements: first, a direction that defendants "cease engaging in debt collection practices that violate the FDCPA, RICO, N.Y. GBL § 349, and N.Y. Jud. Law § 487;" second, a direction that defendants locate and notify class members that a default judgment has been entered against them and that "they have the right to file a motion with the court to re-open their case;" third, a direction that defendants "serve process in compliance with the law in any and all future actions;" and fourth, a direction that defendants' affidavits of merit in future actions reflect their personal knowledge of the facts. Joint App'x at 219.

The Supreme Court has clarified that certification of a class for injunctive relief is only appropriate where "a single injunction ... would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557; *Amara v. CIGNA Corp.,* 775

F.3d 510, 522 (2d Cir.2014) (noting that the Supreme Court in *Dukes* "simply emphasized that in a class action certified under Rule 23(b)(2), 'each individual class member' is not 'entitled to a *different* injunction' " (emphasis in original) (quoting *Dukes,* 131 S.Ct. at 2557)). Mel Harris submit that this proposed injunctive relief does not satisfy this standard, because individualized issues of service differentiate class members from one another, and the named plaintiffs will not benefit because they "have already had their default judgments vacated."

This claim is without merit. "[R]elief to each member of the class," does not require that the relief to each member of the class be identical, only that it be beneficial. *Dukes,* 131 S.Ct. at 2557–58. And while Mel Harris attempt to refocus the proposed injunctive relief on the affidavits of service, it is clear that the proposed injunctive relief sweeps broadly enough to benefit each class member. There is no support for the contention, for example, that because certain class members received ***98** service, they will not be provided relief by the notification proposed by the injunction as well. *See Amara,* 775 F.3d at 522 (finding decertification of Rule 23(b)(2) class not required where certain class members, who might not benefit from injunction's reformation of retirement plan, received "some benefit in the form of new notice" of changes to the plan). Furthermore, while named plaintiffs have had their default judgments vacated, they might each still be subject to a further action by these same defendants. The district court did not abuse its discretion in concluding that plaintiffs had satisfied the requirements of Rule 23(b)(2).

2. We Decline to Decide, in the First Instance, Whether RICO Permits Private Injunctive Relief

[22] Defendants finally argue that injunctive relief is not available under RICO. For the same reasons that we found the district court did not commit error in declining to rule on the availability of relief under the FDCPA, we find that the district court did not commit error in declining to decide, at the class certification stage, whether RICO permits private injunctive relief.

Because the district court did not reach this question below, we decline to address it for the first time[7] on appeal. *See Dardana,* 317 F.3d at 208.

CONCLUSION

For the foregoing reasons, the opinion and order of the district court is hereby affirmed.

DENNIS JACOBS, Circuit Judge, dissenting:

This class action alleges that the defendant firms cut sharp corners in obtaining default judgments against the class members in the Civil Court of New York City. On this interlocutory appeal from class certification, the panel concludes that the superiority and predominance prerequisites to a Rule 23(b)(3) damages class have been satisfied. I respectfully dissent.

The *superiority* ruling is error because a statutory procedure is available, in the Civil Court itself, for redressing such an allegedly wide-ranging fraud—one that is superior in every way to this unwieldy federal class action. The district court's *predominance* ruling cannot be sustained because the court failed to perform, as is necessary, a rigorous weighing of common and individualized issues. The majority also holds that a Rule 23(b)(2) equitable and declaratory relief class was properly certified even though the named plaintiffs can get no benefit from that supposed relief because they have already achieved vacatur (or discontinuance) of the default judgments against them.

This is class litigation for the sake of nothing but class litigation.

I

Four plaintiffs, on behalf of a class of over 100,000, sued a buyer of bad debts (the "Leucadia defendants"), a law firm (the "Mel Harris defendants"), and a process server ("Samserv"), alleging that they fraudulently obtained default judgments against the class members. The alleged scheme proceeded in two steps: (1) a process server, sometimes a Samserv employee (but more often than not, not) engaged in sewer service, and then prepared a fraudulent affidavit of service; and (2) the debt buyer and the law firm generated and submitted standardized affidavits of merit ***99** falsely attesting to personal knowledge of the debt. *See* N.Y. C.P.L.R. 3215(f) (requiring "proof of the facts constituting the claim, the default and the amount due").

The dominant focus of the complaint is the fraud in service of process;[1] although plaintiffs do not actually deny that many class members received proper service. But service is too individualized an issue for class certification. The point was recognized implicitly by the district court,[2] and acknowledged more directly by its dismissal of one named plaintiff's claim as time-barred because service had been effected more than a year prior to the entry of default. *Sykes v. Mel Harris & Assocs., LLC,* 757 F.Supp.2d 413, 422 (S.D.N.Y.2010) ("*Sykes I* "). Plaintiffs' backstop contention —that irregularities in Samserv's logbooks should allow for a presumption that *all* service was fraudulent—is easily refuted.[3]

To patch this hole, plaintiffs changed focus to the affidavits of merit (all of which were generated by a software program used by a single Mel Harris employee) as the "glue" holding together this miscellaneous and diverse class. *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 2552, 180 L.Ed.2d 374 (2011). (The putative debts are to Sears, a credit card company, a bank, and a gym.[4])

The district court certified two classes: (1) a Rule 23(b)(3) class seeking money damages for "all persons who have been sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has been obtained"; and (2) a Rule 23(b)(2) class seeking equitable and declaratory relief for "all persons who have been or will be sued by the Mel Harris defendants as counsel for the Leucadia defendants in actions commenced in New York City Civil Court and where a default judgment has or will be sought." ***100** *Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279, 294 (S.D.N.Y.2012) ("*Sykes II* "). Plaintiffs in both classes assert claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[5] New York General Business Law,[6] and (as against the Mel Harris defendants alone) New York Judiciary Law.[7] The damages class also alleges Fair Debt Collection Practices Act ("FDCPA") claims.[8]

II

It is useful and diplomatic to set out first the points of my agreement with the majority. I agree that it was no abuse of discretion to find that the Rule 23(a) prerequisites —numerosity, commonality, typicality, and adequacy of representation—are met. There is a common issue as to whether the affidavits of merit were fraudulent, and the claims asserted about the affidavits of merit are typical. Fed.R.Civ.P. 23(a)(2), (3); *see also, e.g., Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge."). That issue alone is unlikely to be decisive, but the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. Thus, unlike in *Dukes,* all of the claims are held together by "glue," *id.* at 2552—or some dabs of it.

I also agree that the amount of debt owed by each class member, which defendants urge as an individualized issue that defeats certification, is beside the point. The harm can be viewed as the obligation created by a fraudulent default judgment, so that it should not matter that the original debt may remain, and be unaffected. *See Hamid v. Stock & Grimes, LLP,* 876 F.Supp.2d 500, 501–03 (E.D.Pa.2012) ("It is clear from its underlying purpose that debtors may recover for violations of the FDCPA even if they have defaulted on a debt.... If [plaintiff's] payment was not a proper element of actual damages under the FDCPA, a debt collector could harass a debtor in violation of the FDCPA, as a result of that harassment collect the debt, and thereafter retain what it collected."); *accord Abby v. Paige,* No. 10–23589–CIV, 2013 WL 141145, at *8–9 (S.D.Fla. Jan. 11, 2013); *cf. Sparrow v. Mazda Am. Credit,* 385 F.Supp.2d 1063, 1071 (E.D.Cal.2005) ("[S]trong policy reasons exist to prevent the chilling effect of trying FDCPA claims in the same case as state law claims for collection of the underlying debt."); *Isa v. Law Office of Timothy Baxter & Assocs.,* No. 13–cv–11284, 2013 WL 5692850, at *3 (E.D.Mich.2013) ("Congress did not intend for collectors to engage in violations, enter judgments, and use state law on judgment execution to force payment to creditors.").

The last point of my agreement with the majority is that the substantive legal questions the defendants invite us to answer either counsel in favor of commonality and typicality, or are entirely tangential to the class certification decision and best left unanswered at this stage. One such question—what is required for an affidavit of merit under New York law? —is a common question of law in this case. In any event, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that

they are relevant to ***101** determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* —— U.S. ——, 133 S.Ct. 1184, 1194–95, 185 L.Ed.2d 308 (2013).

III

In my view, the damages class was improperly certified. Rule 23(b)(3) requires first, that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" and second, that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The Rule specifies, as "matters pertinent to these findings," "the desirability or undesirability of concentrating the litigation of the claims *in the particular forum* " and "the likely difficulties in managing a class action." Fed.R.Civ.P. 23(b)(3)(C)-(D) (emphasis added). These very factors counsel against certification here. *See Madison v. Chalmette Refining, LLC,* 637 F.3d 551, 554 (5th Cir.2011) ("The decision to certify a class is within the broad discretion of the district court, but that discretion must be exercised within the framework of Rule 23." (internal quotation marks and alterations omitted)).

A

The district court concluded that a federal class action is a superior method for resolving this litigation over state court proceedings, because: (1) it is more efficient than requiring thousands of individual suits; (2) most class members would not litigate given the small recovery and their limited means; (3) the conduct all occurred in New York; and (4) any problems could be alleviated through use of class management tools. *See Sykes II,* 285 F.R.D. at 294. The majority endorses this analysis. *See supra* Op. pp. 91–94.

Even if a federal class action were a good way to remedy an allegedly massive and pervasive fraud perpetrated on a New York court, it cannot be superior to the adequate remedial scheme already offered by the courts of New York. State law provides that, "on motion of any interested person," a party may be relieved from a judgment based on the grounds of, *inter alia,* "excusable default," "fraud, misrepresentation, or other misconduct of an adverse party." N.Y. C.P.L.R. 5015(a)(1), (3). And, on an application by an administrative judge, vacatur may be granted *en masse* "upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities." *Id.* 5015(c); *cf. Jack Mailman & Leonard Flug DDS, P.C. v. Whaley,* No. 31880/02, 2002 WL 31988623, at *6 (N.Y.C.Civ.Ct. Nov. 25, 2002) (forwarding the court's decision "to the administrative judge for the possible institution of proceedings in conformity with C.P.L.R. 5015(c)"). Because vacatur *en masse* is done by an administrative judge, it is a remedy that is broad, wholesale, effective, and easy. The only remaining salient advantage of this federal class action is attorneys' fees, which do not much help the members of the class.

The majority observes that the availability of recourse to state avenues for relief was not raised in the district court. *See supra* Op. pp. 91 & n. 4. True, defendants' superiority arguments in their opposition to class certification focused on the existence of issues personal to each class member, as well as manageability, and the prospect of "mini-trials just to determine the threshold issue of class membership." *See* Mem. of Law in Opp'n to Class Cert., Dkt. No. 90 at 22–23. But that is because the complaint was chiefly predicated on sewer service, an issue as to which facts ***102** varied from debtor to debtor, whereas class counsel (at least for current purposes) shifted focus to the submission of materially false affidavits of merit. In any event, the district court's ruling on superiority rests on the determination that a class action is "without question, more efficient than requiring thousands of debtors to sue individually." *Sykes II,* 285 F.R.D. at 294. It is this consideration that is obviated by the New York procedure. *See* N.Y. C.P.L.R. 5015(c). "[T]he Legislature has gone so far as to create a special subdivision allowing an administrative judge to bring a proceeding to vacate default judgments *en masse* where obtained by fraud, misrepresentation ... lack of service, ... or other illegalities." *Shaw v. Shaw,* 97 A.D.2d 403, 467 N.Y.S.2d 231, 233 (2d Dep't 1983) (internal quotation marks omitted).

Rule 23 requires consideration of any other "available method[ ] for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3); *see also id.* advisory committee notes (observing the court "ought to assess the relative advantages of alternative procedures" and stating that "[a]lso pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum"). One such "method" that is "available" is afforded by the New York Legislature for redressing harms alleged in this case by recourse to the Civil Court, in which the alleged wrong was done. In the majority's view, "the forum analysis of Rule

23(b)(3) is not grounded in a consideration of the comparative value of pursuing a claim in federal or state court." *Supra* Op. p. 92. That seems to me error, at least when the state court remedy affords relief—available *en masse*—for harm that was suffered in that forum.

Amici briefs filed by consumer advocacy groups explain that unscrupulous debt collection practices abuse the legal process, and demonstrate that this well-documented problem has drawn the attention of all levels of government for years. But that observation does not speak to a need for federal class action remedies. As the parties point out, the Civil Court has recently issued directives regarding "Default Judgments on Purchased Debt," imposing new and additional requirements on third-party debt collectors like the Leucadia defendants.[9] Collectors must now include an "Affidavit of Sale of Account by Original Creditor" and an "Affidavit of the Sale of the Account by the Debt Seller" for each debt re-sale. *Cf. Shaw,* 467 N.Y.S.2d at 234 ("A judgment obtained without proper service of process is invalid, even when the defendant has actual notice of the law suit, because as a prophylactic measure such rule is necessary to prevent 'sewer service' ") (citing *Feinstein v. Bergner,* 48 N.Y.2d 234, 239–41, 422 N.Y.S.2d 356, 397 N.E.2d 1161 (1979)).

The New York court system needs no helping hand from a federal class action initiative. The majority observes that plaintiffs' claims cannot be heard as a class in Civil Court. *See supra* Op. p. 92. But class litigation is not an end in itself. It is simply a "device to vindicate the rights of individuals class members." *In re Gen. Motors Corp. Engine Interchange Litig.,* 594 F.2d 1106, 1127 n. 33 (7th Cir.1979); *see also Blaz v. Belfer,* 368 F.3d 501, 504 (5th Cir.2004) (explaining a class action is merely a procedural device). New York's Civil Court provides such a device. N.Y. C.P.L.R. 5015(c). The majority also discounts the state procedure because it is implemented by judges. *See supra* Op. pp. 93–94. But one would have thought that to be an advantage; it reduces the ***103** burden on plaintiffs and may obviate the need for counsel altogether.

The majority's other critiques of the state procedure are easily disposed of. Vacatur *en masse* is discretionary—so are many aspects of class certification. *See id.* at 94. The majority cites to the district court's observation that a class action is—"without question"—a more efficient way of proceeding. *Id.* at 94. But the state remedy is far more speedy than a cumbersome class action. In state court, all that is needed is to push on an open door. And that, evidently, is what the class representatives themselves did; they have all had their judgments vacated or discontinued. Thus, the door of the state court is open for the vacatur of the default judgments *en masse,* without class certification, subclasses, hungry lawyers, or issues of process and statutes of limitations. *Cf. In re Aqua Dots Prods. Liability Litig.,* 654 F.3d 748, 752 (7th Cir.2011) ("A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."). The countervailing benefits of a class action accrue almost entirely to the lawyers in a fee-rich environment, and leave trivial benefits for consumption by the class.

B

"Rule 23(b)(3)'s predominance criterion is even more demanding" than the "rigorous analysis" mandated under Rule 23(a), and requires a "close look at whether common issues predominate over individual ones." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks omitted); *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615, 623–24, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding.").

The district court acknowledged problems that might easily be viewed as fatal: "individual issues may exist as to causation and damages as well as to whether a class member's claim accrued within the applicable statute of limitations." *Sykes II,* 285 F.R.D. at 293. The district court nevertheless hoped that these problems could be dealt with through "a number of management tools," and cited "appointing a magistrate judge or special master to preside over individual damages proceedings, decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages, creating subclasses, or altering or amending the class." *Id.* at 293–94 (internal quotation marks omitted).

No doubt, resourceful judges can seek or find ways to overcome difficulties. But predominance cannot be determined without a careful balancing of the individualized issues against the common issues. It is not enough to discount problems on the basis of hope and confidence. *Compare In re U.S. Foodservice Inc. Pricing Litig.,* 729 F.3d 108, 131 (2d

Cir.2013) ("[C]lose inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof.") *with Sykes II,* 285 F.R.D. at 292 ("[U]se of sewer service and false affidavits of service may warrant equitable tolling. Even still, though, the Court can address such issues at later stages of the litigation if necessary." (citation omitted)).

The existence of such management tools, which are always at hand, does not help to distinguish a claim that justifies certification from a claim that does not. *Cf.* ***104** *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1176, 1184 (11th Cir.2010) ("[A] class action with numerous uncommon issues may quickly become unmanageable."); *cf. also In re Initial Pub. Offerings Sec. Litig.,* 471 F.3d 24, 42 (2d Cir.2006) ("Plaintiffs' own allegations and evidence demonstrate that the Rule 23 requirement of predominance of common questions over individual questions cannot be met under the standards as we have explicated them."). The useful inquiries are why such tools will be needed and how they would be used. What proceedings are envisioned for the magistrate judge? The magistrate judge who hears a hundred thousand claims, four a day, would finish work in about a century. What subclasses, or "amended" or "alternative" classes would serve —and who would represent *any* of them, seeing as how all of the default judgments against the present class representatives have already been vacated or withdrawn? A better-considered case-management tool is de-certification. *See* Fed.R.Civ.P. 23(c)(1)(C).

Specifically, many claims in this case may be defeated by the statute of limitations. The issue demands a close scrutiny that has not been given. If members were served (or otherwise notified) of the default judgment more than one year before the class action commenced, they cannot now rely on equitable tolling. *See New York v. Hendrickson Bros.,* 840 F.2d 1065, 1083 (2d Cir.1988) (equitable tolling only appropriate if plaintiff was ignorant of cause of action because of defendant's concealment). A member-by-member inquiry concerning service of process will likely be required. Moreover, all members served after April 1, 2008 were provided supplemental notice by the state court before a default judgment was entered, *see* N.Y. Comp.Codes R. & Regs. tit. 22, § 208.6(h)(2); so what will be required is individualized examination of whether a plaintiff was served and whether notice was effected by the court's new system.

In an effort to skate past this appeal, class counsel now jettison their clients' defense of equitable tolling, and propose to include as class members only persons whose claims are not barred by the statute of limitations. But the district court (for one) seemed to think the plaintiffs were still seeking the benefit of equitable tolling when it certified the class. *See Sykes II,* 285 F.R.D. at 292. Crucially, the class definition does not exclude claims based on the date of filing.

Even if this maneuver succeeds (it appears it has), *see supra* Op. pp. 89–90, plaintiffs are simply trading a commonality problem for problems of typicality and adequacy of representation: the district court earlier relied on equitable tolling in order to save the FDCPA claims of two of the named plaintiffs.

IV

Class certification for equitable and declaratory relief under Rule 23(b)(2) is likewise deeply flawed. Such a class may only be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). In other terms, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

The named plaintiffs seek an injunction that would do absolutely nothing for them. The injunction sought would direct defendants to (1) conform their debt collection practices to the laws cited in the complaint, (2) locate and notify class members that a default judgment has been entered against them and that they have the right ***105** to file a motion to re-open, (3) serve process in compliance with law, and (4) produce and file affidavits of merit that truthfully reflect personal knowledge. *See* Third Am. Compl. ¶ 80. *But the default judgments against all of the named plaintiffs were already vacated or discontinued before they asserted these claims. See id.* ¶¶ 131, 161, 215, 330; *Sykes I,* 757 F.Supp.2d at 429 ("In fact, all plaintiffs have had the default judgments against them vacated or discontinued."). They get nothing from the equitable relief they seek (absent any speculation that they will be subject to future suits and default judgments by the Leucadia and Mel Harris defendants). "[A] single injunction or declaratory judgment" will therefore not "provide relief to each member of the class." *Dukes,* 131 S.Ct. at 2557.

V

I cannot figure out what Samserv is doing here. The common thread identified by the district court was the preparation of the allegedly fraudulent affidavits of merit. Samserv had no role in drafting those affidavits. Moreover, fewer than half the class members were served with process (or given sewer service) by Samserv. And though plaintiffs respond that Samserv was still part of the RICO enterprise, the only common RICO issue identified is the affidavits of merit.

A class certification order cannot reach a defendant based on a purportedly common underlying thread unrelated to that defendant's conduct. *See* Fed.R.Civ.P. 23(c)(1)(b) ("An order that certifies a class action must define the class and the class claims, issues, or defenses...."); *see also, e.g., In re Initial Pub. Offerings Sec. Litig.,* 471 F.3d at 41 (stating "a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met").

The majority's proposal that the district court may certify subclasses is no answer to these problems, for reasons set forth above. *See supra* Op. n. 3; *see also Sacred Heart Health Sys.,* 601 F.3d at 1184 (finding subclasses "no answer" when common questions did not predominate and concluding class action was not superior to other available means for fairly adjudicating claims).

Certification of this misbegotten class will generate grinding of gears and spinning of wheels for years to come, notwithstanding an effective, superior, and immediately available remedy in state court.

All Citations

780 F.3d 70, 90 Fed.R.Serv.3d 1793, RICO Bus.Disp.Guide 12,584

Footnotes

1 The Clerk of the Court is directed to amend the caption as above.

2 As previously noted, the Supreme Court has acknowledged that, in certain "context[s] ... '[t]he commonality and typicality requirements of Rule 23(a) tend to merge.' " *Dukes,* 131 S.Ct. at 2551 n. 5 (second alteration in original). The district court analyzed both typicality and commonality and found that the proposed class satisfied the typicality requirement "for many of the same reasons they meet the commonality requirement." *Sykes II,* 285 F.R.D. at 291. Defendants and plaintiffs agree that in this case, the commonality and typicality considerations are sufficiently merged to warrant their consideration in tandem.

3 For similar reasons, defendants'—and the dissent's, *see infra* p. 105 —contentions regarding the inappropriateness of certifying a class to bring claims against Samserv, when Samserv admittedly did not serve process on all individuals who were sued or will be sued in New York City Civil Court by Mel Harris on behalf of Leucadia, are also misplaced. Plaintiffs who were not served by Samserv allege no FDCPA or GBL claims against Samserv—they only bring RICO claims. Carving out such claims may also be the subject of an appropriate subclass under Rule 23(c)(5), but this is for the district court to determine in the first instance. *See Marisol,* 126 F.3d at 379 ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear.").

4 The dissent intimates that Mel Harris cannot be expected to have previously raised this superiority theory, as their arguments below were tailored to plaintiffs' emphasis on sewer service, which involved questions of fact unique to each debtor. *See infra* Op. p. 101–02. According to the dissent, class counsel's shift in the focus of the complaint, to the submission of false affidavits of merit, accounts for the new state-forum argument. But this explanation falls flat, as any shift in the focus of plaintiffs' allegations has not affected the nature of defendants' contentions. Mel Harris defendants continue to insist that resolution of plaintiffs' claims will require "individualized showings," now related to the affidavits of merit, which will result in "one hundred thousand mini-trials." Further, the state procedural remedy the dissent endorses to address these claims concurrently, *see infra* Op. pp. 101–03, could have been raised by Mel Harris before the district court, as that provision applies to sewer service, *see* N.Y. C.P.L.R. § 5015(c) (providing, upon application of an administrative judge, for en masse vacatur of default judgments obtained, inter alia, by "fraud, misrepresentation, ... *lack of due service,* ... or other illegalities" (emphasis added)).

5 It may also be, on full adjudication of the merits of this issue, that the district court may determine that the issue has not been properly raised. The requirement that federal courts afford full faith and credit to state court judgments is an argument that federal courts must give res judicata effect to the state court judgment. *See Kremer v. Chem. Constr.*

Corp., 456 U.S. 461, 481–82, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). Res judicata is an affirmative defense that must be pleaded. *See* Fed.R.Civ.P. 8(c). Defendants have not asserted a res judicata defense in their answers.

6 We have not ruled on whether an FDCPA claim may be brought for misrepresentations made to third parties. *Kropelnicki v. Siegel,* 290 F.3d 118, 128 (2d Cir.2002).

7 We have yet to decide whether RICO allows for private injunctive relief. *See, e.g., Motorola Credit Corp. v. Uzan,* 202 F.Supp.2d 239, 243 (S.D.N.Y.2002).

1 *See* Third Am. Compl. ¶ 4 ("[S]ewer service is the primary reason so few of the people sued by Defendants appear in court to defend themselves."); *see also supra* Op. p. 85 (acknowledging complaint's emphasis on sewer service but concluding "plaintiffs have made clear that this is but one component of the overarching debt collection plan").

2 *See Sykes v. Mel Harris & Assocs., LLC,* 285 F.R.D. 279, 290 (S.D.N.Y.2012) ("*Sykes II* ") ("[Plaintiffs'] overarching claim is that defendants *systematically* filed false affidavits of merit and, *in many instances,* false affidavits of service to fraudulently produce default judgments...." (emphasis added)); *id.* at 291 ("[I]ndividualized proof of service or lack thereof is not fatal to the prerequisite of commonality. Here, defendants' uniform course of conduct was to file an allegedly false affidavit of merit and, *at least in some instances,* an allegedly false affidavit of service." (emphases added)).

3 *See Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 2555, 180 L.Ed.2d 374 (2011) ("Even if [statistical proof] established ... a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists...."); *id.* at 2556 ("Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory."); *id.* at 2561 ("Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims." (citations omitted)); *see also 650 Fifth Ave. Co. v. Travers Jewelers Corp.,* No. LT75766/20, 2010 WL 4187936, at *4 (N.Y.C.Civ.Ct.2010) ("Where a respondent rebuts an affidavit of service with a sworn denial of service, the petitioner must establish jurisdiction by a preponderance of the evidence at a traverse hearing.").

4 *See* Third Am. Compl. ¶¶ 136, 166, 198, 269.

5 *See supra* Op. pp. 83, 86, 91–92; *see also* 18 U.S.C. § 1962(c).

6 *See supra* Op. pp. 93–94, 87; *see also* N.Y. Gen. Bus. Law §§ 349(a), (h).

7 *See supra* Op. p. 84; *see also* N.Y. Jud. Law § 487.

8 *See supra* Op. pp. 82–83, 85–86, 88, 91–92; *see also* 15 U.S.C. §§ 1692e, 1692f, 1692k(a).

9 *Available at* http://www.courts.state.ny. us/courts/nyc/SSI/directives/DRP/drp182.pdf.

Tab 8

729 F.3d 108
United States Court of Appeals,
Second Circuit.

In re U.S. FOODSERVICE INC. PRICING LITIGATION.

Catholic Healthcare West, Tomas & King, Inc., Waterbury Hospital o/b/o themselves & others similarly situated, Cason Inc., o/b/o themselves & others similarly situated, Frankie's Franchise Sys Inc., o/b/o themselves & others similarly situated, Plaintiffs–Appellees,

v.

US Foodservice Inc., Defendant–Appellant, Koninklijke Ahold N.V., Gordon Redgate, Brady Schoefield, Defendants.

No. 12–1311–cv.
|
Argued: May 29, 2013.
|
Decided: Aug. 30, 2013.

Synopsis

Background: Customers brought putative class action against national food distributor, alleging violation of Racketeer Influenced and Corrupt Organizations Act (RICO) and breach of contract. Customers moved to certify class. The United States District Court for the District of Connecticut, Droney, J., 2011 WL 6013551,granted motion. Distributor appealed.

Holdings: The Court of Appeals, Debra Ann Livingston, Circuit Judge, held that:

[1] common issues predominated with regard to customers' RICO claims;

[2] common issues predominated with regard to customers' contract claims; and

[3] class action is superior to other methods of adjudication.

Affirmed.

West Headnotes (21)

[1] **Federal Courts** Class actions

Court of Appeals reviews a district court's decision to certify a class for abuse of discretion, the legal conclusions that informed its decision de novo, and any findings of fact for clear error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3 Cases that cite this headnote

[2] **Federal Courts** Abuse of discretion in general

A district court abuses its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.

[3] **Federal Civil Procedure** Class Actions

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.

4 Cases that cite this headnote

[4] **Federal Civil Procedure** Factors, grounds, objections, and considerations in general

Federal law permits individual claims to be litigated as a class action provided that the party seeking certification affirmatively demonstrates his compliance with the rule governing class actions; the party must demonstrate that the numerosity, commonality, typicality, and adequacy of representation requirements are satisfied, as well as at least one of the three

provisions for certification found in the rule. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

22 Cases that cite this headnote

[5] **Federal Civil Procedure** In general; certification in general

Federal Civil Procedure Evidence; pleadings and supplementary material

Federal Civil Procedure Consideration of merits

To certify a class, a district court must make a definitive assessment of the class certification rule requirements, notwithstanding their overlap with merits issues, must resolve material factual disputes relevant to each rule requirement, and must find that each requirement is established by at least a preponderance of the evidence. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

41 Cases that cite this headnote

[6] **Racketeer Influenced and Corrupt Organizations** Elements of violation in general

Racketeer Influenced and Corrupt Organizations Business, property, or proprietary injury; personal injuries

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

To prevail on a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim, plaintiffs must show (1) a substantive RICO violation; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation. 18 U.S.C.A. § 1962.

24 Cases that cite this headnote

[7] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Putative class's civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims against national food distributor, alleging distributor systematically overcharged them, were susceptible to generalized proof such that common issues would predominate over individual issues, supporting certification of class of customers; common evidence could be used to show distributor created and employed scheme to inflate invoices so as to overbill each class member in the exact same manner, customers' reliance on distributor's purported misrepresentation of actual costs in invoices, necessary to prove causation, could be shown using common evidence that customers paid allegedly inflated invoices and that distributor concealed its billing practices, and common evidence of difference between the amount customers paid on fraudulently inflated invoices and the amount they should have been billed could be used to show that customers suffered injury to their business or property. 18 U.S.C.A. § 1962; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

32 Cases that cite this headnote

[8] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

Class certification rule's predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

83 Cases that cite this headnote

[9] **Racketeer Influenced and Corrupt Organizations** Fraud in general

Racketeer Influenced and Corrupt Organizations Causal relationship; direct or indirect injury

Proof of misrepresentation, even widespread and uniform misrepresentation, only satisfies half of the equation in civil Racketeer Influenced and Corrupt Organizations Act (RICO) actions, since plaintiffs must also demonstrate reliance on a defendant's common misrepresentation to

establish causation under RICO. 18 U.S.C.A. § 1962.

16 Cases that cite this headnote

[10] **Federal Civil Procedure** Particular Classes Represented

Certification of a class action alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO) violation is inappropriate where reliance on defendant's alleged misrepresentation is too individualized to admit of common proof; fact that class members will show causation by establishing reliance on a defendant's misrepresentations, however, does not place fraud-based claims entirely beyond the reach of class certification, provided that individualized issues will not predominate. 18 U.S.C.A. § 1962; Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

47 Cases that cite this headnote

[11] **Racketeer Influenced and Corrupt Organizations** Damages

Damages as compensation in a civil Racketeer Influenced and Corrupt Organizations Act (RICO) action for injury to property must place the injured parties in the same position they would have been in but for the illegal conduct. 18 U.S.C.A. § 1964(c).

6 Cases that cite this headnote

[12] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Putative class's breach of contract claims against national food distributor, alleging distributor used controlled middlemen to inflate invoice prices and that such a practice departed from prevailing commercial standards of fair dealing, were susceptible to generalized proof such that common issues would predominate over individual issues, supporting certification of class of customers; distributor's "cost-plus" contracts were consistent and were governed by the Uniform Commercial Code (UCC), question of whether distributor had violated its duty of good faith and fair dealing was common to all class members, minimum purchase obligations required by some of the contracts were not material, and did not draw into question the predominance of common issues as to the contract claims, and, while claims involved laws of multiple states, such state laws did not vary materially. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; U.C.C. §§ 1–203, 2–103(1)(b).

55 Cases that cite this headnote

[13] **Federal Civil Procedure** Particular Classes Represented

Courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

10 Cases that cite this headnote

[14] **Contracts** What law governs

State contract law defines breach consistently such that the question will usually be the same in all jurisdictions.

8 Cases that cite this headnote

[15] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Even if putative class of customers would be required to rely on national food distributor's alleged fraudulent concealment to toll statutes of limitations applicable to their Racketeer Influenced and Corrupt Organizations Act (RICO) and contract claims, fraudulent concealment could be demonstrated via class-wide, generalized evidence, thus supporting certification of class. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

4 Cases that cite this headnote

[16] **Limitation of Actions** Concealment of Cause of Action

A plaintiff asserting fraudulent concealment to toll limitations periods must prove it exercised some degree of diligence to discover the claims.

[17] **Limitation of Actions** Nature of harm or damage, in general

A plaintiff seeking to toll the statute of limitations for a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim must demonstrate that he was reasonably diligent in trying to discover his cause of action. 18 U.S.C.A. § 1961 et seq.

2 Cases that cite this headnote

[18] **Evidence** Factors, Tests, and Standards in General

Expert testimony is admissible if the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact or issue.

7 Cases that cite this headnote

[19] **Federal Courts** Expert and opinion testimony

Court of Appeals would not disturb district court's determination that expert testimony regarding damages calculation was admissible for purpose of determining whether to certify class of customers in action against national food distributor, alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO) violations and contract claims, even though district court did not conduct *Daubert* hearing, absent a showing of manifest error. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

5 Cases that cite this headnote

[20] **Federal Civil Procedure** Consumers, purchasers, borrowers, and debtors

Class action was the superior method of adjudicating customers' civil Racketeer Influenced and Corrupt Organizations Act (RICO) and contract claims against national food distributor; substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof would achieve significant economies of time, effort and expense, and promote uniformity of decision. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

37 Cases that cite this headnote

[21] **Federal Civil Procedure** Superiority, manageability, and need in general

Federal Civil Procedure Common interest in subject matter, questions and relief; damages issues

Class actions based on predominance of common issues can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

27 Cases that cite this headnote

Attorneys and Law Firms

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Glenn M. Kurtz (Douglas P. Baumstein, on the brief), White & Case LLP, New York, New York, for Defendant–Appellant.

Before: STRAUB, LIVINGSTON, and LYNCH, Circuit Judges.

Opinion

***112** DEBRA ANN LIVINGSTON, Circuit Judge:

This case concerns allegations of fraudulent overbilling by U.S. Foodservice, Inc. ("USF"), the country's second largest food distributor whose customers have included the United States government, as well as hospitals, schools, restaurant chains, and small businesses across the United States. This interlocutory appeal requires us to determine whether the district court abused its discretion in certifying a nationwide class consisting of about 75,000 USF "cost-plus" customers. The gravamen of plaintiffs' complaint is that USF devised

and executed a fraud to overbill these customers in violation of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961–68, and state and tribal contract law. Despite the size of the class and the fact that it implicates the laws of multiple jurisdictions, the district court correctly concluded that both the RICO and contract claims are susceptible to generalized proof such that common issues will predominate over individual issues and a class action is superior to other methods of adjudication. Accordingly, we affirm the district court's certification of this class pursuant to Federal Rule of Civil Procedure 23(b)(3).

BACKGROUND

A. USF and Cost–Plus Pricing

Defendant–Appellant USF was a relatively small player in the food distribution industry in the early 1990s, but by 2000 had tripled in size and become the country's second largest food distributor with over 250,000 customers, 75,000 of whom comprise the class here. USF purchases food products, including meats, seafood, produce, and condiments, from suppliers and in turn sells the items to its customers. USF distributes national brands, such as Heinz and Sara Lee, under their own label; non-branded goods, usually meats and produce; and its own private label brands, which are designed to compete with national brands and require USF to invest in marketing, branding, and similar services.

USF sells many of its food products on a cost-plus basis that is common in the industry. Under this pricing model, the final cost to the customer is computed based on the "cost" (also "landed cost" or "delivered cost"), meaning the price at which USF purchases the goods from its supplier, and the "plus," or additional surcharge that USF charges on top of the cost, often expressed as a percentage increase over this cost. Thus, when a customer enters into a contract with USF, its contract does not guarantee it a set price such as $1 per pound of coleslaw, but rather a set increase over the cost at which USF will purchase the coleslaw (*i.e.,* a 5% mark-up). If a supplier increases the price of goods to USF, that cost is passed on to the customer. USF's contracts with its cost-plus customers provide various methods for calculating cost: some contracts base cost on nationally-published price lists, for instance, while others dictate that cost is set by USF's distribution centers based on the local market. This class action centers on contracts that set cost based on the "invoice cost," which refers to the price on the invoice from the supplier to USF.

Finally, promotional allowances—discounts provided to distributors from suppliers generally in exchange for fulfilling certain conditions, such as order minimums—are central to cost-plus pricing in the food service distribution industry. Such allowances are more readily available to large distributors and are offered by many (but not all) suppliers to promote their products. USF's customer contracts typically permit USF to keep the benefit of any promotional allowances for itself ***113** and do not require that it pass these savings on to the customer. According to USF, without the right to retain these promotional allowances, it would not be able to realize a profit in an extremely competitive market with razor thin margins.

B. The Alleged Fraud and Its Discovery

Plaintiffs allege that USF, beginning at least as early as 1998, engaged in a fraudulent scheme by which it artificially inflated the cost component of its cost-plus billing and then disguised the proceeds of its own inflated billing through the use of purported promotional allowances. The scheme centered on six Value Added Service Providers ("VASPs"), which plaintiffs allege were shell companies established and controlled by USF for the purpose of fraudulently inflating USF's cost to its customers.[1] According to plaintiffs, USF executives Mark Kaiser (who was convicted of securities fraud stemming from a separate fraudulent scheme orchestrated while at USF, *see United States v. Kaiser,* 609 F.3d 556 (2d Cir.2010)) and Tim Lee created the VASPs and installed two confederates, Gordon Redgate and Brady Schofield, in leadership positions at the VASPs in order to hide USF's involvement and control. Though Redgate and Schofield ostensibly owned the VASPs, USF funded the VASPs with multimillion dollar, interest-free loans. As noted by the district court, USF retained irrevocable assignment of the VASP shares, controlled "to whom and when the VASPs made payments," and guaranteed their payments to suppliers.

According to plaintiffs, the purpose of the VASPs was not to provide legitimate services, but to permit USF to overcharge its customers via the generation of fraudulent marked-up invoices that misrepresented USF's cost for the goods provided to its customers. USF allegedly negotiated the purchase of goods from suppliers without input from the VASPs. USF then directed suppliers to bill goods to the VASPs, but often to deliver them directly to USF.[2] The VASPs then generated a second invoice, ostensibly to "sell" the goods to USF, using a higher price dictated by Kaiser or Lee. USF purported to pay the VASPs and

then used the higher VASP prices in setting the landed cost for its cost-plus pricing. USF customers unwittingly paid the inflated amounts and the VASPs then completed the scheme by kicking back the fraudulent mark-ups to USF disguised as legitimate promotional allowances. The VASPs retained nominal transaction fees sufficient to cover operating expenses, including handsome salaries for Redgate and Schofield.

Plaintiffs contend that the operation of the VASP fraud was known only to a small cadre of USF employees. According to plaintiffs, the VASP kickbacks, unlike legitimate promotional allowances, were deposited into a single account that Kaiser and Lee controlled. As for USF customers, they were also kept in the dark. Although some of these customers had the right to audit USF's invoices, the invoices generated by the VASPs revealed nothing about the kickbacks to USF or USF's funding and control of the shell companies. The district court cited evidence, moreover, ***114** "that USF actually took steps to conceal the VASP system from its customers." The court's opinion refers, among other things, to a contemporaneous email in which Rob Soule, USF's Chief Accounting Officer, noted that the company's auditors were raising concerns about funds advanced to one of the VASPs: "They do not understand why USF would advance funds to any vendor." Soule further observed that the VASP in question "is not just any 'vendor,' but we do not want to publicize this fact." J.A. at 623.

In 2000, The Royal Ahold Group ("Ahold") presented USF with a proposal to acquire the rapidly growing company. In the course of conducting due diligence for the purchase, Paul Ekelschot, head of Ahold's audit committee, sent a memo to members of Ahold's executive board in which he noted that USF used brokers for its private label products in order to earn promotional allowance rebates on these products and "shelter" these rebates from its clients' auditors.[3] The memo concluded that "[t]his **technique needs to be researched** to assess the tax and legal implications and associated business risks." J.A. at 795. One recipient of the memo, reacting to this information, wrote in the margin "AVISO! MOLTO PELIGROSA," meaning "Warning! Very Dangerous" in Italian. Ahold nonetheless went forward with the acquisition, and the fraud, according to plaintiffs, thereafter continued.

In January 2003, Ahold management and its auditors, Deloitte & Touche, received an anonymous letter warning that: "US Foodservice ... ha[s] been requiring some of [its] suppliers to ship product to Ahold companies, but send the invoices to companies[ ] which are not owned by Ahold." J.A. at 902. The letter identified three of the VASPs at issue here as companies to which the suppliers were directed to send invoices. Deloitte subsequently conducted an inquiry and produced a memo regarding USF's VASP transactions in which it observed that the "primary beneficiary of the VASP transactions appears to be USF," but that USF has no legal ownership interest in the VASPs. J.A. at 901. The memo queried whether the VASPs should be consolidated into USF's financial statements and whether "the practice of using the VASP's invoice cost to USF as USF's invoice cost for billing customers under cost plus contracts create[s] any legal exposure." *Id.*

Ahold thereafter procured a letter from its outside counsel, White & Case, concluding that USF faced no "serious exposure to damages from any potential claims arising from USF's use of VASPs." J.A. at 927. The opinion, however, was based on assurances from USF, *inter alia:* that USF had no affiliation with the VASPs and none of its officers, directors, or employees had any ties, directly or indirectly, with them; that "[t]itle to products procured for USF by a VASP pass[ed] through the VASP"; that USF's cost-plus customers were "aware that USF is utilizing the VASPs to service their account"; and, finally, that the VASPs provided valuable services, that USF had "legitimate business reasons for outsourcing certain functions to independent VASPs," and that there was "no improper motive" behind the arrangement. *Id.* White & Case withdrew the letter in March 2003, citing "reason ***115** to doubt whether the assumptions on which we based our conclusions are valid." J.A. at 939.

Also in 2003, following the discovery of other accounting irregularities at USF, Ahold's audit committee retained the law firm of Morvillo, Abramowitz, Grand, Iason & Silberberg, which in turn engaged PricewaterhouseCoopers LLP ("PwC") to conduct an independent forensic accounting investigation of USF to address, among other things, whether consolidation of the VASPs was required and "whether legal issues exist relative to cost-plus contracts vis a vis VASP passback earnings." PwC's subsequent report concluded that USF effectively controlled the VASPs, which raised "significant questions" concerning USF's potential liability to its cost-plus customers; PwC concluded that USF's control of the VASPs "clearly required" consolidation. J.A. at 1258, 1295.

On October 17, 2003, Ahold publicly disclosed the VASP system and consolidated the VASPs into restated financial statements for the relevant years. Its filings outlined the

financial relationship between USF and the VASPs, asserted that the "VASPs provide varying degrees of support to USF," and concluded that Generally Accepted Accounting Principles "require the recognition ... of the VASPs within [Ahold's] consolidated financial statements." J.A. at 2684. Shortly thereafter, Ahold ordered USF to phase out its use of VASPs. It subsequently sold the company for $7.1 billion, agreeing to indemnify USF for any liability to cost-plus customers over $40 million arising from the VASP scheme.

C. The Class Action

The first lawsuit against USF in the wake of Ahold's disclosures was filed by Waterbury Hospital, a community and teaching hospital in Connecticut. Other plaintiffs followed suit, including Thomas & King, the owner and operator of 88 Applebee's franchises, and Catholic Healthcare West, the largest not-for-profit hospital system in California.[4] The pending cases were found to involve "common factual questions concerning the propriety of USF's performance of cost-plus contracts" and were consolidated for pretrial proceedings in the District of Connecticut, *see In re U.S. Foodservice, Inc. Pricing Litig.,* 528 F.Supp.2d 1370 (J.P.M.L.2007), after which a consolidated amended class action complaint was filed. The district court subsequently denied USF's motion to dismiss the RICO and breach-of-contract claims. *See In re U.S. Foodservice Inc. Pricing Litig.,* Nos. 3:07–md–1894, 3:06–cv–1657, 3:08–cv–4, 3:08–cv–5, 2009 WL 5064468 (D.Conn. Dec. 15, 2009).

Following class discovery, plaintiffs moved to certify the class on these claims on July 31, 2009. Both sides submitted considerable evidence at the class certification stage, including representative samples of the contracts at issue, evidence as to the structure, operation, and concealment of the VASPs, and competing expert testimony on industry standards and damages calculations. USF argued, in particular, that the VASPs provided legitimate services; that because VASPs are common in the industry, customers were aware that ***116** USF could set cost in the manner it did; and that its customers based their purchasing decisions on the total prices USF charged—which were competitive with the prices available from competitors—and not on a belief that the "cost" component of USF's invoice price reflected the price at which the supplier provided the goods.

After hearing oral arguments, the district court granted the motion for class certification in full and certified a Rule 23(b)(3) class as:

> Any person in the United States who purchased products from USF pursuant to an arrangement that defined a sale price in terms of a cost component plus a markup ("cost-plus contract"), and for which USF used a VASP transaction to calculate the cost component.

In re U.S. Foodservice Inc. Pricing Litig., Nos. 3:07–md–1894, 3:06–cv–1657, 3:08–cv–4, 3:08–cv–5, 2011 WL 6013551, at *1 (D.Conn. Nov. 29, 2011). The district court found that plaintiffs had presented evidence that supported their fraud allegations, including: (1) that USF placed orders directly with the suppliers for "delivery" to the VASPs; (2) that USF "intentionally concealed the VASPs from its cost-plus customers"; and (3) that USF controlled the VASPs' finances, guaranteeing their obligations, dictating to whom and when they made payments, and funding many of the VASPs through short-term, interest-free loans. *Id.* at *2–3. The court noted that the magnitude of the VASP operation was "substantial," with one VASP alone passing back over $58 million to USF in a single year based on about $500 million in sales. PwC, the district court observed, "found that the '[t]otal VASP pass-back receipts over the period from April 2000 to December 2002 were $388 million.' " *Id.* at *3.

The court did not reach the merits whether the VASPs were shell companies created to perpetrate a fraud or whether, as USF contends, they were employed to provide legitimate services to USF in keeping with industry practice. The court noted that the legitimacy of USF's use of the VASPs is contested and that evidence in the record indicates that some VASPs performed legitimate business functions, including: "(1) quality control services; (2) purchasing; (3) brand and product development; (4) merchandising services; (5) marketing support; and (6) customer service." *Id.* Regardless, the court determined that certification was appropriate because plaintiffs had demonstrated, and USF had failed to rebut, that the relevant issues were susceptible to generalized proof such that individualized questions would not predominate and render the class unmanageable.

USF moved this court for leave to file an interlocutory appeal challenging class certification, and that motion was granted on April 3, 2012.

Discussion

[1] **[2]** We review a district court's decision to certify a class under Rule 23 for abuse of discretion, the legal

conclusions that informed its decision *de novo,* and any findings of fact for clear error. *Parker v. Time Warner Entm't Co., L.P.,* 331 F.3d 13, 18 (2d Cir.2003); *In re Initial Pub. Offerings Sec. Litig.,* 471 F.3d 24, 40–41 (2d Cir.2006). A district court abuses its discretion when "(1) its decision rests on an error of law ... or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Parker,* 331 F.3d at 18 (alteration in original) (quoting *Zervos v. Verizon N. Y., Inc.,* 252 F.3d 163, 168–69 (2d Cir.2001)).

***117** **[3]** **[4]** "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotation marks and citation omitted). Federal law permits individual claims to be litigated as a class action provided that the party seeking certification "affirmatively demonstrate[s] his compliance with Rule 23." *Id.* (internal quotation marks omitted). The party must establish that the four threshold requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—are satisfied and demonstrate "through evidentiary proof" that the class satisfies at least one of the three provisions for certification found in Rule 23(b). *Id.* USF does not dispute that the Rule 23(a) factors are met, but protests that the district court erred in finding Rule 23(b)(3)'s requirements satisfied.

[5] To certify a class pursuant to Rule 23(b)(3), a plaintiff must establish: (1) predominance—"that the questions of law or fact common to class members predominate over any questions affecting only individual members"; and (2) superiority—"that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). To certify a class, a district court must "make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues,' ... must resolve material factual disputes relevant to each Rule 23 requirement," and must find that each requirement is "established by at least a preponderance of the evidence." *Brown v. Kelly,* 609 F.3d 467, 476 (2d Cir.2010); *Myers v. Hertz Corp.,* 624 F.3d 537, 548 (2d Cir.2010) (plaintiffs bear the burden of "establish[ing] by a preponderance that common questions [will] predominate over individual ones"); *see also, In re IPO,* 471 F.3d at 33 ("[T]he important point is that the requirements of Rule 23 must be met, not just supported by some evidence.").

Upon a complete review of the record, we conclude that the district court conducted a rigorous analysis based on the relevant evidence, properly resolved factual disputes, and did not abuse its discretion in concluding that common issues predominate as to plaintiffs' RICO and breach of contract claims and that a class action is a superior method of litigating these claims.

* * *

[6] We first briefly outline the substance of plaintiffs' claims against USF. To prevail on their civil RICO claim, plaintiffs must show "(1) a substantive RICO violation under § 1962; (2) injury to the plaintiff's business or property, and (3) that such injury was by reason of the substantive RICO violation." *UFCW Local 1776 v. Eli Lilly & Co.,* 620 F.3d 121, 131 (2d Cir.2010) (citation omitted). Here, plaintiffs allege that USF and its VASPs constituted an enterprise as defined in 18 U.S.C. § 1961(4) that engaged in a pattern of racketeering activity, namely mail and wire fraud, *see* 18 U.S.C. §§ 1341, 1344, in violation of 18 U.S.C. § 1962(c).[5] Specifically, they assert that USF devised a scheme to defraud its customers in which it mailed to customers phony invoices generated by the VASPs to inflate prices ***118** above what the customers were contractually obligated to pay. Similarly, the plaintiffs assert that USF breached the terms of its cost-plus contracts by using the VASP invoices to calculate the cost component of the amounts billed to customers, thereby causing these customers to pay prices higher than they should have paid under the contracts.

A. Predominance

i) The RICO Claim

[7] **[8]** The predominance requirement is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Eli Lilly & Co.,* 620 F.3d at 131 (quoting *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir.2002)); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* —— U.S. ——, 133 S.Ct. 1184, 1196, 185 L.Ed.2d 308 (2013) (in securities fraud class action, explaining that "Rule 23(b)(3) ... does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof [,]" but rather, requires "that common questions *predominate* over any questions affecting only individual class members" (internal quotation marks

and alterations omitted)). USF argues that this has not been shown as to the RICO claim because: (1) a misrepresentation necessary to prove mail or wire fraud cannot be established through common evidence; (2) plaintiffs' reliance on any purported misrepresentation by USF, necessary here to prove causation, cannot be shown using common evidence; and (3) plaintiffs suffered no injury to their business or property that can be shown with common evidence. We disagree with each of these contentions.

a) Misrepresentation

We have previously observed that fraud claims based on uniform misrepresentations to all members of a class "are appropriate subjects for class certification" because, unlike fraud claims in which there are material variations in the misrepresentations made to each class member, uniform misrepresentations create "no need for a series of mini-trials." *Moore,* 306 F.3d at 1253. Here, the district court did not abuse its discretion in determining that USF's alleged misrepresentation was uniform and susceptible to generalized proof. Specifically, plaintiffs allege that the VASP-related invoices mailed from USF to its cost-plus customers included the same fraudulent misrepresentation: namely, that the cost component of USF's billing was based on the invoice cost from a legitimate supplier and not from a shell VASP controlled by USF and established for the purpose of inflating the cost component. While each invoice obviously concerned different bills of goods with different mark-ups, the material misrepresentation—concealment of the fact of a mark-up inserted by the VASP—was the same in each.

The allegations here are most akin to those in *Klay v. Humana, Inc.,* where plaintiffs alleged that defendant HMOs systemically underpaid doctors by uniformly misrepresenting to them that the HMOs were "honestly pay[ing] physicians the amounts to which they were entitled." 382 F.3d 1241, 1258 (11th Cir.2004), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). There, the Eleventh Circuit upheld certification of the physician class on the basis that the doctors' RICO claims were "not simply individual allegations of underpayments lumped together," but rather focused on a centralized corporate conspiracy ***119** to defraud, which could be proven through generalized evidence—and which, absent certification, would have to be re-proven in each case. *Id.* at 1257–58. Similarly here, the thrust of the RICO claim is USF's scheme to create and employ the VASPs to inflate the invoices so as to overbill each class member *in the exact same manner.*

USF contends that the customer invoices cannot be deemed to misrepresent cost without reference to the parties' underlying contractual arrangement, defeating any resort to generalized proof. But even assuming *arguendo* that this is correct, the district court specifically found after reviewing the evidence that USF's cost-plus contracts are substantially similar in all material respects. *In re U.S. Foodservice,* 2011 WL 6013551, at *14. This finding is supported, moreover, by Deloitte, Ahold's auditor, which reviewed the contracts to determine USF's potential legal exposure and concluded that the key term of "invoice cost" is "consistently defined." J.A. at 900–01. In short, because the question whether the invoices materially misrepresented the amounts due USF is common to all plaintiffs, the class will "prevail or fail in unison" on this point—rendering certification appropriate. *Amgen,* 133 S.Ct. at 1191.

b) Causation

USF next contends that reliance is "a necessary part of the causation theory advanced by the plaintiffs," *Eli Lilly,* 620 F.3d at 133, and that individualized issues will predominate as to reliance because "the key issue in this case is customer knowledge of the alleged pricing practice at issue," Appellant's Br. at 25. USF argues that the district court simply "assumed" that USF's customers were "ignorant of USF's influence or control over the landed cost and [promotional allowances]" and that it failed to analyze or even acknowledge evidence to the contrary. Customer reliance on its supposedly inflated invoices, USF maintains, "can be determined only by adducing evidence from the 75,000 customers," and not by generalized proof. Appellant's Br. at 26–27. We disagree.

[9] **[10]** As we have noted, "proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation" in cases such as this because plaintiffs must also demonstrate reliance on a defendant's common misrepresentation to establish causation under RICO.[6] *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 223 (2d Cir.2008), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.,* 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008). Certification is inappropriate where "reliance is too individualized to admit of common proof." *Id.* at 224–25 (concluding that certification was improper where many factors other than defendants'

alleged misrepresentations about health consequences of light cigarettes may have led individuals to purchase them). The fact that class members will show causation by establishing reliance on a defendant's misrepresentations, however, does not place fraud-based claims entirely beyond the reach of Rule 23, provided that individualized issues will not predominate. *See id.*

Such is the case here. First, payment, as we have said, "may constitute circumstantial proof of reliance upon a financial representation." *Id.* at 225 n. 7. As in ***120** *Klay,* the defendant here is alleged to have sent the plaintiffs false billing information (albeit in this case misrepresenting the amount of money due rather than, as in *Klay,* that the proper amount had been paid). *Klay,* 382 F.3d at 1259. In cases involving fraudulent overbilling, payment may constitute circumstantial proof of reliance based on the reasonable inference that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed. Fraud claims of this type may thus be appropriate candidates for class certification because "while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue)." *Id.*

USF therefore errs in suggesting that "there is no common evidence of individual customer knowledge" as to its allegedly fraudulent billing scheme. Provided the plaintiffs are successful in proving that USF inflated their invoices and misrepresented the amount due, proof of payment constitutes circumstantial evidence that the plaintiffs *lacked* knowledge of the scheme. Moreover, and as found by the district court, the record also contains generalized proof of USF's *concealment* of its billing practices, including the Ekelschot memo in which the head of Ahold's audit committee observed that USF used the VASPs to earn promotional allowance rebates on private label products and "*to hide [these rebates] from clients' auditors.*" J.A. at 795 (emphasis added). As the district court found, "there is evidence that USF actually took steps to conceal the VASP system from its customers" and "the record lacks evidence that any of USF's customers had knowledge of USF fraudulently inflating the cost component of its products through the operation of the VASPs." *In re U.S. Foodservice,* 2011 WL 6013551, at *9, 11. Upon a review of the record, we conclude that these findings are not in error.

USF claims that this case is not like *Klay,* but like *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.,* 319 F.3d 205 (5th Cir.2003), in which the Fifth Circuit held that a class action premised on the fraudulent overcharge of insurance premiums, supposedly in excess of regulatory rates, had been improperly certified. In *Sandwich Chef,* however, as the Fifth Circuit concluded, the district court "did not adequately account for individual issues of reliance that will be components of defendants' *defense* against RICO fraud." *Id.* at 220 (emphasis added). There, the defendants had produced evidence that class members had individually negotiated premiums, demonstrating awareness that "the amounts being charged varied from rates filed with regulators," and that policyholders had nonetheless "agreed to pay such premiums." *Id.* Such evidence, reflecting individualized arrangements on the part of putative class members wholly aware of the truth regarding the alleged misrepresentations on which the class was said to have relied, "preclude[d] a finding of predominance of common issues of law or fact." *Id.* at 221. Critically, however, the record here contains *no such individualized proof* indicating knowledge or awareness of the fraud by any plaintiffs.

USF contends, to the contrary, that the district court "failed to rigorously analyze or resolve [an] overwhelming evidentiary record" demonstrating that many class members were not deceived as to the nature of its billing practices. Appellant's Br. at 27. We are not persuaded. Much of the evidence contained in the "ten tranches of evidence" on which USF relies is of marginal relevance, at best, to the ***121** question whether USF's customers had knowledge of the disputed billing practices. For example, USF relies heavily on a 2006 email from an employee at Premier, Inc. ("Premier"), a purchasing agent for some of USF's cost-plus customers, alerting clients that USF had been sued "for pricing practices" and noting the employee's belief that USF had been "transparent and ethical" in its relationship with Premier. As the district court noted, Premier was not a cost-plus customer, but a "Group Purchasing Organization" that helped members like Catholic Healthcare West manage and reduce supply costs. And suffice it to say that this single-paragraph email sheds little light on the question whether any USF customer was aware of USF's billing practices during the relevant period.

Upon a review of the record, we conclude that the district court did not err in finding that "there is no evidence that the plaintiffs were aware of the VASP system or its purpose." *In re U.S. Foodservice,* 2011 WL 6013551,

at *9. But even if this were not the case, most of the remaining proof to which USF points hardly draws into question plaintiffs' Rule 23 showing, and for a simple reason: such proof, far from demonstrating that factual questions regarding the knowledge of individual class members will predominate over questions common to the class, is in fact *generalized* proof concerning common arrangements in the food distribution industry. Thus, USF cites the testimony of its expert, Frank Dell, that pursuant to "well-known and common industry practice," USF's customers would have understood that USF had influence over the invoice cost used in the cost-plus formula and that it received promotional allowances. USF relies on survey evidence suggesting, *inter alia,* that USF customers purchasing on a cost-plus basis understand both "that foodservice distributors, such as USF, ha[ve] an internal profit or inside margin in the cost component of their private label sold on a cost plus basis" and that such distributors use middleman vendors.[7]

We agree with the district court that such evidence "does not raise the concern of issues of individual knowledge predominating." *See In re U.S. Foodservice,* 2011 WL 6013551, at *11. As the district court recognized, the parties "dispute the legitimacy and purpose of the VASPs," with USF contending that the VASPs provided service to USF, particularly regarding its private label products; that USF, as is common in the food service industry, legitimately influenced and even set the "cost" component in its cost-plus pricing based on the service provided; and that the monies supposedly funneled back to USF were in fact proper promotional allowances. *Id.* at *2. USF points to generalized proof supporting this defense—proof wholly consistent with class action treatment—but the record does not contain a single piece of evidence suggesting "actual individual knowledge" on the part of a specific customer "of the VASPs' existence and USF's pricing practices." *Id.* at *11; *see Katz v. China Century Dragon Media, Inc.,* 287 F.R.D. 575, 588–89 (C.D.Cal.2012) (finding predominance requirement satisfied in securities fraud class action where there was no evidence indicating "the likely need for individualized assessments of class members with respect to the[ir] knowledge" of alleged misrepresentations); *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.,* 277 F.R.D. 97, 118–19 (S.D.N.Y.2011) ("Sheer conjecture that class members ***122** 'must have' discovered [the misrepresentations] is insufficient to defeat Plaintiff's showing of predominance when there is no admissible evidence to support Defendants' assertions."). In such circumstances, conjectural "individualized questions of reliance," which are "far more imaginative than real[,] ... do not undermine class cohesion and thus cannot be said to predominate for purposes of Rule 23(b)(3)." *Amgen,* 133 S.Ct. at 1197 (internal quotation marks omitted). For if bald speculation that some class members might have knowledge of a misrepresentation were enough to forestall certification, then no fraud allegations of this sort (no matter how uniform the misrepresentation, purposeful the concealment, or evident plaintiffs' common reliance) could proceed on a class basis—a conclusion that this Court has already declined to reach. *See McLaughlin,* 522 F.3d at 224–25.

Whether, as plaintiffs claim, the VASPs were created for the purpose of misrepresenting cost and were then kept secret so as to deceive customers about overbilling or whether, instead, they provided legitimate service to USF for which it appropriately billed its customers, is a question subject to generalized proof—and a question that, barring class action treatment, will have to be endlessly re-litigated in individual actions. We conclude that the class will "prevail or fail in unison" on this point—so that, in either case, questions of fact common to class members will predominate over questions regarding individual customers' reliance. The district court acted well within its discretion in rejecting USF's claim to the contrary. *See Amgen,* 133 S.Ct. at 1191.

c) Injury

USF next contends that the district court abused its discretion in certifying a RICO class because RICO damages cannot be reliably ascertained on a class-wide basis. According to USF, the proper measure of RICO damages here is the difference between the price paid by each plaintiff for the goods it purchased and the market price available when the goods were bought, so that regardless whether USF deceived customers in purporting to carry out its obligations under its cost-plus contracts, plaintiffs were harmed by USF's fraud *only* if they purchased goods from USF that they could have obtained more cheaply elsewhere. Because such a calculation "would require the consideration of the prices for thousands of products, on a daily, weekly and monthly basis, over a period of years, in hundreds of different markets, for tens of thousands of customers," class-wide issues as to damages, USF contends, do not predominate, and certification was inappropriate. Appellant's Br. at 45.

[11] USF again misses the mark. Our case law is clear that "damages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place [the

injured parties] in the same position they would have been in but for the illegal conduct." *Commercial Union Assurance Co., plc v. Milken,* 17 F.3d 608, 612 (2d Cir.1994). Granted, we have said that because RICO "compensates only for injury to 'business or property,' " a victim who is induced to part with his property by the misrepresentations of a fraudster is generally not entitled to "benefit of the bargain" damages—meaning recovery of what the fraudster promised, as opposed to the property the victim lost. *McLaughlin,* 522 F.3d at 228 (quoting 18 U.S.C. § 1964(c)); *see also Fleischhauer v. Feltner,* 879 F.2d 1290, 1300 (6th Cir.1989); *Heinold v. Perlstein,* 651 F.Supp. 1410, 1412 (E.D.Pa.1987) ("Where, as here, the only property to which a plaintiff alleges injury is an expectation interest that would ***123** not have existed but for the alleged RICO violation, it would defy logic to conclude that the requisite causation exists."). This case, however, is not about such inducement, but concerns a fraud that occurred after plaintiffs already had a protectable interest in their cost-plus contracts with USF. *See Heinold,* 651 F.Supp. at 1411 (distinguishing between RICO violations that induce the formation of a contract and RICO violations that "interfere[ ] with a contract extant at the time of that conduct"); *see also Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1310 (7th Cir.1987) (holding RICO victim entitled to recover benefits due under contract where defendants engaged in fraud after the formation of contract in order to deprive victim of benefits of its bargain).

USF, having entered into contracts that entitled its customers to "cost-plus" pricing, is alleged to have systematically deceived them into believing they were being afforded such pricing when, in fact, they were being overcharged. The key inquiry in such a circumstance is not what price customers could have procured elsewhere at the point of purchase, but rather the amount of overcharge—the amount customers paid USF as a result of its deception. The measure of damages as compensation for *this* injury is straightforward: customers are entitled to the difference between the amount they paid on fraudulently inflated cost-plus invoices and the amount they should have been billed (or, stated differently, the price increase due to the use of VASPs).[8] We accordingly conclude that USF's contention that the district court abused its discretion in certifying the RICO class because RICO damages cannot be shown on a class-wide basis is without merit.

ii) The Contract Claims

[12] Certifying plaintiffs' breach of contract claims raises additional concerns because the contracts here are not uniform and they implicate the laws of many jurisdictions. USF argues common questions will not predominate as to these claims for three reasons: (1) the contracts vary materially from each other and individualized extrinsic evidence will predominate in the interpretation of key terms; (2) some of the contracts require customers to satisfy minimum purchase requirements before they are entitled to cost-plus pricing, a matter that is not subject to common proof; and, finally, (3) the contracts are governed by the laws of 48 states, as well as tribal law. For the following reasons, we disagree.

a) Contract Variations and Extrinsic Evidence

USF argues, first, that the contracts here have materially different terms and that the variations among them defeat plaintiffs' attempt to establish predominance ***124** as to the contract claims. Moreover, determining the issue of breach pursuant to the "numerous different definitions of the terms 'vendor' and [promotional allowance] in the numerous and varying contracts," USF maintains, will require "reference to individualized extrinsic evidence." Appellant's Br. at 49. USF asserts that resolution of the issue of breach can therefore not be attained through generalized proof and that the district court abused its discretion in ruling that Rule 23(b)(3)'s predominance requirement is satisfied as to the contract claims. We are not persuaded.

[13] To be clear, courts properly refuse to certify breach of contract class actions where the claims require examination of individual contract language. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 340 (4th Cir.1998); *Spencer v. Hartford Fin. Servs. Grp., Inc.,* 256 F.R.D. 284, 304 (D.Conn.2009) (declining to certify class for breach of contract claims where contracts defined cost and value differently such that the language of each contract "would need to be carefully considered to determine whether defendants breached each contract at issue"); *cf. Sprague v. Gen. Motors Corp.,* 133 F.3d 388, 398 (6th Cir.1998) (decertifying class of early retirees in ERISA case where "side deals" contained myriad variations as to what each retiree was promised). In such cases, however, courts have determined that the language variations were material to the issue of breach. Here, USF's own expert testified that the contracts "essentially all [say] the same thing" and that in the food service industry, "[i]t [is] well understood ... what a cost plus contract is," J.A. at 2938. Similarly, USF's own auditor found

that USF's contracts are consistent in how they define invoice cost, J.A. at 900–01. The district court's conclusion that USF's cost-plus contracts are substantially similar in all material respects, *see In re U.S. Foodservice,* 2011 WL 6013551, at *14, is amply supported by the record.

USF contends that resolving the contract claims will require introduction of evidence of contract negotiations and course of performance evidence to determine whether individual customers knew about USF's use of VASPs and "acquiesce[d] in it without objection." U.C.C. § 1–303(a)(2). To be sure, extrinsic evidence can illuminate the meaning of ambiguous contract terms, and the terms of the contracts here, each of which is governed by the Uniform Commercial Code ("UCC"), may in theory "be explained or supplemented" by extrinsic evidence of the parties' "course of performance, course of dealing, or usage of trade." *Id.* § 2–202; *see also id.* § 1–303(d)–(e) (noting that course of performance, course of dealing, and trade usage are "relevant in ascertaining the meaning of the parties' agreement, ... and may supplement or qualify the terms of the agreement"); *accord Allapattah Servs., Inc. v. Exxon Corp.,* 333 F.3d 1248 (11th Cir.2003), *aff'd on other grounds by* 545 U.S. 546, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005).[9] USF's argument as to the importance ***125** of individualized extrinsic evidence as to the contract claims, however, simply mimics its claim that the issue of individual customer knowledge defeats certification of the RICO class, and it fails for the same reason. Just as the record contains no evidence regarding individualized customer knowledge, it likewise includes no evidence of any USF customer's contract negotiations or individualized conduct in performing pursuant to the contract that tends to show either that the customer understood his contract to authorize the VASP arrangements or that he otherwise acquiesced in them. USF proffers expert testimony regarding accepted industry practice (namely, that it is common knowledge that food distributors employ VASP-like arrangements), but this is generalized trade usage evidence appropriately considered on a class-wide basis.

The fact that each of these contracts is governed by the UCC, moreover, further supports the district court's conclusion that common issues will predominate in the adjudication of these contract claims. Plaintiffs allege, *inter alia,* that USF breached its cost-plus contracts because the use of VASPs to inflate costs was dishonest, commercially unreasonable, and a breach of USF's implied duty of good faith. *See* Cmplt. ¶¶ 152–53; *see also* U.C.C. § 1–203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). The UCC's implied duty of good faith, in turn, requires not only "honesty in fact" between contracting parties but also "the observance of reasonable commercial standards of fair dealing in the trade." U.C.C. § 2–103(1)(b) (defining "good faith" for merchants); *see id.* § 1–201(b)(20) (defining "good faith" for non-merchants). *See also* U.C.C. § 1–203 cmt. (explaining that the duty of good faith is implemented by the provisions on course of dealing and trade usage, and "directs a court toward interpreting contracts within the commercial context in which they are created, performed, and enforced."); 1B Larry Lawrence, *Lawrence's Anderson on the Uniform Commercial Code* § 1–304:42 (3d ed. 2012) ("U.C.C. § 1–201(b)(20) establishes an objective test for good faith: whether the party acted in observance of reasonable commercial standards of fair dealing. The commercial reasonableness of the party's behavior relates solely to the fairness of the behavior.").

We agree with the district court that the question of breach with regard to plaintiffs' contract claims will focus predominantly on common evidence to determine whether, in fact, USF used controlled middlemen to inflate invoice prices and whether such a practice departs from prevailing commercial standards of fair dealing so as to constitute a breach. *See* U.C.C. § 2–103(1)(b). In this regard, we find the Eleventh Circuit's decision in *Allapattah Services, Inc. v. Exxon Corp.,* 333 F.3d 1248, instructive. There, plaintiffs alleged that Exxon breached its contracts with its dealers by overcharging them on fuel purchases. *Id.* at 1252. Though the contracts were not identical, the Eleventh Circuit affirmed the class certification because the dealer agreements were materially uniform insofar as they imposed the same duty of good faith on Exxon. Thus, the question of whether Exxon had violated its duty was common to all class members. *Id.* at 1261. The same holds true here.

Like the district court, we anticipate that adjudication of the breach of contract ***126** claims will largely parallel adjudication of the RICO claims. The common issues will include USF's creation and control of the VASPs, the actual services, if any, the VASPs provided, USF's efforts to hide the true nature of the VASPs from its customers (which in the breach of contract setting is circumstantial proof that customers did not know of and never acquiesced in USF's course of performance), and trade usage concerning controlled middlemen like the VASPs. Since the record does not indicate the existence of material differences in contract language or other significant individualized evidence, we conclude that the district court did not abuse its discretion

in concluding that common issues will predominate over any individual issues, and that USF's claim to the contrary should be rejected.

b) Minimum Purchase Requirements

USF next contends that many of the contracts impose minimum purchase requirements on customers as a precondition to their entitlement to cost-plus pricing. Compliance with this "condition precedent" to USF's obligation to provide cost-plus pricing, USF contends, raises individualized issues not subject to generalized proof, defeating predominance as to the contract claims. The district court concluded, to the contrary, that these minimum purchase obligations are not material, and do not draw into question the predominance of common issues as to the contract claims. We agree with the district court.

The minimum purchase requirements at issue here stipulate that to be entitled to the benefits of the contract, including cost-plus pricing, customers must purchase a minimum percentage of their food supplies from USF. For instance, the Thomas & King contract provides that the specified margins are contingent on Thomas & King "purchasing 85% of [its] total purchases in each specified product category from [USF]," J.A. at 1544. We agree with USF that if the minimum purchase requirements in many of its contracts had ever been enforced, individualized questions could potentially predominate regarding these contracts, as each plaintiff might be required to introduce evidence showing that it had complied with the requirements set forth in its contract to establish USF's breach.

But that is not this case. Here, the district court found that the minimum purchase requirements in the contracts were not enforced by USF and thus are not material to the question whether USF breached its agreements. The factual finding of non-enforcement is entitled to deference unless clearly erroneous. *See Parker,* 331 F.3d at 18. Given the absence of any evidence showing that USF ever enforced these requirements, as well as testimony from USF's own expert describing such requirements as "dream figure[s]" that food distributors do not even monitor for customer compliance, we cannot say that the district court's determination was clearly erroneous. In light of this factual finding, the district court did not abuse its discretion in determining that the provisions are not material to the question of breach, and thus that they create no need for individualized evidence of compliance.

c) Variations in State Contract Law

USF next argues that certification was improper because this multi-state class action implicates the laws of many jurisdictions. We agree that putative class actions involving the laws of multiple states are often not properly certified pursuant to Rule 23(b)(3) because variation in the legal issues to be addressed overwhelms the issues common to the ***127** class. *See, e.g., Castano v. Am. Tobacco Co.,* 84 F.3d 734, 741 (5th Cir.1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1183 (11th Cir.2010). However, these concerns are lessened where the states' laws do not vary materially. *See Klay,* 382 F.3d at 1262 ("[I]f the applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate."). Thus, the crucial inquiry is not whether the laws of multiple jurisdictions are implicated, but whether those laws differ in a material manner that precludes the predominance of common issues. *See Walsh v. Ford Motor Co.,* 807 F.2d 1000, 1017 (D.C.Cir.1986) ("[N]ationwide class action movants must creditably demonstrate, through an 'extensive analysis' of state law variances, 'that class certification does not present insuperable obstacles.' " (quoting *In re Sch. Asbestos Litig.,* 789 F.2d 996, 1010 (3d Cir.1986))).

[14] Here, they do not. As courts have noted, state contract law defines breach consistently such that the question will usually be the same in all jurisdictions. *See Klay,* 382 F.3d at 1263 ("A breach is a breach is a breach, whether you are on the sunny shores of California or enjoying a sweet autumn breeze in New Jersey."); *see also Am. Airlines, Inc. v. Wolens,* 513 U.S. 219, 233 n. 8, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) ("[C]ontract law is not at its core diverse, nonuniform, and confusing" (internal quotation marks omitted)). The uniformity is even more pronounced in this matter, moreover, as all the jurisdictions implicated have adopted the UCC. USF's principal contention to the contrary is that despite such adoption, state and tribal laws differ as to the admissibility of extrinsic evidence. But plaintiffs' papers in support of their motion for class certification demonstrate that all the relevant jurisdictions have adopted U.C.C. § 1–303, governing the introduction of such evidence. *See* J.A. at 2648–50. In the absence of any showing by USF disputing this, we

conclude that the district court did not abuse its discretion in determining that variations in state contract law do not preclude certification.

iii) Fraudulent Concealment and Tolling

In yet another effort to refute the district court's conclusion that plaintiffs have established predominance for the purpose of Rule 23(b)(3), USF argues: (1) that plaintiffs must rely on USF's alleged fraudulent concealment to toll the various statutes of limitations implicated in this action, in order to render timely their RICO and contract claims; (2) that different jurisdictions employ various legal standards for tolling statutes of limitations; and (3) that, as a result, common issues of law or fact do not predominate, and the district court abused its discretion in concluding otherwise. For the following reasons, we disagree.[10]

***128** **[15]** **[16]** **[17]** At the start, we agree with the district court that fraudulent concealment can be demonstrated via class-wide, generalized evidence. Granted, some jurisdictions whose law may apply to plaintiffs' contract claims require that a "plaintiff asserting fraudulent concealment prove it exercised some degree of diligence" to discover the claims. *See In re U.S. Foodservice,* 2011 WL 6013551, at *19. Similarly, a plaintiff seeking to toll the statute of limitations for a civil RICO claim must demonstrate that he was "reasonably diligent in trying to discover his cause of action." *Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 182, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997). The district court found, however, that plaintiffs "produced common evidence showing that USF intended to conceal the VASPs and, therefore, it cannot reasonably be expected that the plaintiffs could have discovered the injury until they became more fully aware of VASPs['] existence and purpose." *In re U.S. Foodservice,* 2011 WL 6013551, at *17. And while some contracts provided customers audit rights, common evidence indicates that USF purposefully designed the VASP system to be invisible to customer audits, and USF's own expert testified that an audit could not have uncovered the VASP arrangements. In the absence of any individualized evidence that plaintiffs were not deceived by USF's attempts to conceal the truth about the VASPs or that plaintiffs had the necessary tools to uncover the fraud prior to public disclosure of the VASP system in 2003, the district court did not abuse its discretion in determining that common evidence of this concealment will predominate in resolving whether the relevant statutes of limitations were tolled. *Cf. McLaughlin,* 522 F.3d at 233–34 (decertifying class in part because defendants introduced evidence indicating that plaintiffs knew truth about light cigarettes and were not deceived by false advertising).

The other variations among potentially applicable tolling standards identified by USF do not change this analysis. First, surveys of state law conducted by both parties reveal that all but three states apply the doctrine of fraudulent concealment or the related doctrine of equitable estoppel to toll the statute of limitations for contract claims. USF points out that 14 of these states provide that a statute of limitations is tolled for fraudulent concealment only if the plaintiff relied on a misrepresentation by the defendant, and that five states require that plaintiffs demonstrate fraudulent concealment by clear and convincing evidence.[11] *See* J.A. at 3201–33. But just as payment of inflated invoices constitutes circumstantial evidence that can be used to establish, for RICO purposes, that plaintiffs relied on the invoices' misrepresentation as to the cost component of USF's pricing, so too may such evidence be used to establish reliance for fraudulent concealment purposes. And the mere fact that five states impose a ***129** heightened standard of proof for fraudulent concealment does not draw into question the district court's conclusion as to predominance, but instead suggests simply the possibility that the district court, in a case in which generalized proof will resolve many issues, may choose to handle other less numerous and less substantial issues through the creation of a limited number of homogeneous subclasses. *See* Fed.R.Civ.P. 23(c)(5) (authorizing creation of subclasses); *Marisol A. v. Giuliani,* 126 F.3d 372, 379 (2d Cir.1997) ("Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear."). In sum, fraudulent concealment issues may sometimes preclude certification under Rule 23(b)(3), but they do not do so here.

B. Expert Testimony

[18] USF also challenges the district court's reliance on the plaintiffs' damages expert John Damico, who testified that individual damages could be calculated on a class-wide basis with a simple formula using data extracted from USF's databases, and plaintiff's industry expert Stacy Moore, who testified that the VASP system "was not common industry practice and [USF's] customers would not—and by USF's design, could not—have known that USF was engaging in such conduct," J.A. at 2986. USF argues that the district court erred by considering this testimony without first conducting a *Daubert* hearing to determine the evidence's

admissibility.[12] The record establishes, however, that the district court performed its gatekeeping function and that it resolved the disputes regarding expert testimony in plaintiffs' favor.

The Supreme Court has not definitively ruled on the extent to which a district court must undertake a *Daubert* analysis at the class certification stage.[13] In *Wal–Mart Stores, Inc. v. Betty Dukes,* the Court offered limited dicta suggesting that a *Daubert* analysis may be required at least in some circumstances. *See* —— U.S. ——, 131 S.Ct. 2541, 2553–54, 180 L.Ed.2d 374 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so...." (internal citation omitted)). In *In re IPO,* we disavowed our earlier statement that "an expert's testimony may establish a component of a Rule 23 requirement simply by not being fatally flawed," 471 F.3d at 41, without deciding whether or when a *Daubert* analysis forms a necessary component of a district court's rigorous analysis. *But see id.* at 41 (noting that ***130** a district judge must be afforded "considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements").

[19] We need not reach that question here either, as the record indicates that even though the district court did not conduct a *Daubert* hearing, it considered the admissibility of the expert testimony on the papers after USF had indicated that it was "happy to rely on the papers." S.A. at 608, 719; *see United States v. Williams,* 506 F.3d 151, 161 (2d Cir.2007) (noting that the "formality of a separate hearing" is not always required for a district court to "effectively fulfill[ ] its gatekeeping function under *Daubert* "). As its opinion makes clear, the district court did make the requisite findings, concluding with respect to Damico's proposed damages model that it is appropriately "based on USF's alleged fraudulent pricing," "provides for a universal calculation of damages" because USF "almost always used an invoice to calculate prices," and that "the only feasibility-related issue is the potential need for manual input of certain customers." *In re U.S. Foodservice,* 2011 WL 6013551, at *15–16. Similarly the court concluded that industry practice can be used to establish whether "USF customer[s] had any reason to know of" USF's VASP pricing. *Id.* at *11.[14] We therefore see no reason to disturb the district court's considered conclusions on the issue of expert testimony. *See United States v. Farhane,* 634 F.3d 127, 158 (2d Cir.2011) (noting that *Daubert* inquiry is flexible, that "district courts enjoy considerable discretion in deciding on the admissibility of expert testimony," and that "[w]e will not disturb a ruling respecting expert testimony absent a showing of manifest error").

C. Superiority

[20] USF asserts, finally, that even if common issues predominate in this class action, so that the district court did not err in reaching this conclusion, certification was still improper because a class action is not a superior method of adjudicating these claims. USF does not address any of the Rule 23(b)(3) factors,[15] however, and argues only that no economies would be achieved over individual litigation because absent this action individual customers would not bring suit. We do not find this reasoning persuasive.

[21] As the Supreme Court has said, Rule 23(b)(3) class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery. *See Amchem Prods., Inc.,* 521 U.S. at 617, 117 S.Ct. 2231. Here, substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of "time, effort and expense, and promote uniformity of decision." Fed.R.Civ.P. 23 advisory ***131** committee's notes. USF raises no significant argument to the contrary.

Conclusion

Despite the size and geographic scope of this class, close inspection of this case reveals that any class heterogeneity is minimal and is dwarfed by common considerations susceptible to generalized proof. The claims of each class member will be governed by the same substantive law, either RICO or the UCC. Moreover, the uniform nature of USF's alleged fraud and USF's concerted effort to shield its scheme from scrutiny place each customer in the same position as to these issues and ensure the cohesiveness of the class. USF itself, moreover, relies heavily on common proof—namely, trade usage evidence—in articulating its defense and has identified no individualized evidence or legal issues drawing into question the district court's conclusion that common issues will predominate. We discern no abuse of discretion in the district court's determination that certification was appropriate. Accordingly, for the foregoing reasons, we affirm the district court's order certifying the class.

All Citations

729 F.3d 108, 86 Fed.R.Serv.3d 702, RICO Bus.Disp.Guide 12,397

Footnotes

1 The six VASPs in questions are: (1) Seafood Marketing Specialists, Inc.; (2) Frozen Farms, Inc.; (3) Produce Solutions, Inc.; (4) Private Label Distribution, Inc.; (5) Speciality Supply and Marketing, Inc.; and (6) Commodity Management Systems, Inc.

2 Title for the purchased goods often passed directly from suppliers to USF without being transferred to the VASPs.

3 Earlier in the year, when USF's finance department became concerned about large payments between USF and the VASPs, David Eberhardt, USF's Deputy General Counsel, drafted agreements to formalize the relationship between USF and the entities created by Kaiser and Lee. Notably, a provision in each of the agreements prohibited the VASPs from publicly indicating any affiliation with USF and required them, if asked, to disavow any suggestion that they acted on USF's behalf.

4 The United States also brought suit, alleging that USF "falsely and fraudulently inflated the prices it charged the United States under its cost-based contracts to supply agencies of the United States with food products." Complaint, *United States v. U.S. Foodservice, Inc.,* 1:10–cv–06782 (S.D.N.Y. Sept. 13, 2010). These claims were brought pursuant to the False Claims Act, 31 U.S.C. § 3729, and the common law of fraud and unjust enrichment. *See id.* The parties settled upon USF's agreement to pay approximately $30 million. Appellee's Br. at 2.

5 Section 1962(c) makes it "unlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" is in turn defined to include a litany of so-called predicate acts, including "any act which is indictable" under the mail and wire fraud statutes. 18 U.S.C. § 1961(1)(B).

6 While the Supreme Court has clarified that first-party reliance is not an element of a RICO claim predicated on mail fraud, *see Bridge,* 553 U.S. at 649, 128 S.Ct. 2131, it may be, as it is here, "a necessary part of the causation theory advanced by the plaintiffs." *Eli Lilly,* 620 F.3d at 133.

7 USF additionally points to the testimony of plaintiffs' expert, Thomas Maronick, to the effect that pursuant to industry practice, USF would have a "say" in determining the price of their private label products.

8 Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability (that the misrepresentations on the invoices caused overpayments) and is therefore in accord with the Supreme Court's recent decision in *Comcast v. Behrend,* —— U.S. ——, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013), which reversed a Rule 23(b)(3) class certification on the ground that plaintiffs' theory of damages was flawed. *Id.* at 1432–33. In *Comcast,* the Supreme Court held that courts should examine the proposed damages methodology at the certification stage to ensure that it is consistent with the classwide theory of liability and capable of measurement on a classwide basis. *Id.* at 1433–35 (finding that plaintiffs' damages "model failed to measure damages from the particular antitrust injury on which petitioners' liability in this action is premised"). As discussed in Part B, *infra,* the district court carefully examined plaintiffs' damages model, finding it appropriate and feasible to redress the common harms alleged, and therefore did not abuse its discretion in determining that common issues predominate.

9 The UCC defines "course of performance" as the parties' conduct in the transaction in question provided that "(1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection." U.C.C. § 1–303(a). In contrast, "course of dealing" focuses on the parties' conduct in previous transactions that can "fairly be regarded as establishing a common basis of conduct for interpreting their expressions and other conduct" in the transaction in question. *Id.* § 1–303(b). Finally, "usage of trade" does not involve any inquiry into the conduct of the individual parties, but rather covers "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." *Id.* § 1–303(c).

10 Both parties presented the district court with an analysis of the relevant statute of limitations principles in all 50 states, though plaintiffs argue, *inter alia,* that upon proper application of choice of law principles, the law of only one to three

states will be germane. Like the district court, we do not reach this choice of law issue in light of our conclusion that even assuming the laws of multiple jurisdictions apply, common issues predominate.

With regard to variations in the statutes of limitations themselves, the district court found that such variations did not pose an insuperable obstacle to class certification because only one state imposes a statute of limitations less than four years and subclasses may be created as needed to manage statute of limitations issues. *See In re U.S. Foodservice,* 2011 WL 6013551, at *17. USF does not dispute the propriety of this ruling on appeal.

11 USF also highlights variations in state law as to (1) whether an affirmative act of concealment by defendants is required as opposed to simple silence; (2) whether intent / knowledge on behalf of the defendant is required; and (3) whether the statute of limitations begins to run on actual discovery or constructive discovery. We find no error, however, in the district court's conclusion that these differences are immaterial. Plaintiffs allege an affirmative act by defendants who acted with an intent to deceive, and "the point at which plaintiffs should have discovered the breach is the same point at which they did discover the breach." *In re U.S. Foodservice,* 2011 WL 6013551, at *19.

12 Under *Daubert v. Merrell Dow Pharmaceuticals Inc.,* expert testimony is admissible if the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact or issue. 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93, 113 S.Ct. 2786; *see also* Fed.R.Evid. 702; *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (extending *Daubert* to non-scientific testimony).

13 The Supreme Court certified this precise question in *Comcast Corp., see* —— U.S. ——, 133 S.Ct. 24, 183 L.Ed.2d 673 (2012) (mem.) (certifying question "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis"), but did not reach it because the defendant had not objected to consideration of the expert testimony below, *see* 133 S.Ct. at 1435–36 (Ginsburg, *J.,* dissenting).

14 USF's argument that the district court erred in relying on Moore's testimony is actually a red herring. The district court cited Moore only once in its opinion—referring to her only as a "purported expert"—and its analysis regarding the predominance of industry standards over questions of individual customer knowledge was not dependent on her declaration. *See In re U.S. Foodservice,* 2011 WL 6013551, at *11.

15 Rule 23 instructs that matters pertinent to a finding of superiority include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

End of Document

Tab 9

Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	**)**	THURSDAY, THE 24th
	)	
JUSTICE MCEWEN	**)**	DAY OF MARCH, 2022

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 OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.
(each, an "**Applicant**", and collectively, the "**Applicants**")

ORDER
(Stay Extension)

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order extending the Stay Period (as defined in paragraph 17 of the Second Amended and Restated Initial Order, granted May 26, 2021) was heard this day by judicial video conference via Zoom in Toronto, Ontario due to the COVID-19 pandemic.

ON READING the Notice of Motion of the Applicants, the Affidavit of Michael Carter sworn March 21, 2022, including the exhibits thereto (the "**Ninth Carter Affidavit**") and the Seventh Report of FTI Consulting Canada Inc., in its capacity as monitor (the "**Monitor**"), dated March 22, 2022 (the "**Seventh Report**"), and on hearing the submissions of respective counsel for the Applicants, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Emily Paplawski, affirmed March 21, 2022, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

STAY EXTENSION

2. **THIS COURT ORDERS** that the Stay Period is hereby extended until and including April 22, 2022.

APPROVAL OF MONITOR'S REPORT

3. **THIS COURT ORDERS** that that the activities and conduct of the Monitor prior to the date hereof in relation to the Applicants and these CCAA proceedings are hereby ratified and approved.

4. **THIS COURT ORDERS** that the Seventh Report be and is hereby approved.

5. **THIS COURT ORDERS** that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approvals set forth in paragraphs 3 and 4 of this Order.

GENERAL

6. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada.

7. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body, having jurisdiction in Canada or in the United States of America to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

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 OR ARRANGEMENT OF JUST ENERGY GROUP INC., *et al.*

Court File No: CV-21-00658423-00CL

Applicants

24 March 22

The Order shall go as per the draft filed and signed.
The Monitor supports the motion and it is otherwise unopposed.
There is sufficient liquidity during the brief stay extension and I am satisfied that the Applicant is acting in good faith and due diligence, particularly with respect to the ongoing restructuring.
As discussed, the Monitor will provide an update to the Court on April 7/22.
The ancillary relief is fair and reasonable and the Monitor's Seventh Report is approved.

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Stay Extension)

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Counsel for the Applicants

Tab 10

See para. 2

COURT OF APPEAL FOR ONTARIO

CITATION: Timminco Limited (Re), 2012 ONCA 552
DATE: 20120720
DOCKET: M41062 & M41085

Simmons, Juriansz and Epstein JJ.A.

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 Timminco Limited and Becancour Silicon Inc.

Applicants

Ashley J. Taylor and Erica Tait, for the applicants

Douglas J. Wray and Jesse Kugler, for the Communications, Energy and Paperworkers Union of Canada

Charles E. Sinclair, for the United Steelworkers

Considered in writing on: July 20, 2012

On leave to appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated February 9, 2012.

ENDORSEMENT

[1] Leave to appeal is denied.

[2] In the CCAA context, leave to appeal is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining whether leave ought to be granted, this Court is required to consider the following four-part inquiry:

- whether the point on the proposed appeal is of significance to the practice;
- whether the point is of significance to the action;
- whether the proposed appeal is *prima facie* meritorious or frivolous; and
- whether the appeal will unduly hinder the progress of the action.

See *Re Stelco* (2005), 78 O.R. (3d) 241

[3] In our view, the proposed appeals lack sufficient merit to meet this stringent test.

[4] This court's decision in *Indalex Ltd. (Re)* (2011), 104 O.R. (3d) 641, affirms that a CCAA court may invoke the doctrine of paramountcy to override conflicting provisions of provincial statutes where the application of provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[5] Here, the motion judge recognized that in the circumstances of this case there was a conflict between the federal CCAA and the provincial PBA and SPPA. He found that, "[i]n the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated". Further, he concluded that "to ensure that the objectives of the CCAA are fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of the QSPPA and the OPBA".

[6] We see no basis on which this court could interfere with the motion judge's decision, including his unassailable findings of fact that: (1) without DIP financing, Timminco would be forced to cease operating; (2) bankruptcy would not be in the interests of anyone, including members of the pension plan; (3) if the DIP lender did not get super priority, it would not have agreed to provide financing; and (4) there was insufficient liquidity or unfavourable terms associated with the rejected DIP proposals. In short, he found that there was "no real alternative" to approving the DIP facility and DIP super priority charge.

[7] The motion judge also addressed the union's fiduciary arguments, primarily in his earlier reasons released February 2, 2012, that are incorporated by reference into his February 9, 2012 reasons. He concluded that it was in the best interests of all parties to proceed with the restructuring. We see no basis on which this court could interfere with this finding.

[8] Costs are to the responding parties on the motions on a partial indemnity scale fixed in the amount of $1,500 per motion inclusive of disbursements and applicable taxes.

"Janet Simmons J.A."
"R.G. Juriansz J.A."
"G.J. Epstein J.A."

Tab 11

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 Stelco Inc., and the Other Applicants Listed Under Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[Indexed as: Stelco Inc. (Re)]

78 O.R. (3d) 241
[2005] O.J. No. 4883
Dockets: C44436 and M33171

Court of Appeal for Ontario,
Goudge, Sharpe and Blair JJ.A.
November 17, 2005

Debtor and creditor -- Companies' Creditors Arrangement Act -- Creditors -- Classification -- Classification of creditors should be determined by their legal rights in relation to debtor company as opposed to their rights as creditors in relation to each other.

The appellant represented unsecured creditors who held convertible unsecured subordinated debentures issued by the debtor company pursuant to a Supplemental Trust Indenture. Their claims were subordinated to Senior Debt Holders. The Supplemental Trust Indenture provided that if the Subordinated Debenture Holders received any payment from the company, or any distribution from the assets of the company, before the Senior Debt was fully paid, they were obliged to remit any such payment or distribution to the Senior Debt Holders until the latter had been paid in full, but that no such payment or distribution by the company shall be deemed to constitute

payment on the Subordinated Debenture Holders' debt. The parties referred to these provisions as the "Turnover Payment" provisions. In the company's Proposed Plan, the Subordinated Debenture Holders and the Senior Debt Holders were included in the same class (along with Trade Creditors) for the purposes of voting on the Proposed Plan. The appellant sought an order from the supervising judge classifying the Subordinated Debenture Holders as a separate class for voting purposes, arguing that their interests were different than those of the Senior Debt Holders and that creditors who do not have common interests should not be classified in the same group for voting purposes. The motion was dismissed. The appellant appealed.

Held, the appeal should be dismissed.

The classification of creditors is a fact-driven exercise, dependent upon the circumstances of each particular case. It is determined by the creditors' legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. The supervising judge did not err in finding that there was no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis--vis the company. Each was entitled to be paid the moneys owing under their respective debt contracts. The only difference was that the former creditors were subordinated in interest to the latter and had agreed to pay over to the latter any portion of their recovery received until the Senior Debt had been paid in full. As between the two groups of creditors, this merely reflected the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. The supervising judge was also entitled to determine that th is was not a case involving any confiscation of legal rights. Finally, the supervising judge's finding that there was no realistic conflict of interest between the creditors was supported on the record. [page242] Each had the same general interest in relation to the company, namely to be paid under their contracts, and to maximize the amount recoverable from the company through the Plan negotiation process. The Senior Debt Holders' efforts would not be moderated in some respect because they would be content to make their recovery on the

backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders would require the support of the Trade Creditors, whose interest was not affected by the subordination agreement. Thus, the Senior Debt Holders would be required to support the maximization approach.

Canadian Airlines Corp. (Re), [2000] A.J. No. 1693, 19 C.B.R. (4th) 12 (Q.B.), apld

NsC Diesel Power Inc. (Re), [1990] N.S.J. No. 484, 97 N.S.R. (2d) 295, 258 A.P.R. 295, 79 C.B.R. (N.S.) 1 (T.D.), not folld

Other cases referred to

Campeau Corp. (Re), [1991] O.J. No. 2338, 86 D.L.R. (4th) 570, 10 C.B.R. (3d) 100 (Gen. Div.); Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101 (C.A.) (sub nom. Nova Metal Products v. Comiskey); Fairview Industries Ltd. (Re), [1991] N.S.J. No. 456, 109 N.S.R. (2d) 32, 11 C.B.R. (3d) 71, 30 A.C.W.S. (3d) 376 (T.D.); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1988] A.J. No. 1226, [1989] 2 W.W.R. 566, 64 Alta. L.R. (2d) 139, 72 C.B.R. (N.S.) 20 (Q.B.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] B.C.J. No. 63, 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363, 73 C.B.R. (N.S.) 195 (C.A.); Northland Properties Ltd. (Re), [1988] B.C.J. No. 1937, 32 B.C.L.R. (2d) 309 (C.A.), affg [1988] B.C.J. No. 1530, 31 B.C.L.R. (2d) 35, 73 C.B.R. (N.S 166 (S.C.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 610, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, 261 A.R. 12, 19 C.B.R. (4th) 33, 97 A.C.W.S. (3d) 844 (C.A.); Savage v. Amoco Acquisition Co., [1988] A.J. No. 330, 59 Alta. L.R. (2d) 260, 40 B.L.R. 188, 68 C.B.R. (N.S.) 154 (C.A.) (sub. nom. Amoco Acquisition Co. v. Savage); Sklar-

Peppler Furniture Corp. v. Bank of Nova Scotia, [1991] O.J. No. 2288, 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Gen. Div.); Sovereign Life Assurance Co. v. Dodd (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573, 8 T.L.R. 684, 36 Sol. Jo. 644, 41 W.R. 4, 62 L.J.Q.B. 19, 67 L.T. 396 (C.A.); Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 117, 1196 O.A.C. 142, 253 D.L.R. (4th) 109, 9 C.B.R. (5th) 135, 2 B.L.R.(4th) 238 (C.A.); Wellin gton Building Corp. Ltd. (Re), [1934] O.R. 653, [1934] 4 D.L.R. 626, 16 C.B.R. 48 (H.C.J.); Woodward's Ltd. (Re), [1993] B.C.J. No. 852, 84 B.C.L.R. (2d) 206, 20 C.B.R. (3d) 74 (S.C.)

Statutes referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Joint Stock Companies Arrangement Act 1870 (U.K.), 33 and 34 Vict., c. 104

Authorities referred to

Edwards, S.E., "Reorganizations Under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587

Robertson, Q.C., R.N., "Legal Problems on Reorganization of Major Financial and Commercial Debtors" (Canadian Bar Association -- Ontario Continuing Legal Education, April 5, 1983) [page243]

APPEAL from an order of Farley J., [2005] O.J. No. 4814, 143 A.C.W.S. (3d) 623 (S.C.J.) dismissing a motion for an order classifying the appellants as a separate class of creditors for voting purposes.

Paul Macdonald, Andrew Kent and Brett Harrison, for Informal Independent Converts' Committee.

Michael E. Barrack and Geoff R. Hall, for Stelco Inc.

Robert Staley and Alan Gardner, for Senior Debenture Holders.

Fred Myers, for Her Majesty the Queen in Right of Ontario, and the Superintendent of Financial Services.

Ken Rosenberg, for United Steelworkers of America.

A. Kauffman, for Tricap Management Ltd.

Kyla Mahar, for Monitor.

Murray Gold, for Salaried Retirees.

Heath Whitley, for CIBC.

Steven Bosnick, for U.S.W.A. Loc. 5328 and 8782.

The judgment of the court was delivered by

BLAIR J.A.:--

Background

[1] This appeal arises out of the reorganization of Stelco Inc., and related companies, pursuant to the Companies' Creditors Arrangement Act ("CCAA") [See Note 1 at the end of the document]. Stelco has been in the midst of this fractious process for approximately 21 months. Justice Farley has been the supervising judge throughout.

[2] Stelco has presented a Proposed Plan of Compromise or Arrangement to its creditors for their approval. The vote was scheduled for Tuesday, November 15, 2005. On Thursday, November 10, a group of creditors known as the Informal Independent Converts' Committee (the "Converts' Committee) sought an order from the supervising judge, amongst other things, classifying the Subordinated Debenture Holders whom they represent as a separate class for voting purposes. Justice Farley dismissed the motion. In the face of the pending vote, the Converts' Committee sought leave to appeal on Thursday

afternoon (the courts were closed on Friday, November 11, for Remembrance Day). Rosenberg J.A. dealt with the matter and directed that the application for leave, and if leave be granted, the appeal, be heard by a panel of this court on Monday, November 14, 2005. [page244]

[3] This panel heard the application for leave and the appeal on Monday. We concluded that leave should be granted, but that the appeal must be dismissed, and at the conclusion of argument -- and in order to clarify matters so that the vote could proceed the following day -- we issued a brief endorsement with our decision, but indicating that more detailed reasons would follow.

[4] The endorsement read as follows:

> In our view, the appellants have not demonstrated a different legal interest from the other unsecured creditors vis vis the debtor, nor any basis for setting aside the finding of Farley J. that there are no different practical interests such that the appellants deserve a separate class. We see no legal error or error in principle in his exercise of discretion.
>
> Leave to appeal is granted, but the appeal must therefore be dismissed. Because of the importance of the issue for Ontario practice in this area, we propose to expand somewhat on these reasons in due course.

[5] These are those expanded reasons.

Facts

[6] Stelco's Proposed Plan is made to unsecured creditors only. It is not intended to affect the claims of secured creditors.

[7] The Converts' Committee represents unsecured creditors who hold $90 million of convertible unsecured subordinated debentures issued by Stelco pursuant to a Supplemental Trust Indenture dated January 21, 2002, and due in 2007. With

interest, the claims of the Subordinated Debenture Holders now amount to approximately $110 million. Those claims are subordinated to approximately $328 million in favour of Senior Debt Holders. In addition, Stelco has unsecured trade debts totalling approximately $228 million. In the Proposed Plan, these three groups of unsecured creditors -- the Subordinated Debenture Holders (represented by the Converts' Committee), the Senior Debt Holders and the Trade Creditors -- have all been included in the same class for the purposes of voting on the Proposed Plan or any amended version of it.

[8] The Converts' Committee takes issue with this, and seeks to have the Subordinated Debenture Holders classified as a separate class of creditors for voting purposes. They argue that their interests are different than those of the Bondholders and that creditors who do not have common interests should not be classified in the same group for voting purposes. They submit, therefore, that the supervising judge erred in law in not granting them a separate classification. In that regard, they rely upon this court's decision in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.). They also argue that the supervising [page245] judge was wrong, on the facts contained in the record, in finding that the Subordinated Debenture Holders and the Bondholders did not have conflicting interests.

[9] In making their argument about a different interest, the appellants rely upon their status as subordinated debt holders as shaped particularly by Articles 6.2 and 6.3 of the Supplemental Trust Indenture. In essence those provisions reinforce the subordinated nature of their debt. They stipulate (a) that if the Subordinated Debenture Holders receive any payment from Stelco, or any distribution from the assets of Stelco, before the Senior Debt is fully paid, they are obliged to remit any such payment or distribution to the Senior Debt Holders until the latter have been paid in full (Art. 6.2(3)), but (b) that no such payment or distribution by Stelco shall be deemed to constitute a payment on the Subordinated Debenture Holders' debt (Art. 6.3). The parties refer to these provisions as the "Turnover Payment" provisions.

[10] In short, although Stelco is obliged to pay both groups of creditors in full, as between the Subordinated Debenture Holders and the Senior Debt Holders, the latter are entitled to be paid in full before the former receive anything. The Supplemental Trust Indenture makes it clear that the provisions of Article 6 "are intended solely for the purpose of defining the relative rights of [the Subordinated Debenture Holders] and the holders of the Senior Debt" (Art. 6.3).

[11] The appellants contend that the Turnover Payment provisions distinguish their interests from those of the Subordinated Debenture Holders when it comes to voting on Stelco's Proposed Plan. They say that the Subordinated Debenture Holders' interest in maximizing the amounts to be made available to unsecured creditors ends once they have received full recovery, in part as a result of the Turnover Payments that the Subordinated Debenture Holders will be required to make from their portion of the funds. On the other hand, the Subordinated Debenture Holders will have an interest in seeking more because their recovery, for practical purposes, will have only begun once that point is reached.

[12] The respondents submit, for their part, that the appellants are seeking a separate classification for a collateral purpose, i.e., so that they will be able to veto the Proposed Plan, or at least threaten to veto it, unless they are granted a benefit to which they are not entitled -- the elimination of their subordinated position by virtue of the Turnover Payment provisions.

[13] Farley J. rejected the appellants' arguments. The thrust of his decision in this regard is found in paras. 13 and 14 of his reasons: [page246]

> I would note as well that the primary and most significant attribute of the ConCom debt and that of the BondCom debt/ Senior Debt [See Note 2 at the end of the document] plus the trade debt vis--vis Stelco is that it is all unsecured debt. Thus absent valid reason to have separate classes it would be reasonable, logical, rational and practical to have all this unsecured debt in the same class. Certainly that would avoid

> any unnecessary fragmentation -- and in this respect multiplicity of classes does not mean that that fragmentation starts only when there are many classes. Unless more than one class is necessary, fragmentation would start at two classes. Fragmentation if necessary, but not necessarily fragmentation.
>
> Is it necessary to have more than one class? Firstly, it would not appear to me that as between Stelco and the unsecured creditors overall there is any material distinction. Secondly, there would not appear to me to be any confiscation of any rights (or the other side of the coin any new imposition of obligations) upon the holders of the ConCom debt. The subrogation issue was something which these holders assumed on the issue of that debt. Thirdly, I do not see that there is a realistic conflict of interest. Each group of unsecured creditors including the ConCom debt holders and the BondCom debt holders has the same general interest vis--vis Stelco, namely to extract from Stelco through the Plan the maximum value in the sense of consideration possible . . . . That situation is not impacted for our purposes here in this motion by the possibility that in a subsequent dispute between the ConCom holders and the BondCom holders there may be a difference of opinion as to the variation of the considerat ion obtained.

[14] We agree with his conclusion and see no basis to interfere with his findings in that regard.

The Leave Application

[15] The principles to be applied by this court in determining whether leave to appeal should be granted to someone dissatisfied with an order made in a CCAA proceeding are not in dispute. Leave is only sparingly granted in such matters because of their "real time" dynamic and because of the generally discretionary character underlying many of the orders made by supervising judges in such proceedings. There must be serious and arguable grounds that are of real and significant interest to the parties. The court has assessed this criterion on the basis of a four-part test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous; and [page247]

(d) whether the appeal will unduly hinder the progress of the action.

See Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.), at para. 24; Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15; Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 610, 19 C.B.R. (4th) 33 (C.A.), at para. 7.

[16] Here, we granted leave to appeal because the proposed appeal raised an issue of significance to the practice, namely the nature of the "common interest" test to be applied by the courts for purposes of the classification of creditors in CCAA proceedings. Although the law seems to have progressed in the lower courts along the lines developed in Alberta, beginning with the decision of Paperny J. in Canadian Airlines Corp. (Re), [2000] A.J. No. 1693, 19 C.B.R. (4th) 12 (Q.B), this court has not dealt with the issue since its decision in Elan Corp. v. Comiskey, supra, and the Converts' Committee argues that the Alberta line of authorities is contrary to Elan.

[17] A brief further comment respecting the leave process may be in order.

[18] The court recognizes the importance of its ability to react in a responsible and timely fashion to the appellate needs arising in the "real time" dynamics of CCAA restructurings. Often, as in the case of this restructuring, they involve a significant public dimension. For good policy reasons, however, appellate courts in Canada -- including this one -- have developed relatively stringent parameters for the granting of leave to appeal in CCAA cases. As noted, leave is only sparingly granted. The parameters as set out in the

authorities cited above remain good law.

[19] Merely because a corporate restructuring is a big one and money is no object to the participants in the process, does not mean that the court will necessarily depart from the normal leave to appeal process that applies to other cases. In granting leave to appeal in these circumstances, we do not wish to be taken as supporting a notion that the fusion of leave applications with the hearing of the appeal in CCAA restructurings -- particularly in major ones such as this one involving Stelco -- has become the practice. Where there is an urgency that a leave application be expedited in the public interest, the court will do so in this area of the law as it does in other areas. However, where what is involved is essentially an attempt to review a discretionary order made on the facts of the case, in a tightly supervised process with which the judge is intimately familiar, the collapsed process that was made available in this particular situation will not generally be afforded. [page248]

[20] As these reasons demonstrate, however, the issues raised on this particular appeal, and the timing factor involved, warranted the expedited procedure that was ordered by Justice Rosenberg.

The Appeal

No error in law or principle

[21] Everyone agrees that the classification of creditors for CCAA voting purposes is to be determined generally on the basis of a "commonality of interest" (or a "common interest") between creditors of the same class. Most analyses of this approach start with a reference to Sovereign Life Assurance Co. v. Dodd (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (C.A.) which dealt with the classification of creditors for voting purposes in a winding-up proceeding. Two passages from the judgments in that decision are frequently cited. At pp. 249-50 All E.R., Lord Esher said:

The Act provides that the persons to be summoned to the

> meeting, all of whom, it is to be observed, are creditors, are persons who can be divided into different classes, classes which the Act [See Note 3 at the end of the document] recognizes, though it does not define. The creditors, therefore, must be divided into different classes. What is the reason for prescribing such a course? It is because the creditors composing the different classes have different interests, and, therefore, if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes.

At p. 251 All E.R., Bowen L.J. stated:

> The word "class" used in the statute is vague, and to find out what it means we must look at the general scope of the section, which enables the court to order a meeting of a "class of creditors" to be summoned. It seems to me that we must give such a meaning to the term "class" as will prevent the section being so worked as to produce confiscation and injustice, and that we must confine its meaning to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

[22] These views have been applied in the CCAA context. But what comprises those "not so dissimilar" rights and what are the components of that "common interest" have been the subject of debate and evolution over time. 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 must apply in all cases.

[23] In Canadian Airlines Corp. (Re), supra, Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said: [page249]

> In summary, the cases establish the following principles

applicable to assessing commonality of interest:

1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;

2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;

3. The commonality of interests are to be viewed purposively, bearing in mind the object of the C.C.C.A., namely to facilitate reorganizations if at all possible;

4. In placing a broad and purposive interpretation on the C.C.C.A., the court should be careful to resist classification approaches which would potentially jeopardize viable plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

[24] In developing this summary of principles, Paperny J. considered a number of authorities from across Canada, including the following: Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, [1991] O.J. No. 2288, 86 D.L.R. (4th) 621 (Gen. Div.); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., [1988] A.J. No. 1226, 72 C.B.R. (N.S.) 20 (Q.B.); Fairview Industries Ltd. (Re), [1991] N.S.J. No. 456, 11 C.B.R. (3d) 71 (T.D.); Woodward's Ltd. (Re), [1993] B.C.J. No. 852, 84 B.C.L.R. (2d) 206 (S.C.); Northland Properties Ltd. (Re), [1988] B.C.J. No. 1530, 73 C.B.R. (N.S.) 166 (S.C.); Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, [1989] B.C.J. No. 63, 73 C.B.R. (N.S.) 195 (C.A.); NsC Diesel Power Inc. (Re), [1990] N.S.J. No. 484, 79 C.B.R. (N.S.) 1 (T.D.); Savage v. Amoco Acquisition Co., [1988] A.J. No. 330, 68 C.B.R. (N.S.) 154 (C.A.) (sub nom. Amoco Acquisition Co. v.

Savage); Wellingt on Building Corp. (Re), [1934] O.R. 653, 16 C.B.R. 48 (H.C.J.). Her summarized principles were cited by the Alberta Court of Appeal, apparently with approval, in a subsequent Canadian Airlines decision: Canadian Airlines Corp. (Re), supra, at para. 27.

[25] In the passage from his reasons cited above (paras. 13 and 14) the supervising judge in this case applied those principles. In our view, he was correct in law in doing so.

[26] We do not read the foregoing principles as being inconsistent with the earlier decision of this court in Elan Corp. v. Comiskey. There the court applied a common interest test in determining that the two creditors in question ought not to be grouped in the same class of creditors for voting purposes. But the differing interests in question were not different legal interests as between the [page250] two creditors; they were different legal interests as between each of the creditors and the debtor company. One creditor (the Bank) held first security over the debtor company's receivables and the other creditor (RoyNat) held second security on those assets; RoyNat, however, held first security over the debtor's building and realty, whereas the Bank was second in priority in relation to those assets. The two creditors had differing commercial interests in how the assets should be dealt with (it was in the interests of the bank, with a smaller claim, to collect and retain the more realizable receivable assets, but in the interests of RoyNat to preserve the cash flow and have the business sold as a going concern). Those differing commercial interests were rooted in differing legal interests as between the individual creditors and the debtor company, arising from the different security held. Because of the size of its claim, RoyNat would dominate any group that it was in, and Finlayson J.A. was of the view that RoyNat, as the holder of second security, should not be able to override the Bank's legal interest as the first secured creditor with respect to the receivables by virtue of its voting rights. On the basis that there was "no true community of interest" between the secured creditors (p. 299 O.R.), given their different legal interests, he ordered that the Bank be placed in a separate class for voting purposes.

[27] Elan Corp. v. Comiskey did not deal with the issue of whether creditors with divergent interests as amongst themselves -- as opposed to divergent legal interests vis--vis the debtor company -- could be forced to vote as members of a common class. Nor did it apply an "identity of interest" test -- a test that has been rejected as too narrow and too likely to lead to excessive fragmentation: see Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra); Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra; Fairview Industries Ltd. (Re), supra; Woodward's Ltd. (Re), supra. In our view, there is nothing in the decision in Elan Corp. that is inconsistent with the evolutionary set of principles developed in the Alberta jurisprudence and applied by the supervising judge here.

[28] In addition to commonality of interest concerns, a court dealing with a classification of creditors issue needs to be alert to concerns about the confiscation of legal rights and about avoiding what the parties have referred to as "a tyranny of the minority". Examples of the former include Elan Corp. v. Comiskey [See Note 4 at the end of the document] and [page251] Wellington Building Corp. Ltd. (Re), supra [See Note 5 at the end of the document]. Examples of the latter include Sklar-Peppler, supra [See Note 6 at the end of the document] and Campeau Corp. (Re), [1991] O.J. No. 2338, 10 C.B.R. (3d) 100 (Gen. Div.) [See Note 7 at the end of the document].

[29] Here, as noted earlier in these reasons, the respondents argue that the appellants are seeking a separate classification in order to extract a benefit to which they are not entitled, namely a concession that the Turnover Payment requirements of their subordinated position be extinguished by the Proposed Plan, thus avoiding their obligation to transfer payments to the Senior Debt Holders until they have been paid in full, and freeing up all of the distribution the appellants will receive from Stelco for payment on account of their own claims. On the other hand, the appellants point to this conflict between the Subordinated Debenture Holders and the Senior Debt Holders as evidence that they do not have a commonality of interest or the ability to consult together with a view to whatever commonality

of interest they may have vis--vis Stelco.

[30] We agree with the line of authorities summarized in Canadian Airlines (Re) and applied by the supervising judge in this case which stipulate that the classification of creditors is determined by their legal rights in relation to the debtor company, as opposed to their rights as creditors in relation to each other. To the extent that other authorities at the trial level in other jurisdictions may suggest to the contrary -- see, for example NsC Diesel Power Inc. (Re), supra -- we prefer the Alberta approach.

[31] There are good reasons for such an approach.

[32] First, as the supervising judge noted [at para. 7], the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.), at para. 24 [page252] (after referring to the full style of the legislation):

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[33] In this particular case, the supervising judge was very careful to say that nothing in his reasons should be taken to determine or affect the relationship between the Subordinate Debenture Holders and the Senior Debt Holders.

[34] Secondly, it has long been recognized that creditors should be classified in accordance with their contract rights, that is, according to their respective interests in the debtor company: see Stanley E. Edwards, "Reorganizations Under the

Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at p. 602.

[35] Finally, to hold the classification and voting process hostage to the vagaries of a potentially infinite variety of disputes as between already disgruntled creditors who have been caught in the maelstrom of a CCAA restructuring runs the risk of hobbling that process unduly. It could lead to the very type of fragmentation and multiplicity of discrete classes or sub-classes of classes that judges and legal writers have warned might well defeat the purpose of the Act: see Stanley Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", supra; Ronald N. Robertson Q.C., "Legal Problems on Reorganization of Major Financial and Commercial Debtors", Canadian Bar Association -- Ontario Continuing Legal Education, April 5, 1983 at 19-21; Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd., supra, at para. 27; Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada, supra; Sklar-Peppler, supra; Woodwards Ltd. (Re), supra.

[36] In the end, it is important to remember that classification of creditors, like most other things pertaining to the CCAA, must be crafted with the underlying purpose of the CCAA in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors, so that the debtor company can continue to carry on its business to the benefit of all concerned. As Paperny J. noted [at para. 31] in Canadian Airlines (Re), "the Court should be careful to resist classification approaches that would potentially jeopardize viable plans". [page253]

Discretion and fact finding

[37] Having concluded that the supervising judge made no error in law or principle in his approach to the classification issue, we can find no error in his factual findings or in his exercise of discretion in determining that the Subordinate Debenture Holders should remain in the same class as the Senior Debt Holders and Trade Creditors in the circumstances of this case.

[38] We agree that there is no material distinction between the legal rights of the Subordinated Debenture Holders and those of the Senior Debt Holders vis--vis Stelco. Each is entitled to be paid the moneys owing under their respective debt contracts. The only difference is that the former creditors are subordinated in interest to the latter and have agreed to pay over to the latter any portion of their recovery received until the Senior Debt has been paid in full. As between the two groups of creditors, this merely reflects the very deal the Subordinated Debenture Holders bought into when they purchased their subordinated debentures. For that reason, the supervising judge was also entitled to determine that this was not a case involving any confiscation of legal rights.

[39] Finally, the supervising judge's finding that there is no "realistic conflict of interest" between the creditors is supported on the record. Each has the same general interest in relation to Stelco, namely to be paid under their contracts, and to maximize the amount recoverable from the debtor company through the Plan negotiation process. We do not accept the argument that the Senior Debt Holder's efforts will be moderated in some respect because they will be content to make their recovery on the backs of the Subordinated Debenture Holders through the Turnover Payment process. In order to carry the class, the Senior Debt Holders will require the support of the Trade Creditors, whose interest is not affected by the subordination agreement. Thus the Senior Debt Holders will be required to support the maximization approach.

[40] We need not deal with whether a realistic and genuine conflict of interest, produced by different legal positions of creditors vis--vis each other, could ever warrant separate classes, as we are satisfied that even if it could, this is not such a case.

Disposition

[41] Accordingly, we would not interfere with the supervising judge's decision that the appellants had not made out a case for a separate class. The appeal is therefore dismissed.

Appeal dismissed. [page254]

Notes

Note 1: R.S.C. 1985, c. C-36, as amended.

Note 2: Farley J. uses the term "ConCom debt" to refer to the debt represented by the Converts' Committee (i.e., that of the Subordinated Debenture Holders), and the term "BondCom debt" to refer to that of the Senior Debt Holders.

Note 3: The Joint Stock Companies Arrangement Act 1870 (U.K.), 33 & 34 Vict., c. 104.

Note 4: A second secured creditor with superior voting power was separated from a first secured creditor for the voting purposes, in order [to] prevent the former from utilizing its superior voting strength to adversely affect the latter's prior security position.

Note 5: The court refused to allow subsequent mortgagees to vote in the same class as a first mortgagee because in the circumstances the subsequent mortgagees would be able to use their voting power to destroy the priority rights and security of the first mortgagee.

Note 6: Borins J., as he then was, warned against the dangers of "excessive fragmentation" and of creating "a special class simply for the benefit of the opposing creditor, which would give that creditor the potential to exercise an unwarranted degree of power" [at p. 627 D.L.R.].

Note 7: Montgomery J. declined to grant a separate classification to a minority group of creditors who would use that classification to extract benefits to which it was not otherwise entitled.

Tab 12

See para. 6

2019 CarswellOnt 24229
Ontario Superior Court of Justice [Commercial List]

Rothmans, Benson & Hedges Inc., Re

2019 CarswellOnt 24229, 324 A.C.W.S. (3d) 162

In the Matter of the Companies' Creditors Arrangement Act

In the Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc. ("Applicant")

Pattillo J.

Judgment: March 22, 2019
Docket: CV-19-616779-00CL

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — General principles
Order in Quebec awarded compensatory and punitive damages against debtor and its co-defendants of approximately $13.529 billion — Debtor brought application for initial order under Companies Creditors' Arrangement Act granting stay of proceedings — Application granted — Debtor incorporated under Canada Business Corporations Act, carried on business in Ontario, and head office was in Ontario — Debtor was insolvent under balance sheet test — Liabilities clearly exceed $5 million, so that jurisdiction existed under Act to grant relief requested — Relief under Act necessary to enable debtor to pursue plan of arrangement while continuing to operate its business and keep creditors and contingent creditors on equal footing to allow it to deal fairly with the claims against it — Administration charge granted.
Table of Authorities
Cases considered by *Pattillo J.*:
Imperial Tobacco Canada Limited, et al, Re (2019), 2019 ONSC 1684, 2019 CarswellOnt 4003, 68 C.B.R. (6th) 322 (Ont. S.C.J.) — followed
JTI-Macdonald Corp., Re (2019), 2019 ONSC 1625, 2019 CarswellOnt 3653, 69 C.B.R. (6th) 285 (Ont. S.C.J. [Commercial List]) — followed
Pacific Exploration & Production Corp., Re (2016), 2016 ONSC 5429, 2016 CarswellOnt 13733, 40 C.B.R. (6th) 64 (Ont. S.C.J. [Commercial List]) — considered
Statutes considered:
Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — considered

APPLICATION by debtor for initial order in insolvency proceedings.

***Pattillo J.*:**

1 Rothmans, Benson & Hedges Inc. (the "Applicant") seeks an Initial Order pursuant to the Companies' Creditors Arrangement Act ("CCAA") providing for, among other things, a stay of all existing and prospective proceedings against or in respect of any member of the Philip Morris International Inc. group of companies (the PMI Group) that relate to or involve RBH or a Tobacco Claim as that term is defined in the material.

2 This application is precipitated by the Judgment of the Quebec Court of Appeal dated March 1, 2019 upholding in most respects the judgment of the Quebec Superior Court and awarding compensatory and punitive damages against RBH and its co-defendants Imperial Tobacco Canada Limited (ITCAN) and JTI-Macdonald Corp ("JTIM") of approximately $13.529 billion.

3 This application follows earlier CCAA applications by both ITCAN and JTIM and is similar in most respects. On March 8, 2019, Hainey J. issued an Initial Order in respect of JTIM and on March 12, 2019, McEwen J. issued an Initial Order in respect of ITCAN.

4 Based on the material filed, including the First Report of Ernst & Young, the Monitor dated March 22, 2019, and submissions of counsel, I am satisfied that the draft Initial Order provided at Tab 3 of the Application Record should issue. RBH is incorporated under the Canada Business Corporations Act, carries on business in Ontario, and has its Head Office in Ontario. Based on the Quebec Court of Appeal Judgment as well as other pending litigation against it involving tobacco, RBH is insolvent under the balance sheet test - that is the realizable value of its assets is less than its obligations due and accruing due, including contingent liabilities.

5 Further, RBH's liabilities clearly exceed $5 million. Accordingly, the court has jurisdiction under the CCAA to grant the relief requested.

6 RBH requires CCAA relief to enable it to pursue a CCAA plan of arrangement while continuing to operate its business and keep creditors and contingent creditors on an equal footing to allow it to deal fairly with the claims against it, with a view to a global settlement. As a result, I am satisfied a stay pursuant to s.11.02 of the CCAA is appropriate to maintain the status quo and prevent prejudice to creditors. Leave is granted to allow RBH to file its leave application to the Supreme Court in respect of the Quebec Court of Appeal Judgment. At the same time, I am satisfied that a stay of proceedings in Canada as against other members of the PMI Group that relate to RBH, the Business or Property or a Tobacco Claim as defined in the material should also issue. I have considered the factors set out in *Pacific Exploration & Production Corp., Re*, 2016 ONSC 5429 (Ont. S.C.J. [Commercial List]) at para. 26 in respect of extending the stay to non-applicant third parties. In the circumstances, the balance of convenience favours granting the stay to enable a global solution to the claims.

7 I am also satisfied that the requested administration charge should be granted. The costs of the CCAA proceedings will be significant. Similarly, I am satisfied that the charges for Sales & Excise Taxes and indemnification of directors and officers are appropriate. Further the cash collateral in the amount of $31.1 million as security for the letters of credit and bank guarantees provided to the provincial and federal government in respect of Excise Taxes is approved. It maintains the status quo. RBH is also permitted to engage in the normal course intercompany transactions within the PMI Group.

8 The service and notice provisions in the draft order are approved. Ernst & Young is appointed as the Monitor.

9 In addition to the above, I agree with and adopt the reasons of my colleagues Hainey J. in *JTI-Macdonald Corp., Re*, 2019 ONSC 1625 (Ont. S.C.J. [Commercial List]) and McEwen J. in *Imperial Tobacco Canada Limited, et al, Re*, 2019 ONSC 1684 (Ont. S.C.J.) in respect of the issues herein.

10 The Comeback Motion referred to in para. 49 of the Initial Order will take place on April 4 and 5, 2019. Order signed by me.

Application granted.

Appendix

Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

In the Matter of the Companies' Creditors Arrangement Act
Plaintiff(s)
AND
AND IN The Matter of a Plan of Compromise or Arrangement of Rothmans, Benson & Hedges Inc. Defendant(s) (Applicant)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
See attached		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

Rothmans, Benson and Hedges Inc. (the "Applicant") seeks an Initial Order pursuant to the Companies Creditors Arrangement Act ("CCAA") providing for, among other things, a stay of all existing and prospective proceedings against or in respect of any member of the Philip Morris International Inc. group of companies (the PMI Group) that relate to or involve RBH or a Tobacco Claim as that term is defined in the Material.

This application is precipitated by the judgment of the Quebec Court of Appeal dated March 1, 2019 upholding

March 22, 2019
Date

Judge's Signature

☑ Additional Pages 3

Graphic 1

Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

in most respects the judgment of the Quebec Superior Court and awarding compensatory and punitive damages against RBH and its co-defendants Imperial Tobacco Canada Limited (ITCAN) and JTI-Macdonald Corp. (JTIM) of approximately $19.529 billion.

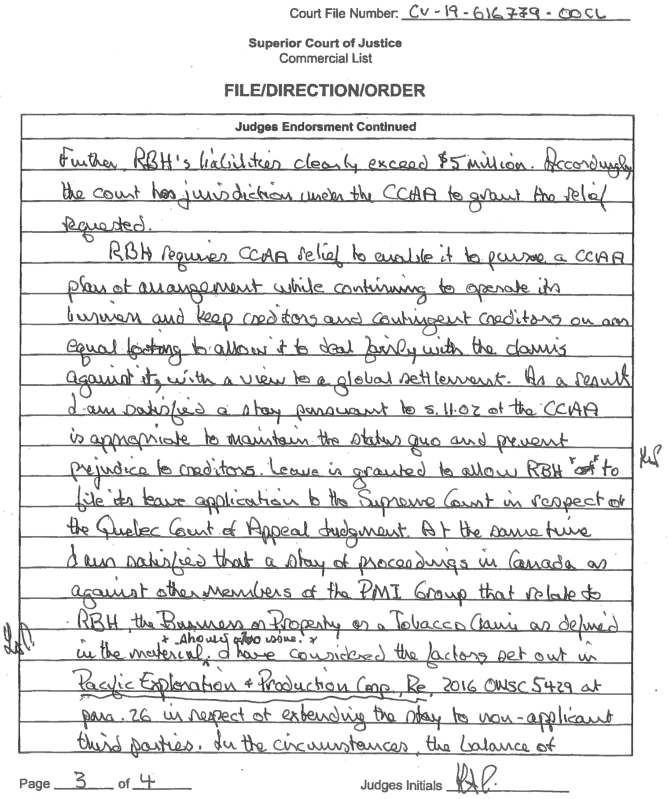
This application follows earlier CCAA applications by both ITCAN and JTIM and is similar in most respects. On March 8, 2019, Hainey J. issued an Initial Order in respect of JTIM and on March 12, 2019, McEwen J. issued an Initial Order in respect of ITCAN.

Based on the material filed, * including the First Report of Ernst & Young, the Monitor dated March 22, 2019, and the submissions of counsel, I am satisfied that the draft Initial Order provided at Tab 3 of the Application Record should issue.

RBH is incorporated under the Canada Business Corporations Act ** carries on business in Ontario and has its Head Office in Ontario. Based on the Quebec Court of Appeal judgment as well as other pending litigation against it involving tobacco, RBH is insolvent under the balance sheet test - that is the realizable value of its assets is less than its obligations due and accruing due, including contingent liabilities.

Page 2 of 4 Judges Initials

Graphic 2



Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

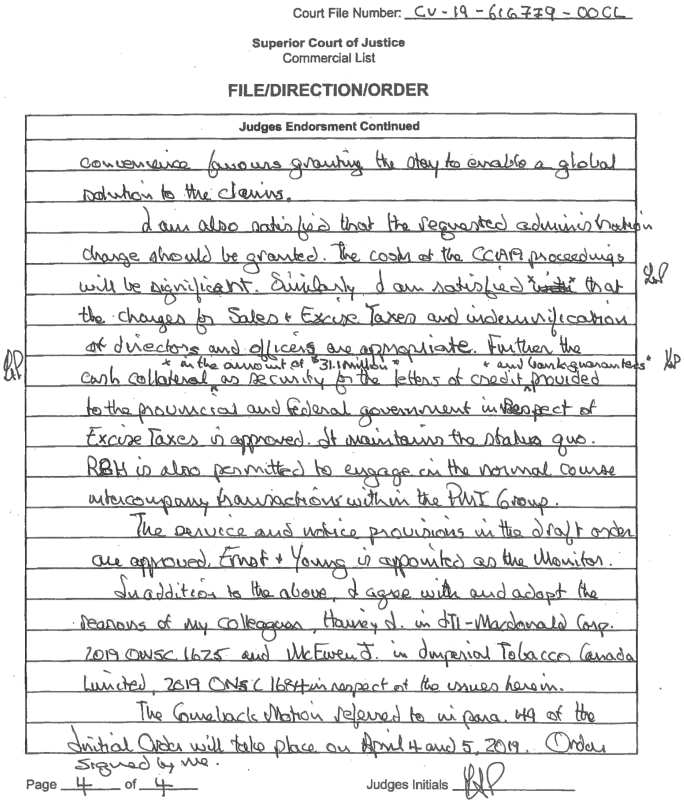
Judges Endorsment Continued

Further, RBH's liabilities clearly exceed $5 million. Accordingly, the court has jurisdiction under the CCAA to grant the relief requested.

RBH requires CCAA relief to enable it to pursue a CCAA plan of arrangement while continuing to operate its business and keep creditors and contingent creditors on an equal footing to allow it to deal fairly with the claims against it, with a view to a global settlement. As a result I am satisfied a stay pursuant to s. 11.02 of the CCAA is appropriate to maintain the status quo and prevent prejudice to creditors. Leave is granted to allow RBH to file its leave application to the Supreme Court in respect of the Quebec Court of Appeal judgment. At the same time I am satisfied that a stay of proceedings in Canada as against other members of the PMI Group that relate to RBH, the Business or Property or a Tobacco Claim as defined in the material, I have considered the factors set out in Pacific Exploration & Production Corp., Re, 2016 ONSC 5429 at para. 26 in respect of extending the stay to non-applicant third parties. In the circumstances, the balance of

Page 3 of 4 Judges Initials

Graphic 3



Court File Number: CV-19-616779-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

convenience favours granting the stay to enable a global solution to the claims.

I am also satisfied that the requested administration charge should be granted. The costs of the CCAA proceedings will be significant. Similarly, I am satisfied that the charges for Sales & Excise Taxes and indemnification of directors and officers are appropriate. Further the cash collateral as security for the letters of credit provided to the provincial and federal government in respect of Excise Taxes is approved. It maintains the status quo. RBH is also permitted to engage in the normal course intercompany transactions within the PMI Group.

The service and notice provisions in the draft order are approved. Ernst & Young is appointed as the Monitor.

In addition to the above, I agree with and adopt the reasons of my colleagues, Hainey J. in ATI-Macdonald Corp. 2019 ONSC 1625 and McEwen J. in Imperial Tobacco Canada Limited, 2019 ONSC 1684 in respect of the issues herein.

The Comeback Motion referred to in para. 49 of the Initial Order will take place on April 4 and 5, 2019. Order signed by me.

Page 4 of 4 Judges Initials

Graphic 4

End of Document

Tab 13

CITATION: JTI-Macdonald Corp., Re, 2019 ONSC 1625
COURT FILE NO.: CV-19-615862-00CL
DATE: 2019/03/12

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERIAL LIST

RE: **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 OR ARRANGEMENT OF JTI-MACDONALD CORP.

Applicant

BEFORE: Hainey J.

COUNSEL: *Robert I. Thornton, Leanne M. Williams, Rachel Bengino and Mitch Grossell*, for the Applicant

Scott A. Bomhof and Adam M. Slavens, for Respondents JT Canada LLC, and PWC, in its capacity as Receiver of JTI-MacDonald TM

Pamela L.J.Huff, Linc A. Rogers and Christopher Burr, for the Proposed Monitor, Deloitte Restructuring Inc.

HEARD: March 8, 2019

ENDORSEMENT

Background

[1] On March 8, 2019 JTI-Macdonald Corp. ("JTIM" or "Applicant") sought an Initial Order pursuant to *The Companies Creditors Arrangement Act* ("CCAA"). I granted the Initial Order and endorsed the record as follows:

> I am satisfied that this application should be granted today on the terms of the attached Initial Order. There shall be a sealing order on the terms of para. 59 of the Initial Order. I will provide written reasons for my decision to grant this order in due course. The comeback motion referred to in para. 50 shall be on April 4, 2019 at 10 a.m. in this Court.

[2] These are my Reasons.

Facts

[3] As a result of a judgment of the Quebec Court of Appeal released on March 1, 2019 in a class proceeding ("Quebec Class Action"), JTIM and two other defendants are liable for damages totaling $13.5 billion ("Quebec Judgment"). If this judgment is not stayed, its enforcement could destroy the company because JTIM does not have sufficient funds to satisfy the judgment.

[4] According to JTIM, enforcement of the Quebec Judgment would destroy the company's value for its 500 employees and 1,300 suppliers. It would also impact approximately 28,000 retailers that sell JTIM's products and 790,000 consumers of its products. Enforcement of the Quebec Judgment would also jeopardize federal and provincial taxes and duties in excess of $1.3 billion paid annually in connection with JTIM's operations (of which $500 million per year is paid directly by JTIM and another $800 million per year is paid by third parties and consumers).

[5] JTIM is also a defendant in a number of significant health care costs recovery actions ("HCCR Actions"). The total claims in the HCCR Actions exceed $500 billion.

[6] JTIM wishes to seek a "collective solution" to the Quebec Judgment and the HCCR Actions for the benefit of all of its stakeholders. It is for this reason that it seeks a stay of all proceedings in its application for an Initial Order pursuant to the CCAA.

[7] In its application JTIM seeks protection from its creditors and the following additional relief under the CCAA:

(a) declaring that it is a company to which the CCAA applies;

(b) granting a stay of proceedings against it, and the Other Defendants in the Pending Litigation, as defined and described in the Notice of Application;

(c) appointing Deloitte Restructuring Inc. ("Proposed Monitor") as Monitor in these CCAA proceedings;

(d) granting an Administrative Charge, Directors' Charge and Tax Charge;

(e) authorizing the Applicant to pay its pre-filing and post-filing obligations in respect of suppliers, trade creditors, taxes, duties, employees (including outstanding and future pension plan contributions, other post-employment benefits and severance packages) and royalty payments and to pay post-filing interest of certain of its secured obligations in the ordinary course of business in order to minimize any disruption of the Applicant's business;

(f) approving the engagement letter dated April 23, 2018 (the "CRO Engagement Letter") appointing Blue Tree Advisors Inc. as the Applicant's Chief Restructuring Officer ("CRO");

(g) authorizing it to apply for leave and, if successful, to appeal the Quebec Judgment to the Supreme Court of Canada; and

(h) sealing Confidential Exhibit "1" of Robert Master's affidavit.

Issues

[8] I must decide the following issues:

(a) Should the Court grant protection to JTIM under the CCAA?

(b) Is it appropriate to grant the requested stay of proceedings?

(c) Should the Proposed Monitor be appointed as Monitor in these proceedings?

(d) Should the Court grant the requested charges?

(e) Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

(f) Should Blue Tree Advisors be appointed as CRO?

(g) Should JTIM be authorized to continue its application for leave to appeal of the Quebec Judgment to the Supreme Court of Canada?

Analysis

Should the Court grant protection to JTIM under the CCAA?

[9] The CCAA applies to an insolvent company whose liabilities exceed $5 million.

[10] JTIM is a company incorporated pursuant to the *Canada Business Corporations Act*.

[11] JTIM's liabilities clearly exceed $5 million. It faces a judgment for $13.5 billion. According to Robert McMaster, JTIM's Director, Taxation and Treasury, the company does not have sufficient funds to satisfy the Quebec Judgment which is currently payable. Accordingly, JTIM is an insolvent company to which the CCAA applies.

Is it appropriate to grant the requested stay of proceedings?

[12] The Court may grant a stay of proceedings pursuant to s. 11.02 of the CCAA in respect of a debtor company if it is satisfied that circumstances exist that make the order appropriate. In order to determine whether a stay order is appropriate the Court should consider the purpose behind the CCAA. The primary purpose of the CCAA is to maintain the *status quo* for a period while the debtor company consults with its creditors and stakeholders with a view to continuing the company's operations for the benefit of the company and its creditors.

[13] JTIM cannot pay the amount of the Quebec Judgment. Any steps to enforce the judgment could cause serious harm to JTIM's business to the detriment of all of its stakeholders. In my view, it is appropriate for this reason to grant the requested stay of proceedings in favour of JTIM.

[14] JTIM also requests a stay of proceedings in favour of the other defendants in other litigation relating to tobacco claims in which JTIM is a defendant, including the Quebec Class Action and the HCCR Actions. The Court has discretion under s. 11 of the CCAA to impose a stay of proceedings with respect to non-applicant third parties. In *Tamerlane Ventures Inc., Re,* 2013 ONSC 5461, Newbould J stated as follows at para. 21:

> Courts have an inherent jurisdiction to impose stays of proceedings against non-applicant third parties where it is important to the reorganization and restructuring process, where it is just and reasonable to do so.

[15] I came to the same conclusion in *Pacific Exploration & Production Corp., Re,* 2016 ONSC 5429, where at para. 26 I set out the following list of factors that courts have considered in deciding whether to extend a stay of proceedings to non-applicant third parties:

(a) the business and operations of the third party was significantly intertwined and integrated with those of the debtor company;

(b) extending the stay to the third party would help maintain stability and value during the CCAA process;

(c) not extending the stay to the third party would have a negative impact on the debtor company's ability to restructure, potentially jeopardizing the success of the restructuring and the continuance of the debtor company;

(d) if the debtor company is prevented from concluding a successful restructuring with its creditors, the economic harm would be far-reaching and significant;

(e) failure of the restructuring would be even more harmful to customers, suppliers, landlords and other counterparties whose rights would otherwise be stayed under the third party stay;

(f) if the restructuring proceedings are successful, the debtor company will continue to operate for the benefit of all of its stakeholders, and its stakeholders will retain all of its remedies in the event of future breaches by the debtor company or breaches that are not related to the released claims; and

(g) the balance of convenience favours extending the stay to the third party.

[16] Having considered these factors, I am satisfied that granting the requested stay of proceedings to the other defendants will allow JTIM to attempt to arrive at a collective solution with respect to the Quebec Class Action and the HCCR actions. If these actions continue to

proceed against the other defendants but not JTIM there could be significant economic harm for all of JTIM's stakeholders.

[17] Accordingly, I have concluded that the balance of convenience favours exercising my discretion under the CCAA to grant a stay of proceedings to the other defendants.

Should the Proposed Monitor be appointed as the Monitor?

[18] I am satisfied that Deloitte Restructuring Inc. ("Deloitte") should be appointed the Monitor in these proceedings pursuant to s. 11.7 of the CCAA. Deloitte regularly acts as the Monitor in CCAA proceedings and it is not subject to any of the restrictions set out in s. 11.7(2) of the CCAA.

Should the requested charges be granted?

Administrative Charge

[19] JTIM requests that I grant an administrative charge in favour of JTIM's counsel, the CRO, the Monitor and its legal counsel in the amount of $3 million.

[20] The Court has jurisdiction to grant an administrative charge pursuant to s. 11.52 of the CCAA. In *Canwest Global Publishing Inc.*, 2012 ONSC 633, Pepall J. set out the following list of factors the Court should consider when granting an administrative charge:

(a) the size and the complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.

[21] Having considered these factors, I am satisfied that the requested administration charge should be granted for the following reasons:

(a) JTIM's restructuring will require extensive involvement by the professional advisors who are subject to the administrative charge;

(b) the professionals subject to the administration charge have contributed, and will continue to contribute, to the restructuring of JTIM;

(c) there is no unwarranted duplication of roles so that the professional fees associated with these proceedings will be minimized;

(d) the administrative charge will rank in priority to the directors' charge and the tax charge. The only secured creditors that will be affected by the administrative charge are JTIM's parent companies and certain other secured related party suppliers, each of which support the granting of the administrative charge; and

(e) the Proposed Monitor believes that the amount of the administration charge is reasonable

Directors' Charge

[22] I am satisfied that the directors' charge should be approved to ensure the ongoing stability of JTIM's business during the CCAA proceedings. The directors and officers have a great deal of institutional knowledge and experience and JTIM requires their continued management of its business. To ensure that the officers and directors remain with JTIM during the CCAA proceedings they require the protection of the directors' charge. The proposed charge of $4.1 million will only be available to the extent that the directors' and officers' insurance is not available if a claim is made against them. The Proposed Monitor is of the view that the directors' charge is reasonable and appropriate.

Tax Charge

[23] JTIM is also seeking a third-ranking super-priority charge in the amount of $127 million in favour of the Canadian federal, provincial and territorial authorities that are entitled to receive payments and collect money from JTIM with respect to sales taxes and excise taxes and duties. I am satisfied that this tax charge should be granted so that JTIM's directors and officers do not become personally liable for these taxes. Further, the Proposed Monitor is of the view that the tax charge is reasonable and appropriate.

Is it appropriate to allow the payment of certain pre-filing and post-filing amounts?

[24] In *Cinram International Inc., Re,* 2012 ONSC 3767 Morawetz J. (as he then was) concluded at Para. 68 that the court should consider the following factors in deciding whether to authorize the payment of pre-filing obligations:

(a) whether the goods and services were integral to the business of the applicants;

(b) the debtors' need for the uninterrupted supply of the goods or services;

(c) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate; and

(d) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

[25] JTIM's business is expected to remain cash-flow positive during these CCAA proceedings so that it will have sufficient cash to meet its pre-filing and post-filing

obligations. JTIM's operations depend on timely and continuous supply from its suppliers. Maintaining its operations as a going concern is in the best interests of all of JTIM's stakeholders. The Proposed Monitor supports JTIM's intentions to pay its employees, trade creditors, royalty payments, interest, payments, previous obligations and other disbursements in the ordinary course of its business. I agree and adopt the Proposed Monitor's reasons for supporting these pre-filing and post-filing payments as set out at paras. 65-72 of the Report of the Proposed Monitor dated March 8, 2019.

Should Blue Tree Advisors be appointed as CRO?

[26] According to JTIM, it requires the proposed Chief Restructuring Officer, William Aziz, to successfully complete its contemplated restructuring plan. Mr. Aziz has the experience and necessary skills to oversee and assist JTIM with its complex negotiations during the CCAA proceedings. With the assistance of the CRO, JTIM's management can focus on the company's operations which should maximize value for its stakeholders.

[27] I am satisfied that Mr. Aziz should be appointed as CRO pursuant to the terms of the CRO Engagement Letter which the Monitor supports.

[28] JTIM requests an order sealing the unredacted copy of the CRO Engagement Letter. Section 137(2) of the *Courts of Justice Act* gives the Court jurisdiction to order that a document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[29] The CRO Engagement Letter sets out the commercial terms of the CRO's engagement. This is commercially sensitive information. In my view JTIM's request for a sealing order meets the test set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 because it will protect a commercial interest and the salutary effects of sealing the CRO's Engagement Letter outweighs any deleterious effects since this is the type of information that a private company outside of a CCAA proceeding would treat as confidential.

Should JTIM be authorized to continue its appeal to the Supreme Court of Canada?

[30] At para. 75 of its Factum, JTIM submits as follows:

> 75. In this case, the Applicant is cash flow positive and has successful business operations. Its insolvency is primarily due to the QCA Judgment. The Applicant wishes to exercise its right to appeal the QCA Judgment, while staying enforcement thereof and while considering its options for a viable solution for the benefit of all of its stakeholders.

[31] In my view, based on this submission it is reasonable to permit JTIM to continue its leave to appeal application to the Supreme Court of Canada.

Conclusion

[32] For the reasons set out above the Application is granted.

HAINEY J.

Date Released: March 12, 2019

Tab 14

SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-049838-150

DATE : JULY 4, 2019

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

In the matter of the *Companies' Creditors Arrangement Act*

9323-7055 QUEBEC INC.
(formerly Aquadis International Inc.)
Debtor

and

RAYMOND CHABOT Inc, (Mr Jean Gagnon, CPA, CA, CIRP)
Applicant / Monitor

JUDGMENT

I. OVERVIEW

[1] The Monitor has submitted a Plan of Compromise and Arrangement for the Court's approval (the "Plan"). The Plan has received the unanimous approval of the creditors of 9323-7055 Québec inc., formerly Aquadis International inc. ("Aquadis"). Nevertheless, a number of persons who are not party to the Plan oppose its ratification (the "Opposing Retailers"). The Opposing Retailers object that the Plan would entitle the Monitor to take legal action against them on behalf of Aquadis' creditors. They argue that such an action would not be necessary for the restructuring of Aquadis and

that granting this power to the Monitor under the Plan would therefore be a misuse of the *Companies' Creditors Arrangement Act*.[1]

[2] Aquadis' problems arose in 2010 from its sale of defective water faucets. The faucets were manufactured in Taiwan by JYIC Industrial Corporation and Jing Yudh Industrial Co. Ltd. (collectively "JYIC"). Gearex Corporation, a Taiwanese distributor, purchased the faucets from JYIC and resold them to Aquadis. Aquadis in turn sold the faucets to a number of Canadian distributors, including the Opposing Retailers, for resale to builders and consumers.

[3] The Opposing Retailers include Home Depot Canada Inc., RONA Inc., Home Hardware Stores Limited, Groupe BMR Inc., Groupe Patrick Morin Inc. and Matériaux Laurentien Inc. Intact Compagnie d'Assurance Inc. has also opposed the Plan.

[4] Aquadis' creditors include numerous insurance companies who have indemnified their clients for water damage caused by the defective faucets and therefore have subrogated claims against the Opposing Retailers, Aquadis and JYIC. In 2018, the creditors settled with JYIC's distributor, Gearex, which was released from all claims.

[5] The Opposing Retailers and Aquadis also have recursory and other rights against JYIC.

[6] Under the Plan, the Monitor would be allowed to distribute to creditors the settlement funds of $4.7 million received from Gearex and the other settling parties. The Monitor would also be allowed to continue the product liability suit filed against JYIC in November 2017 on behalf of Aquadis and its creditors. Finally, the Plan would recognize the Monitor's ability to take legal action against the Opposing Retailers on behalf of Aquadis' creditors.

[7] The Monitor argues that since the Initial Order was issued in December 2015 suspending all legal proceedings in connection with the sale of the defective faucets, he has been unable to reach a settlement with JYIC and the Opposing Retailers. Consequently, the Monitor argues that there can only be a global settlement of all claims if he is allowed to continue the suit against JYIC and commence an action against the Opposing Retailers. Under the Plan, the Monitor will make a final distribution to creditors once the litigation is terminated or settled.

[8] It is worth noting that in November 2016 the Monitor obtained Court approval to institute legal proceedings against Aquadis' Canadian distributors. At the time, the Opposing Retailers did not voice any objection. However, now that the Monitor seeks to approve the Plan and file suit, the Opposing Parties object.

[9] The Opposing Retailers' objection is based on the legal distinction between the Monitor's action against JYIC and his proposed action against them. In suing JYIC on behalf of Aquadis' creditors, the Monitor is exercising Aquadis' rights against the

[1] R.S.C. 1985, c. C-36.

manufacturer.[2] His action on behalf of creditors is an attempt to recover Aquadis' unliquidated assets, a legitimate objective under a CCAA plan of arrangement. However, the Opposing Retailers argue that because Aquadis has no right of action against the Canadian distributors to whom it sold the defective faucets, the Monitor's action against them is unrelated to a restructuring of Aquadis' affairs under the CCAA.

[10] The Opposing Retailers rely on the decision in *Ernst & Young Inc. v Essar Global Fund Limited*,[3] where the Ontario Court of Appeal held that a monitor may exceptionally play an active role (in this case as a complainant in an oppression remedy) where the proposed action has a restructuring purpose that "materially advances or removes an impediment to a restructuring".

[11] Consequently, in deciding whether to sanction the Plan, the Court is called upon to determine whether the Plan meets the legal test set out in the case law and is consistent with the objectives of the CCAA. For the following reasons, the Court finds that the Plan satisfies these criteria.

II. ANALYSIS

[12] The jurisprudential test applicable to the sanctioning of a plan of compromise or arrangement under the CCAA was repeated by Justice Gascon of the Québec Superior Court (as he then was) in *AbitibiBowater inc. (Arrangement relatif à)* :[4]

> The exercise of the Court's authority to sanction a compromise or arrangement under the CCAA is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that:
>
> a) There has been strict compliance with all statutory requirements;
>
> b) Nothing has been done or purported to be done that was not authorized by the CCAA; and
>
> c) The Plan is fair and reasonable.
>
> [citations omitted]

[13] In the present case, the first and second conditions are not at issue, despite the arguments made by Home Depot of Canada Inc. The Court is satisfied that the Monitor has complied with all statutory requirements and that nothing has been done that was not authorized by the CCAA. The real question is whether the Plan is fair and reasonable and in keeping with the spirit of the CCAA. The Court believes that it is.

[14] It is worth recalling that the Monitor's objective in applying for a continuation of the proceedings under the CCAA[5] was to present a plan of compromise or arrangement

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2 Articles 1529 and 1730 CCQ.
3 2017 ONCA 1014, paras 119-123.
4 2010 QCCS 4450, para 19.

that would apply a "global solution" to the many outstanding claims against Aquadis.[6] Indeed, when the CCAA application was filed in December 2015, the company faced 296 claims totalling over $18 million, with new claims relating to the defective faucets being added regularly.

[15] This Court described the purpose of the present proceeding in its June 2018 decision approving the transaction between the Monitor and Gearex:

> The present CCAA proceeding seeks to maximize the assets available to Aquadis' creditors. It has the advantage of centralizing all claims and rights of action in the hands of the Monitor, thereby putting an end to a multitude of judicial proceedings between numerous parties. The process allows the manufacturer, distributors, vendors, purchasers and insurers to advance their competing interests in a comprehensive and expeditious fashion, the whole in keeping with the objectives of the CCAA.[7]

[16] This description highlighted the flexible nature of the CCAA, a feature previously commented on by the courts:

> [T]he CCAA is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy. (…) [O]rders are made if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.[8]

[17] The Monitor's objective of using the CCAA to reach a global resolution of the product liability claims is not without precedent. In recent years the statute has served to liquidate a debtor company's assets and propose an arrangement whereby the debtor and other parties contribute to an indemnity fund intended to compensate creditors. Plans of arrangement have been approved by the courts to resolve multi-party litigation related to the Mégantic rail disaster, [9] financial fraud, [10] product liability claims[11] and a class action suit.[12]

[18] Whatever its form, a plan of compromise or arrangement is intended to settle all the existing issues between the debtor company and its creditors. The purpose of the

---

5 On June 11, 2015, 9323-7055 Québec inc. filed a Notice of Intention under para 50.4 (1) of the *Bankruptcy and Insolvency Act*.

6 *Requête pour continuer les procédures de restructuration sous la Loi sur les arrangements avec les créanciers des compagnies et pour l'émission d'une ordonnance initiale*, December 8, 2015, para 4d).

7 Arrangement relative à 9323-7055 Québec inc (Aquadis International inc.), 2018 QCCS 2945, para 18.

8 *Re Canadian Red Cross Society/Société canadienne de la croix-rouge*, (1998) 5 C.B.R. (4th) 299, para 45.

9 *Montréal, Maine & Atlantique Canada Cie. (Arrangement relative à),* Court file No. 450-11-000167-134, June 8, 2015, Superior Court of Québec.

10 *Corporation Mount Real (Arrangement relative à),* Court File No. 500-11-051741-169, April 26, 2917, Superior Court of Québec.

11 *Muscletech Research and Development Inc*., 2006 CanLII 1020 (ON SC).

12 *Sino-Forest Corporation (Re),* Court file No. CV-12-9667-00CL, December 3, 2012, Ontario Superior Court of Justice.

CCAA is to create an environment of negotiation and compromise and often it is the stay provision that creates the necessary stability for that process to unfold.[13]

[19] In the present case, the stay provision has been in place for three and a half years. During that time, the Monitor has reached an agreement with Gearex and others, but has not been able to settle the claims involving the manufacturer and retailers. As a result, the Monitor cannot at this time present a plan of compromise or arrangement that offers a definitive solution to all of the product liability claims involving Aquadis. The Monitor's solution is to present a plan whereby the sums recovered to date will be distributed to creditors, with a final distribution to be made when the Monitor's legal proceedings against JYIC and the retailers have resulted in final judgments or been settled.

[20] In light of this objective, the Opposing Retailers' argument that the CCAA is being misused to allow the Monitor to prosecute an action that cannot be legally asserted against them by Aquadis appears both narrowly technical and unconvincing. It is the position adopted by the Opposing Retailers, not the Monitor, which appears at odds with the CCAA objective to settle all outstanding issues between the debtor and its creditors.

[21] In the absence of a compromise, a global restructuring of Aquadis' liabilities is only possible by litigating the claims against the Opposing Retailers and JYIC. To borrow the words of the court in *Essar*,[14] litigation has become necessary to "materially advance" the restructuring process contemplated by the Initial CCAA Order.

[22] Furthermore, the bringing of consolidated proceedings by the Monitor is the only practical solution to a global resolution. If the Monitor pursues his claim against JYIC under the Plan, while the insurers continue their individual claims against the Opposing Retailers outside the Plan, any amounts recovered from one defendant will have to take account of amounts recovered from the other defendants. In addition, all awards or settlements will have to take into account the amounts already recovered from Gearex and other parties. The creditors' claims against Aquadis will only be settled once and for all when the contribution of each actor in the chain of distribution has been established.

[23] It is a sensible use of judicial resources to authorize a consolidated action by the Monitor against the Opposing Retailers, and avoid the reactivation of a multitude of individual legal actions. A single action respects the guiding principle of proportionality found in the Québec *Code of Civil Procedure*, and is in keeping with the social objective of the CCAA, which requires an examination of the wider public interest when assessing a plan of compromise.[15]

[24] The Opposing Retailers cannot argue they are prejudiced by having to defend a single action by the Monitor as opposed to a cascade of litigation by individual insurers.

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13 *Canadian Airlines Corp., Re,* 2000 ABQB 442, para 152.
14 *Supra*, note 3.
15 *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.,* 2008 ONCA 587, paras 51-52.

[25] The Monitor could have brought one action naming JYIC and the retailers as joint defendants. Instead he sued JYIC, excluding the retailers because he was still negotiating with them. Had the retailers been included in the action, they would certainly have invoked their recursory right against JYIC – as they are sure to do in the Monitor's proposed action. Assuming the Court has jurisdiction over JYIC,[16] it is foreseeable that the two actions will be joined.

[26] It is important to note that under the Plan all of Aquadis' creditors, whether they are party to the Plan, or merely subject to it like the Opposing Retailers, receive equal treatment regarding their claims.

[27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[28] Finally, the Monitor has asked for an order condemning the Opposing Retailers to pay costs on a solicitor-client basis, arguing that their opposition to the Plan is entirely without merit. The Court notes the novel character of the Plan and does not consider the opposition abusive.

FOR THESE REASONS, THE COURT:

[29] **GRANTS** the Monitor's application to sanction and approve the Amended Plan of Compromise and Arrangement dated April 25, 2019;

[30] **THE WHOLE** with costs against the Opposing Parties.

_____

DAVID R. COLLIER, J.S.C.

Mtre Alain N. Tardif
Mtre Gabriel Faure
MC CARTHY TETREAULT
Mtre Francis C. Meagher
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
Counsel for Applicant / Monitor

[16] JYIC has filed a declinatory exception contesting the Court's jurisdiction over it. The motion has not yet been heard.

Mtre Éric Savard
LANGLOIS AVOCATS
Counsel for Creditors committee

Mtre Hubert Sibre
MILLER THOMSON
Counsel for Home Depot

Mtre Julie Himo
Mtre Dominic Dupoy
NORTON ROSE FULBRIGHT CANADA
Counsel for Rona

Mtre Alexander Bayus
GOWLING WLG (CANADA)
Counsel for Home Hardware Stores Ltd

Mtre Pierre Goulet
Counsel for Intact and BMR and Patrick Morin

Mtre François D. Gagnon
Mtre Panagiota Kyres
BORDEN LADNER GERVAIS
Counsel for JYIC and Cathay

Hearing date : June 5, 2019

Tab 15

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
LUCIE FOURNIER, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

No.: 500-09-028436-194

HOME DEPOT OF CANADA INC.
APPELLANT – Impleaded Party
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)
RAYMOND CHABOT INC.
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY

L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL- SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028474-195

GROUPE BRM INC. (Formerly known as Gestion BMR inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
INTACT INSURANCE COMPANY
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS

and

HOME HARDWARE STORES LIMITED

IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party

and

CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
L'UNIQUE GENERAL INSURANCE INC.
LA CAPITAL GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRES-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL-SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
HOME DEPOT OF CANADA INC.
AIG TAIWAN INSURANCE CO LTD
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IMPLEADED PARTIES – Impleaded Parties

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ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
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SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

JUDGMENT

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[1] On appeal from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier), that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[2] For the reasons of Justice Schrager, J.A., with which Justices Healy and Fournier, JJ.A., concur, **THE COURT**:

In the file 500-09-028436-194

[3] **DISMISSES** the appeal with legal costs;

[4] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-028474-195

[5] **DISMISSES** the appeal with legal costs;

[6] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-28476-190

[7] **DISMISSES** the appeal with legal costs;

[8] **DISMISSES** the incidental appeal without legal costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

LUCIE FOURNIER, J.A.

Mtre Hubert Sibre
Mtre Rosemarie Sarrazin
MILLER THOMSON
For Home Depot of Canada Inc.

Mtre Pierre Goulet
For Groupe BMR Inc., Groupe Patrick Morin Inc., Matériaux Laurentiens, Intact Compagnie d'assurance inc.

Mtre Julie Himo
Mtre Dominic Dupoy
Mtre Arad Mojtahedi
NORTON ROSE FULBRIGHT CANADA
For Rona Inc., Royal & Sun Alliance Insurance Company of Canada

Mtre Jocelyn Perreault
Mtre Gabriel Faure
McCARTHY TÉTRAULT
Mtre Antoine Melançon
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
For Raymond Chabot inc.

Mtre Éric Savard
LANGLOIS AVOCATS
For Desjardins General Insurance Inc., The Personal General Insurance Inc., Intact Insurance Company, L'unique General Insurance Inc., La Capital General Insurance Inc., Promutuel Insurance Bagot, Promutuel Insurance Boréale, Promutuel Insurance Bois-Francs, Promutuel Insurance Chaudières-Appalaches, Promutuel Insurance L'estuaire, Promutuel Insurance Deux-Montagnes, Promutuel Insurance Lac Au Fleuve, Promutuel Insurance Outaouais, Promutuel Insurance La Vallée, Promutuel Insurance Montmagny-L'islet, Promutuel Insurance Portneuf-Champlain, Promutuel Insurance Réassurance, Promutuel Insurance Rive-Sud, Promutuel Insurance Vallée Du Saint-Laurent, Promutuel Insurance Vaudreuil-Soulanges, Promutuel Insurance Verchères-Les-Forges, Promutuel Insurance Lanaudière, Royal Sun Alliance Insurance Company

of Canada, Aviva Insurance Company of Canada

Mtre Alexandre Bayus
GOWLING WLG (Canada)
For Home Hardware Stores Limited

Date of hearing: March 11, 2020

REASONS OF SCHRAGER, J.A.

[9] These are appeals from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier),[1] that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act*[2] ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[10] The Appellants (sometimes hereinafter the "**Retailers**") oppose the Plan because it authorizes the Respondent Raymond Chabot Inc. (the "**Monitor**") to take legal proceedings against them on behalf of creditors of Aquadis International Inc. ("**Aquadis**" or the "**Debtor**"). Most of the creditors are insurers by way of subrogation in the rights of policy holders whose homes were damaged due to the allegedly defective faucets sold by Aquadis.

[11] The appeals are concerned with the scope of the powers that may be conferred on the Monitor.

[12] The Monitor was authorized to exercise the rights of creditors rather than those of the Debtor. While some reported judgments may present certain analogies, the present case appears to be unique in Canadian jurisprudence.

[13] There are also procedural issues raised against the Appellants' challenge of the specific clause in the Plan of Arrangement. As will be explained below, the Respondents argue primarily that these appeals are an indirect challenge of the *CCAA* judge's November 2016 order to vary the Monitor's powers (the "**November 2016 Order**").

I. FACTS AND PROCEDURAL HISTORY

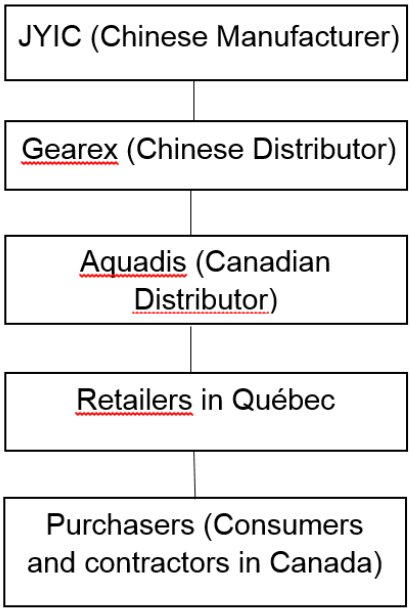
[14] The case arises from the sale of faucets that were allegedly affected by manufacturing defects and the subsequent claims arising from the resulting water damage suffered by purchasers of the product.

[15] Aquadis imported and distributed bathroom products, including faucets.

[16] Jing Yudh Industrial Co. ("**JYIC**") is a China-based manufacturer of various valve products. The faucets in question were manufactured by JYIC and sold to a Chinese

[1] Judgment in appeal.
[2] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36.

distributor, Gearex, which, in turn, sold them to Aquadis. The latter resold the faucets to various retailers in Quebec. These include the Appellants Rona Inc. ("**Rona**"), BMR Group Inc. ("**BMR**"), The Home Depot of Canada ("**Home Depot**"), Matériaux Laurentiens and Home Hardware Stores Limited ("**Home Hardware**"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:



[17] It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019.[3]

[18] Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

[19] The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*[4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on

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3 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 1396.

4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces.[5]

[20] On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

[21] On November 9, 2016, the Monitor sought an order to amend its powers "to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors". Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

[22] On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above.[6]

[23] That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

[24] Following the issuance of the November 2016 Order, the Monitor began negotiations with the Retailers that stretched over a period of two years with a view to arriving at a "global settlement" in virtue of which the Retailers would contribute to a litigation pool in exchange for full releases from any liability arising as a result of the sale of any defective faucets.

[25] On December 19, 2016, the Monitor initiated legal proceedings against JYIC and Gearex to enforce the rights of Aquadis regarding the defective faucets. Settlements were reached with some of JYIC's and Gearex's insurers generating the receipt of over $7 million ($4.7 million net of fees and costs) in consideration of full releases. However,

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5 In virtue of arts. 1728, 1729 and 1730 *C.C.Q.*, each group in the supply chain would have a recourse against relevant parties above them at each step in the chain.

6 The November 2016 Order is in these terms:

> initier ou continuer toute réclamation, poursuite, action en garantie ou autre recours des créanciers de 9323-7055 Québec inc. (anciennement connue sous le nom d'Aquadis International inc., « Aquadls ») au nom et pour le compte de ces créanciers contre des personnes opérant au Canada découlant, directement ou indirectement, ou ayant un lien ou pouvant avoir raisonnablement un lien, direct ou indirect, avec un défaut de fabrication affectant des biens vendus par Aquadis, avec l'accord préalable du comité des créanciers constitue par le paragraphe n° 24 de l'Ordonnance initiale (le « Comite des créanciers »). (Emphasis added)

the Monitor was unable to reach an agreement with one of JYIC's insurers, Cathay Century Insurance Co. Ltd. On June 20, 2018, the Superior Court approved these transactions between Aquadis, its insurers and the manufacturer of the products in a judgment executory notwithstanding appeal. The Retailers opposed this because, in their view, the proceedings under the *CCAA* were being used to settle disputes not involving Aquadis' creditors, but rather third parties. On June 28, 2018, Rona sought leave to appeal and a stay of the foregoing judgment which was dismissed by a judge of this Court since the matter had become hypothetical given the completion of the transaction immediately following the issuance of the judgment.[7]

[26] At the beginning of 2019, the Monitor filed the Plan of Arrangement providing for the establishment of a litigation pool made up of all the sums collected by the Monitor in exchange for full releases. The Plan of Arrangement also includes the power of the Monitor to sue the Retailers on behalf of the creditors, which is the subject of these appeals.

[27] The Plan, as amended, was unanimously approved at the meeting of creditors called for such purpose on April 25, 2019. All creditors voting (831 in number representing $20,686,727) were in favour. The total claims in the file (885) are $22,424,476, of which 738 creditors held $18,190,120 (or 81%) of the debt. These 738 creditors, who are represented on the creditors' committee, all voted in favour. They are all insurers of consumers who claimed damages arising from the faucets.

[28] On May 23, 2019, the Monitor instituted actions in damages against the Retailers as contemplated in the Plan. These actions were suspended pending judgment in these appeals. The Monitor seeks condemnations against the Retailers based on the total amount of claims received for damages incurred by consumers divided amongst the Retailers on the basis of the proportion of defective faucets sold. The validity of the approach is not in issue in these appeals. The eventual success or failure of these actions based on the evidence presented will be for another day in another court.

[29] The Plan of Arrangement, as amended at the meeting of creditors, was approved by the Superior Court on July 4, 2019 despite the Retailers' contestation. This is the judgment in appeal.

II. THE JUDGMENT IN APPEAL

[30] The *CCAA* judge emphasized from the outset that the Retailers' opposition was based primarily on the fact that Aquadis had no right of action against them. He undertook an analysis of the Plan of Arrangement in light of the three criteria developed by the case law as relevant to approval: (1) that all statutory provisions are complied

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[7] Arrangement relatif à 9323-7055 Québec inc., 2018 QCCA 1345 (Schrager, J.A.).

with; (2) that nothing was done that was not authorized by the *CCAA*; and (3) that the plan is fair and reasonable.

[31] The first two criteria were not in issue. The judge concluded that the Plan of Arrangement satisfies the third criterion since the Monitor's main objective was to achieve an overall solution to all the actions brought against Aquadis. The Monitor's proceedings against the Retailers were therefore aimed at maximizing Aquadis' assets in liquidation, which is a proper purpose recognized in the case law. Thus, the Plan would, upon resolution of the law suits, allow for distribution of all the sums collected in partial satisfaction of creditors' claims.

[32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. The judge accepted this course of action as the only practical resolution of this case. As such, he indicated that the solution chosen was a sensible use of judicial resources since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. He also pointed out that the Appellants cannot complain that they are prejudiced by having to defend themselves against a single action rather than a "cascade of litigation by individual insurers".

[33] Finally, the judge noted that the Retailers were aware, in 2016, of the November 2016 Order granting the Monitor the power to sue them but failed to challenge it. As such, their challenge of such power in the Plan of Arrangement was late.

[34] The judge thus approved the Plan of Arrangement.

III. **ISSUES**

[35] The Appellants submit two questions to the Court:

a) Can a monitor appointed under the provisions of the *CCAA* exercise the rights, not of the insolvent debtor, but of certain creditors of the insolvent debtor to sue third parties for damages?

b) Does the mere fact that the Retailers did not challenge the November 2016 Order mean that they could not challenge the application for approval of the corresponding provision of the Plan of Arrangement?

[36] The Respondent Monitor adds that the appeal should be dismissed as hypothetical, since the November 2016 Order granting it the power to sue is not challenged and as such will remain in effect even if this Court allows the appeals.

IV. **APPELLANTS' POSITION**

[37] The Appellants submit to the Court that the judge of first instance erred in granting the Monitor the right to bring actions on behalf of Aquadis' creditors against the Retailers, because this power is not "in respect of the company" within the meaning of section 23 of the *CCAA* which enumerates the Monitor's duties.

[38] In addition, they argue that since these claims are not assets of the Debtor, the mere fact that the law suits relate to products distributed by the Debtor is insufficient to give the Monitor the right to sue the Retailers on behalf of the creditors. The Appellants contend that the Monitor cannot pursue recourses between the various creditors of an insolvent company given the lack of a sufficient connection with the insolvency of the Debtor. Stays of proceedings granted by a *CCAA* judge should apply only to actions against the debtor and its assets. Lawsuits by the creditors against the Retailers fall outside the *CCAA* estate and should not be stayed or otherwise dealt with in the file.

[39] The Appellants further submit that the Monitor's exercise of remedies on behalf of Aquadis' creditors compromises the Monitor's duty of neutrality. They argue that by exercising the rights of the creditors the Monitor is acting for the benefit of some of the Debtor's creditors. They also point out that the Monitor failed to act transparently in the process leading up to the November 2016 Order and that the contingency fee agreed upon with the creditors' committee places the Monitor in a conflict of interest.

[40] The Appellants contend that the hearings of damage actions based on the *Civil Code of Québec* before the Commercial Division of the Superior Court results in inappropriate preferential treatment of such claims over similar ones filed before the Civil Division, which is contrary to the proper administration of justice. Specifically, the Monitor, by instituting proceedings in the Commercial Division, avoids the filing of a case protocol[8] and may improperly rely on the *Canada Evidence Act*.[9] They add that their rights of appeal under the *CCAA* are subject to leave[10] whereas under the *Code of Civil Procedure* they would have a right of appeal for any condemnation exceeding $60,000.[11]

[41] The Appellants also argue that, according to established and recognized principles of statutory interpretation, a tribunal must favour an interpretation of the law

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8 Under arts. 148 and following *Code of Civil Procedure* [*C.C.P.*].
9 *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*].
10 See s. 13 *CCAA*.
11 See art. 30 *C.C.P.*

that is respectful of the division of powers under the *Canadian Constitution*.[12] They point out that an interpretation conferring rights on the Monitor to exercise remedies on behalf of solvent creditors against solvent defendants (the Retailers) constitutes an unwarranted intrusion by Parliament into the jurisdiction of the provincial legislatures over property and civil rights, thereby contravening the division of powers. They argue that the interpretation of the scope of *CCAA* jurisdiction should be directed to a result that is constitutionally coherent.

[42] As for the second question in appeal, the Appellants argue that they are entitled to challenge the Plan of Arrangement and are not precluded from doing so despite the absence of any contestation of the November 2016 Order, now or previously.

[43] For the Appellants, the Plan of Arrangement is not merely a confirmation of the powers granted by the November 2016 Order, but rather has the effect of replacing the interlocutory orders. In that sense, the present challenge is not, in their view, a collateral attack on the November 2016 Order. Moreover, since that order is the product of an interlocutory decision, it does not benefit from the presumption of *res judicata*.

[44] The Appellants further indicate that they were not notified of the application to vary the Monitor's powers until two years after the fact and, in that sense, they could not oppose the granting of the November 2016 Order. They further state that the consumers or their insurers (i.e. the creditors) are not prejudiced by the failure to challenge the November 2016 Order as this has had no impact on any party who chose to settle.

[45] In addition, the Appellants contend that even if they are effectively precluded from challenging the November 2016 Order, the question as to whether the judge had jurisdiction to sanction a plan of arrangement granting the Monitor the right to exercise the rights of creditors against the Retailers remains open. In that sense, the November 2016 Order does not, in the Appellants' view, establish the validity of any such power under a plan of arrangement made pursuant to the *CCAA*.

V. **DISCUSSION**

[46] I am of the view that the judge's approval of the Plan of Arrangement and, specifically, the Monitor's power to institute proceedings to recover from the Retailers damages allegedly suffered by consumers is not tainted by a reviewable error. Though I think that reasoning in addition to that found in the judgment is required to justify such a position, the result is not an erroneous or unreasonable exercise of the judge's discretion. As such, I propose to dismiss the appeals.

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[12] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [*Constitution Act*].

[47] Given such results, it is not strictly necessary to dispose of the Appellants' second ground regarding the right to challenge the Plan given the November 2016 Order, but I think a few words are appropriate to set the record straight from the point of view of both Appellants and Respondent Monitor, because of the emphasis put on such matter by the parties.

[48] The judge said this:

> [27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[49] This, essentially, is in answer to the Monitor's argument, reiterated in appeal, that the contestation of the Plan of Arrangement by the Appellants constitutes a collateral attack against the November 2016 Order long after the expiry of the time limit to appeal and after the expiry of any time limit which could be reasonable to either revoke it (under the *Code of Civil Procedure*)[13] or vary it (under the comeback clause in the initial order issued under the *CCAA*), the whole given the Appellants' lack of diligence in the matter.

[50] The time limit to seek leave to appeal under the *CCAA* is 21 days.[14] The "comeback clause" in the initial order[15] permits parties such as the Appellants, who may be affected by an order of the *CCAA* court, to seek to vary such provision even after the expiry of the time limit to appeal. Even in the absence of such a clause, a party that was not served with the proceedings could seek its revision.[16] However, a party seeking "comeback relief" must act diligently.[17]

[51] The Appellants underline that with the exception of Rona, they were not served with the proceedings giving rise to the November 2016 Order as they were not on the service list. They contend that they were only informed two years after the fact as

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13 Arts. 347 and 348 *C.C.P*.

14 S. 14 (2) *CCAA*.

15 Paragraph 44 of the Order of December 9, 2016.

16 Janis P. Sarra, ***Rescue! The Companies' Creditors Arrangement Act***, 2nd ed., Toronto, Carswell, 2013, pp. 58-60. *Indalex Limited (Re)*, 2011 ONCA 265, para. 55 [*Indalex*]; *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, para. 48 [*Canada North Group*].

17 See *Indalex*, *supra*, note 16, paras. 157, 161 and 166, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Parc Industriel Laprade Inc. v. Conporec Inc*., 2008 QCCA 2222, paras. 7 and 17; *Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2015 QCCS 3236, para. 33; *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, para. 238; *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020 (Ont. Sup. Ct.), para. 5; *Canada North Group Inc*, *supra*, note 16, para. 48.

disclosed by the correspondence filed as exhibits.[18] However, and though the record does not *per se* disclose it, the fact of not being on the service list is, experience indicates, purely a result of not asking the Monitor or its counsel to be placed on the list.[19]

[52] The Respondents contend that the Appellants have not acted with sufficient diligence in the matter and point to analogous situations arising before the Ontario Court of Appeal in *Indalex* and before the Quebec Superior Court in *Aveos*.[20]

[53] In *Indalex*, the interim lender sought the benefit from the proceeds of asset sales in the repayment of loans in accordance with the priority granted by the *CCAA* court three months earlier. The debtor company's pension fund sought to enforce its alleged priority over the monies, which the monitor contested, pleading that the pension fund was in effect attacking the security previously granted the lenders in priority to the pension fund. The Ontario Court of Appeal held that the pension fund had acted in a timely manner since it was only upon the court application to distribute the funds received from the asset sales that "it became clear" that the debtor company was abandoning the pension plans in their underfunded states.

[54] In *Aveos*, the Superintendent of Financial Institutions claimed that the statutory deemed trust created in its favour afforded a priority for monthly pension plan contributions to defray the pension plan deficit. These payments were stopped with court approval at the inception of the *CCAA* process. The present Respondents quote the undersigned, then the *CCAA* judge treating the argument, as follows:

> [92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" in civil law.
>
> (…)
>
> [95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.[21]

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18 The record indicates that this is not the case for all of the Appellants (*infra*, para. [55]).

19 Para. 41 of the Initial Order of December 9, 2015 provides for service of proceedings to all who have given notice to the Monitor or its counsel.

20 *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 [*Aveos*] and Indalex, *supra*, note 16, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

21 *Aveos*, *supra*, note 20, paras. 85, 91-95.

Aveos does not support the Respondents' position on the matter of delay since, in effect, the secured creditor in *Aveos* would have retroactively been obliged to cede priority to the $2.8 million of pension deficit. The debtor company and the secured creditor acted throughout on the premise arising from the court's order that the pension payments need not be made in priority to repayments to the secured creditor. In the present matter, the inaction of the Appellants since November 2016 has not caused the Monitor to act to its detriment. The only material prejudice the Monitor points to is the time and energy invested in negotiating with the Retailers, but there is no quantification of a proof of loss and, in any event, the Monitor's fees are calculated on a contingency basis, not on a "time spent on the matter" basis.

[55] In the cases at bar, the Appellants contend that until the Plan was approved (and almost simultaneously the legal proceedings against them filed) it was not clear that their potential liability in the matter would be the object of litigation rather than negotiated settlements. However, they had previously received demand letters from the Monitor[22] and contested the approval of settlements reached by the Monitor with the insurers of the Debtor and the manufacturer. The judgment of Collier, J.S.C., approving the settlements, refers specifically to the November 2016 Order, and counsel for the Appellants Home Depot, Rona and BMR were heard on the application.[23]

[56] The Appellants appear to have had sufficient knowledge of the November 2016 Order prior to the filing of the Plan in 2019. However, even if I were to ignore this, I think that they would still be barred from seeking the revision of the November 2016 Order as part of their contestation of the Plan of Arrangement simply because they have not sought any formal conclusions regarding the November 2016 Order. They target only the powers afforded the Monitor in clause 6.2 of the Plan of Arrangement. The Respondents plead that even if the Plan is set aside, the same powers subsist under the November 2016 Order.[24] As such, the Monitor maintains that the Appellants' contestation is an indefensible collateral attack[25] on the November 2016 Order or, alternatively, that the appeal raises a moot point,[26] because, as stated above, even if

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[22] BMR, Groupe Patrick Morin inc. and Rona appear to have received the letters in 2016 while Home Hardware and Matériaux Laurentiens inc. received one in 2018. No letter addressed to Home Dépôt is filed in the record.

[23] *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945.

[24] Moreover, the Monitor amended the Plan at the meeting of creditors to provide that the previous orders survive the Plan sanction: "6.2(d) … the Initial Order remains in effect … until the final distribution date." This is reflected in para. 19 of the sanction order.

[25] See for example: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 par. 61; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, para. 35; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, paras. 33-34.

[26] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. See also: *R. v. Oland*, 2017 SCC 17; [2017] 1 S.C.R. 250*; R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Forget v. Québec (Attorney General)*, [1988] 2 S.C.R. 90, paras. 67-68. Art. 10, para. 3 *C.C.P*.

section 6.2(c) of the Plan is set aside, the power to sue the Retailers subsists under the November 2016 Order.

[57] I would tend to think that, on the facts, no reviewable error is made out in the judge's conclusion that the attack is late. Moreover, the November 2016 Order would survive the Plan sanction and, in all events, the Appellants do not directly seek conclusions contrary to said order. However, as mentioned earlier, these questions do not require definite resolution given my answer to the primary point of the appeal, which is the validity of the power granted the Monitor in the Plan to sue on behalf of a group of creditors rather than in the exercise of the Debtor's rights. I now address that issue.

* * *

[58] As indicated in the review of the facts above, parties in the distribution chain would in the normal course have recourse against those above them in the flowchart. The recourses (exercised or not) of the ultimate purchasers of the faucets (and their insurers) and the Retailers were stayed upon the initial insolvency filing in 2015. The November 2016 Order led to some negotiated settlements. The consumers (or their insurers) filed proofs of claim; the Retailers did not, nor did they settle any claims asserted by the Monitor. It is against this factual background that the Monitor was granted the power to sue the Retailers under the Plan of Arrangement.

[59] The purpose of the proposed legal proceedings is consonant with a legitimate purpose under the *CCAA,* as the Monitor seeks to establish a "litigation pool" with a view to paying creditors of Aquadis on a *pro rata* basis. In itself, this more than satisfies the spirit of the *CCAA,* but is also supported by examples in the reported cases. Specifically, and of close resemblance is the arrangement in the matter of *Muscletech*,[27] where the debtor was a distributor of dietary supplements in the middle of a multi-tier distribution chain between the manufacturer at one end and ultimate consumers at the other. The plan of arrangement provided for releases from liability to be given to those in the chain who paid into the litigation pool as compensation arising from selling the defective product. The scheme was voluntary – i.e. the monitor was not given power to sue. However, the situation is similar to that in the case at bar. Other examples of voluntary litigation pools where contributors receive releases exist, but the precise factual matrix of the present plan, where the Monitor is empowered to sue, appears to be novel.[28]

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[27] *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (Ont. Sup. Ct.).

[28] *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, paras. 6 and 33; *Metcalfe & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, paras. 69-71 [*Metcalfe*]; *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235.

[60] The granting of releases for third parties in consideration of their contribution to a litigation pool to satisfy creditors' claims is now well entrenched in *CCAA* jurisprudence.[29]

[61] The *CCAA* expressly provides for certain powers and duties of the monitor.[30] These powers and duties may be extended, because s. 23 *CCAA* provides that a monitor is required to "do anything in respect of the company that the court directs the monitor to do".[31] Thus, while the law does provide the basic framework within which the monitor must act, the courts may use their discretion to grant additional powers considered appropriate.[32]

[62] This discretion cannot be exercised arbitrarily; it must be exercised in a manner consistent with and directed toward the attainment of the objectives of the *CCAA*. In *Century Services Inc.,* Justice Deschamps observed for the Supreme Court that:

> [58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs". (References omitted)

She added that judicial discretion may be exercised in furtherance of the *CCAA*'s purposes,[33] which in the case at bar is the maximization of creditor recovery, since Aquadis has ceased carrying on business.

[63] The courts, however, have expressed reservations regarding the imposition of third-party settlements under the *CCAA,* indicating that the purpose of the *CCAA* is not to settle disputes between parties other than the debtor and its creditors.[34] Nonetheless, the precise point in issue – i.e. whether a judge may allow a monitor to exercise the rights and remedies of certain creditors against other persons or creditors of a debtor appears to be without precedent.

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29 *Metcalfe*, *supra*, note 28.

30 S. 23 *CCAA*.

31 S. 23 (1) (*k*) *CCAA*.

32 *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 105-106 [*Essar*]; *MEI Computer Technology Group Inc. (Bankruptcy), Re*, 2005 CanLII 15656 (Qc. Sup. Ct.), para. 20.

33 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, para. 59.

34 The courts have also indicated that proceedings under the *CCAA* were not intended to alter priorities amongst creditors: "The *CCAA* is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders (sic) position at the expense of others - there should be no confiscation of legal rights.": *843504 Alberta Ltd., Re*, 2003 ABQB 1015, para. 13. See also: *Royal Oak Mines Inc., Re*, 1999 CanLII 14843 (Ont. Sup. Ct.), para. 1.

[64] In *Urbancorp*,[35] the Ontario Superior Court of Justice refused to recognize the power of a monitor to claw back a payment in kind made by the debtor to a third party who was a creditor of a company related to the debtor. While Justice Myers acknowledged that "… Monitors can certainly be empowered to bring legal proceedings to act on behalf of *CCAA* debtors",[36] he disagreed that the monitor should act as a bankruptcy trustee to bring proceedings in the place of *CCAA* creditors. The latter could initiate their own proceedings outside of the insolvency or provoke a bankruptcy for a trustee to initiate those proceedings for them. It should be emphasized that a single payment was in issue in *Urbancorp*. Justice Myers distinguished *Essar*,[37] which is relied on by Respondents. In that case, the Ontario Court of Appeal confirmed the lower court's authorization of the monitor to institute oppression proceedings for the benefit of various creditors (or stakeholders) in the *CCAA* estate: "(…) the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors (…)".[38] The court noted as well that the debtor would also benefit from such proceedings, particularly in the sense that an impediment to restructuring would potentially be removed by the oppression remedy.

[65] The result in *Urbancorp* was echoed in *Pacific Costal Airlines*,[39] where the British Columbia Supreme Court indicated that "proceedings under the *CCAA* are not intended to resolve disputes between a creditor and third parties":

> [24] It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the *CCAA* proceedings. The purpose of a *CCAA* proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in *CCAA* proceedings, it is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company.[40]

[66] The *Stelco*[41] case, for its part, raised issues relating to a dispute between certain creditors near the end of the debtor's restructuring process over the distribution of

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35 *Urbancorp Cumberland 2 GP Inc., (Re)*, 2017 ONSC 7649.
36 *Ibid*.
37 *Essar*, *supra*, note 32.
38 *Essar*, *supra*, note 32, para. 124.
39 *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, para. 24; see also *Stelco Inc., Re*, 2005 CanLII 42247 (Ont. C.A.), para. 32 [*Stelco*].
40 *Id*., para. 24.
41 *Stelco*, *supra*, note 39.

certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.[42] (References omitted)

[67] The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor".[44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[45] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[46] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.[47] Thus, the mere fact that the

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42 *Stelco Inc., Re*, 2005 CanLII 41379 (Ont. Sup. Ct.).
43 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].
44 Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.
45 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.
46 *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32-40.
47 S. 36.1 *CCAA*.

judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law.

[71] Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims. As such, they are third parties. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:
>
> > Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. … [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.
>
> (…)
>
> [119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc., Re* (2006), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.
>
> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (…).[48]

[73] As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated.

[74] It must be repeated that the Retailers are not creditors in the *CCAA* estate as they did not file proofs of claim. As such, their status as "stakeholders" is tenuous, so that any resulting duty to them by the Monitor is questionable.

[75] Neither is the contingency fee arrangement of the Monitor and its counsel a valid ground to attack the Monitor's neutrality. The contingency fee may give the Monitor an interest in the outcome of the litigation, but such arrangements have a long history, particularly with lawyers' mandates, and are recognized as legitimate and, indeed, as

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[48] *Essar*, *supra*, note 32.

enhancing access to justice. The fee arrangement dates back to the initial order. Given that Aquadis had no assets, there would be no other way to pay professionals to act in the matter. In effect, the professionals are financing the recovery efforts.

[76] The Appellants also submitted that the Monitor has lacked transparency. This position has no merit. The Plan sanction was the product of a legal process served on parties that appeared in the record by entry on the service list and followed a creditors' meeting and a court hearing before an impartial judge. The Monitor's agenda was not hidden.

* * *

[77] I agree with the judge that on practical and equitable grounds the power accorded to the Monitor to sue the Retailers in the context of the present matter makes *CCAA* sense. In my mind, however, that is not enough to justify the judge's exercise of discretion to approve the Plan.

[78] The broad judicial discretion propounded in much of the case law and literature is not boundless.[49] It, like all judicial discretion, must be exercised judiciously, meaning that it must be based on legal rules and principles. In my opinion mere commercial expediency or good sense is not enough to qualify the exercise of judicial discretion under the *CCAA* as appropriate[50] nor for a plan to qualify as fair and reasonable. Rulings (even discretionary ones) must have some measure of predictability if confidence in the legal system is to be maintained.[51] That predictability stems from adherence to the application of the law. I am not willing to cross the Rubicon from the realm of the law to the land of the lore.

[79] That being said, there is, in the present case, legal and not merely commercial or practical justification for the judgment. The Appellants attack it based on an analogous reasoning of the powers of a bankruptcy trustee to exercise the debtor's rights against third parties but not the rights of creditors. However, this is not really true as I have indicated above. The trustee in bankruptcy can exercise rights for the benefit of creditors.

[80] Significantly, the creditors voted unanimously that their rights against the Retailers be exercised by the Monitor in their place and stead and for their benefit through the proposed proceedings and the litigation pool within the *CCAA* framework.

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49 *Callidus*, *supra*, note 43, paras. 48-49.

50 *Ibid*.

51 See Sharpe, Robert J., *Good judgment – Making Judicial Decisions*, Toronto, University of Toronto Press, 2018, p. 129; *Nechi Investments Inc. v. Autorité des marchés financiers*, 2011 QCCA 214, paras. 22-23.

[81] Absent a *CCAA* process, the creditors would have been free to consensually assign their rights or subrogate others, including, by way of example, a trustee of a litigation trust. Again, there is precedent in *CCAA* matters for such litigation trusts,[52] which trusts include rights of actions against third parties.[53] With the *CCAA* file, the Monitor, through the Plan, the vote and the sanctioning judgment in appeal, is in such position to exercise those rights against the Retailers. The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the *CCAA*[54] is a sound basis for a court to approve the Plan.

[82] Accordingly and in conclusion, given that the parties being sued are third parties vis-à-vis the *CCAA* estate and as such, have no claim on the litigation pool, and given that the creditors/beneficiaries of the litigation pool voted unanimously in favour of the Plan of Arrangement, there is sufficient legal rationale to grant the power in question. In addition, as indicated by the trial judge, the mechanism is a direct and practical way to maximize recovery for creditors.

* * *

[83] The Appellants have also argued that granting the Monitor the power to sue is a misuse of the resources of the Commercial Division of the Superior Court, since the proposed proceedings should be taken in the Civil Division. This, however, is purely a matter of case management for the Superior Court. There is but one Superior Court; its administrative divisions, such as the Commercial Division, are not separate and distinct tribunals.[55] Accordingly, there is no valid argument based on the jurisdiction of the Superior Court which can be brought to bear against the judgment of the lower court.

[84] The Appellants submit that they are prejudiced by the judgment in that eventual rights of appeal are restricted because leave is required under the *CCAA* but not under the *C.C.P.* for awards exceeding $60,000. The argument is not persuasive given that the judgment is not erroneous, the Monitor's recourses against the Retailers fall under the *CCAA* and consequently eventual appeals would be governed by s. 14 *CCAA*.

[85] In addition, the Appellants put forward a constitutional argument claiming that since the creditors and Retailers are not insolvent, proceedings of one against the other under the umbrella of the *CCAA* should not apply to them.

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52 Plan of Compromise and re-organization of Sino-Forest Corporation, December 3, 2012, Ont. Sup. Ct. CV-12-9667-00CL.

53 *Lutheran Church Canada (Re)*, 2016 ABQB 419, paras. 125, 134 and 135.

54 S. 6 *CCAA*.

55 *Re Arctic Gardens Inc.*, 1990 R.J.Q. 6 (Qc. C.A.). See also *TVA Publications inc. v. Quebecor World Inc.*, 2009 QCCA 1352, para. 71 (Morissette, J.A.); *Formula E Operations Limited v. Ville de Montréal*, 2019 QCCS 884.

[86] The constitutional validity of the *CCAA* is grounded in Parliament's jurisdiction under s. 91(21) of the *Constitution Act*[56] with respect to bankruptcy and insolvency. The statute should be applied, say the Appellants, in a manner consistent with its constitutional foundation.

[87] The Ontario Court of Appeal made it clear in *Metcalfe & Mansfield* that the granting of releases to solvent third parties in proceedings under the *CCAA* is not contrary to the constitutional division of powers. To the extent that the granting of such powers to the Monitor enables the objectives of the *CCAA* to be achieved, the impact of the exercise of ancillary powers in respect of solvent third parties (such as suing the Retailers) cannot constitute an infringement of the constitutional division of powers. Rather, the powers granted to the Monitor in clause 6.2 of the Plan arise out of, and are necessary for, the valid exercise of federal jurisdiction.[57]

[88] In the case at bar, the Plan provides for releases to be granted to, *inter alia*, Retailers who contribute to the litigation pool destined to satisfy claims of creditors against the Debtor. The Monitor has the additional power to compel such contribution by instituting legal proceedings. Such actions are calculated to maximize creditor recovery, a proper *CCAA* purpose[58] falling within the ambit of s. 91(21) of the *Constitution Act*. Moreover, the parties who might have raised a contestation analogous to that of the objecting parties in *Metcalfe & Mansfield* are the consumers (or their insurers) who can no longer sue the Retailers outside of the Plan of Arrangement. However, they voted unanimously in favour of the arrangement.

[89] As for the other consequence for the Appellants, their direct recourse for any loss would be against Aquadis, but that recourse is stayed and such stay of proceedings is, self-evidently, a valid exercise by way of the *CCAA* of federal jurisdiction in insolvency matters under s. 91(21) of the *Constitution Act*.

[90] The Appellants' submissions based on the division of powers have no merit.

* * *

[91] Plans of arrangement are sanctioned by the courts where considered "fair and reasonable", which raises mixed questions of fact and law. Accordingly, the standard of review is one of deference.[59] Appellate intervention is only warranted where the

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56 *Constitution Act*, *supra*, note 12, s. 91; See *Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.)*, [1934] S.C.R. 659.

57 *Metcalfe*, *supra*, note 28.

58 *Essar*, *supra*, note 32, para. 103.

59 *Metcalfe*, *supra*, note 28.

judgment is affected by an error of principle or results from an unreasonable exercise of judicial discretion.[60] The Appellants have failed to satisfy this standard.

[92] For all the foregoing reasons, I propose that the appeals be dismissed with legal costs.

MARK SCHRAGER, J.A.

[60] *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, para. 20; *Ivaco Inc., Re*, 2006 CanLII 34551 (Ont. C.A.), para. 71; *Re Air Canada*, 2003 CanLII 36792 (Ont. C.A.), para. 25; *Re Royal Crest Lifecare Group Inc.*, 2004 CanLII 19809 (Ont. C.A.), para. 23; *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 (Ont. C.A.), para. 16.

Tab 16

2015 CarswellQue 5917
Quebec Superior Court

Montreal, Maine & Atlantic Canada Co. / Montreal, Maine & Atlanique Canada Cie, Re

2015 CarswellQue 5917, 256 A.C.W.S. (3d) 262

Dans l'Affaire du Plan de Transaction ou d'Arrangement de: Montreal, Maine & Atlantic Canada Co. (Montreal, Maine & Atlantique Canada CIE), Débitrice et Richter Advisory Group Inc. (Richter Groupe Conseil Inc.), Contrôleur et Compagnie de Chemin de Fer Canadien Pacifique, Opposante

Gaétan Dumas J.C.S.

Audience: 17 juin 2015
Jugement: 13 juillet 2015
Dossier: C.S. Saint-François 450-11-000167-134

Avocat: Me Patrice Benoit, Me Alexander Bayus, pour Montréal, Maine & Atlantic Canada Co.
Me Sylvain Vauclair, pour Richter Groupe Conseil Inc. (Richter Advisory Group inc.)
Me Alain Riendeau, Me Enrico Forlini, Me André Durocher, Me Brandon Farber, pour Compagnie de chemin de fer Canadien Pacifique

Sujet: Insolvency

Classifications d'Abridgment connexes

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Sommaire

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et équitable »

À la suite d'une tragédie ferroviaire au cours de laquelle plusieurs personnes sont mortes, la débitrice a éprouvé des ennuis financiers et s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Débitrice a créé un fond d'indemnisation afin de payer les réclamations des victimes — Plan a été approuvé à l'unanimité par les créanciers lors d'une assemblée de créanciers — Débitrice a déposé une requête visant à faire homologuer le plan par le Tribunal — Requête accordée — Objectif du plan était de compenser les victimes de la tragédie — Plan devait répondre aux exigences statutaires et être conforme aux ordonnances du Tribunal — Plan devait être examiné afin de déterminer si des actions interdites par la Loi avaient été prises — Plan devait être juste et équitable — Preuve révélait que la restructuration de la débitrice avait déjà eu lieu — Tribunaux peuvent homologuer des plans proposant des quittances à des tierces parties — En l'espèce, les quittances étaient essentielles pour la survie de l'entreprise de la débitrice — En somme, le plan était juste et le Tribunal devait l'approuver afin de ne pas miner la confiance du public dans le système de justice — Par conséquent, le Tribunal a approuvé le plan.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Following railroad tragedy in which several people died, debtor experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — Debtor created indemnity fund to pay for claims of victims — Plan was unanimously approved by creditors at creditors' meeting — Debtor brought motion seeking approval of plan by Court — Motion granted — Purpose of plan was to compensate victims of tragedy — Plan had to comply with statutory requirements and orders of Court — Plan had to be examined to determine whether any actions prohibited under Act had been taken — Plan had to be fair and

just — Evidence showed that restructuring of debtor had already occurred — Courts may approve plans proposing to release third parties — Here, releases were essential for survival of debtor's business — In sum, plan was fair and Court had to approve it to maintain confidence in administration of justice — Therefore, Court approved plan of arrangement.

Table des précédents

Cases considered by *Gaétan Dumas J.C.S.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — followed

Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

Dairy Corp. of Canada Ltd., Re (1934), [1934] O.R. 436, [1934] 3 D.L.R. 347, [1934] O.W.N. 347, 1934 CarswellOnt 33 (Ont. C.A.) — considered

Hinse v. Canada (Attorney General) (2015), 2015 SCC 35, 2015 CSC 35, 2015 CarswellQue 4775, 2015 CarswellQue 4776 (S.C.C.) — followed

Muscletech Research & Development Inc., Re (2006), 2006 CarswellOnt 6230, 25 C.B.R. (5th) 231 (Ont. S.C.J.) — considered

Muscletech Research & Development Inc., Re (2007), 2007 CarswellOnt 1029, 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]) — considered

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175, 1988 CarswellBC 558 (B.C. S.C.) — considered

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, *(*sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — considered

Sino-Forest Corp., Re (2012), 2012 ONSC 7050, 2012 CarswellOnt 15913 (Ont. S.C.J. [Commercial List]) — referred to

Sino-Forest Corp., Re (2013), 2013 ONCA 456, 2013 CarswellOnt 8896 (Ont. C.A.) — referred to

Uniforêt Inc., Re (2002), 2002 CarswellQue 2472, 40 C.B.R. (4th) 251, [2003] R.J.Q. 161 (C.S. Que.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Code civil du Québec, L.Q. 1991, c. 64

art. 1631 et seq. — referred to

Code de procédure civile, RLRQ, c. C-25

art. 95 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 4 — considered

REQUÊTE déposée par la débitrice visant à faire homologuer un plan d'arrangement incluant des quittances à des tiers.

***Gaétan Dumas J.C.S.*:**

1 Le tribunal est saisi d'une requête en approbation d'un plan d'arrangement accepté à l'unanimité lors d'une assemblée des créanciers de la débitrice tenue à Lac-Mégantic le 9 juin 2015.

2 Ce plan d'arrangement fait suite à la tragédie ferroviaire qui a coûté la vie à 48 personnes, et a dévasté le centre-ville de la ville de Lac-Mégantic le 6 juillet 2013.

3 Après une ordonnance initiale prononcée par notre collègue, Martin Castonguay, j.c.s., en août 2013, le soussigné s'est vu assigner le présent dossier.

4 Plus de 40 jugements et ordonnances ont été rendus par le soussigné dans le cadre du présent dossier.

5 Comme le rappelait le soussigné dans un jugement rendu le 17 février 2014:

> [26] Les procédures en vertu de la LACC avaient pour but de poursuivre, dans la mesure du possible, l'exploitation du chemin de fer afin de desservir les nombreuses municipalités et les nombreux clients situés le long de son parcours. Elles avaient également pour but de mettre en place un processus de vente afin de procéder à la vente des actifs de MMA et de MMAR en tant qu'entreprises en exploitation (*as a going concern*). Railroad Acquisition Holdings (RAH) a été la soumissionnaire gagnante pour la quasi-totalité des actifs des sociétés pour lesquelles le tribunal a autorisé la vente le 23 janvier 2014.
>
> [27] Les procédures en vertu de la LACC avaient également pour but de maintenir les emplois du personnel spécialisé qui travaille toujours chez la requérante, et ce, afin de maximiser la valeur des actifs de la requérante et idéalement pour assurer que les emplois soient maintenus après la vente.
>
> [28] Selon l'entente d'achat d'actifs, RAH devrait conserver le poste de la majorité des employés actuels de MMA.
>
> [29] Les procédures en vertu de la LACC avaient également pour but de mettre en place un processus de réclamation pour éviter que plusieurs recours judiciaires soient menés en parallèle et pour traiter efficacement les réclamations de toutes les parties intéressées, y compris les familles des victimes et les détenteurs de réclamations liées au déraillement.

6 L'importance de conserver un chemin de fer pour les industries desservies n'a pas besoin de plus amples explications.

7 Ce premier objectif a été atteint dès février 2014, soit moins de sept mois après la tragédie ferroviaire, par la vente des actifs de la débitrice avec les ordonnances nécessaires pour pouvoir parfaire la vente des actifs. Il reste donc à compléter le deuxième but clairement exprimé dès le départ par la débitrice, à savoir d'indemniser les victimes de cette tragédie ferroviaire pour laquelle la débitrice a presque immédiatement reconnu sa responsabilité.

8 Le tribunal ne reprendra pas ici l'historique complet du dossier, puisque tous les jugements rendus précédemment en font amplement état. Qu'il suffise de rappeler que le soussigné a rendu un jugement le 27 mai 2015 résumant les faits depuis le début du dossier ainsi que le jugement rendu par le soussigné par le 17 février 2014 qui faisait état de la situation à l'époque.

9 Par contre, il est important de rappeler que dès février 2014, le soussigné s'est questionné sur l'obligation de déposer un plan d'arrangement viable pour la continuation du sursis d'exécution et sur la question de savoir si un plan d'arrangement pouvait prévoir la liquidation d'une compagnie, ou si le plan devait obligatoirement prévoir une restructuration complète de l'entreprise.

10 Puisque le déroulement du dossier semble être la suite logique de ce qu'affirme le soussigné aux pages 8 à 30 du jugement du 17 février 2014, et puisque plus de 4 000 créanciers se fient à l'orientation donnée au dossier, il nous semble important de rappeler ce que mentionne le soussigné dans ce jugement, à savoir:

> **Obligation de déposer un plan d'arrangement viable pour la continuation du sursis des procédures**
>
> [57] Il existe depuis fort longtemps un débat sur l'obligation de déposer un plan d'arrangement si l'on désire bénéficier de la *LACC*.
>
> [58] Avant les amendements de 2009, il existait même un débat sur l'autorité des tribunaux d'autoriser la liquidation d'une compagnie sans l'acceptation d'un plan d'arrangement. L'article 36 *LACC* (L.C. 2007, c.36) adopté en 2007 prévoit:
>
> > 36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce, malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.
>
> **Avis aux créanciers**

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants:

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

[59] Avant cet amendement, aucune disposition de la loi ne permettait expressément la liquidation partielle ou totale des actifs d'une compagnie.

[60] Les tribunaux utilisaient leurs pouvoirs inhérents pour autoriser la vente des actifs hors du cours ordinaire des affaires.

[61] L'auteure Shelley C. Fitzpatrick [1] mentionnait que la flexibilité de la *LACC* permettait la liquidation d'actifs excédentaires. Le débat découlait plutôt du fait que plusieurs tribunaux ont autorisé la liquidation d'actifs qui n'entraient pas dans cette catégorie:

> As is evident from the comments of Blair J.A. in Metcalfe, one of the major strengths of the CCAA is its flexibility in meeting any particular fact situation. Clearly, Parliament intended to allow a downsizing of redundant assets as part of the restructuring process. Such downsizing would assist in returning the debtor company to profitability and thereby enable it to remain in business. (page 41)
>
> The courts, however, have permitted asset sales that extend well beyond a sale of redundant assets as part of a downsizing of operations. There are a variety of liquidation scenarios. On one end of the spectrum is a sale of assets to various purchasers who do not intend to continue the operations of any part of the debtor's business. On the other end of the spectrum is a sale to a single purchaser who does intend to continue operating the debtor's business. Somewhere in the middle is a sale to one or more purchasers who do intend to continue certain parts of the debtor's business on a going concern basis.

[62] L'auteur Bill Kaplan [2] abonde dans le même sens en précisant que les tribunaux provinciaux à travers le Canada s'accordent sur la possibilité d'autoriser la liquidation d'actifs sous la *LACC*, mais que la jurisprudence n'est pas constante en ce qui a trait à la façon dont on permet cette liquidation:

> « *We will see later that there is no consensus among the Alberta Court of Appeal, the Ontario Courts and the British Columbia Court of Appeal considering the proper exercise of that jurisdiction, but there is no disagreement that there is jurisdiction under the CCAA to approve a liquidation of assets*. » (page 94)

[63] Il y avait donc un débat sur les circonstances dans lesquelles une liquidation d'actifs sous la *LACC* pouvait être autorisée tant en ce qui a trait aux actifs visés qu'à l'obligation ou non de soumettre la liquidation au vote des créanciers.

Arguments favorables à la liquidation

[64] Dans certains cas, la liquidation d'actifs par le biais de la *LACC* est préférable à la liquidation sous un autre régime d'insolvabilité et c'est pourquoi certains tribunaux l'ont permise. Le fait de poursuivre les activités de la compagnie peut avoir pour effet d'augmenter sa valeur lors d'une liquidation et ainsi améliorer le sort des créanciers et des diverses parties prenantes [3] .

[65] Selon l'auteure Fitzpatrick [4] , ce courant jurisprudentiel a été enclenché par les affaires suivantes:

> « *The line of cases that, in obiter, "endorse" liquidating CCAAs can be traced to two early authorities: Re Amirault Fish Co. and Re Associated Investors of Canada Ltd.* »
>
> **[Citations omises]**

[66] Elle réfère également à d'autres décisions [5] qui ont justifié la liquidation d'actifs dans l'intérêt des créanciers. Il est à noter que ces décisions sont issues de tribunaux ontariens qui au fil du temps ont été autrement plus proactifs qu'ailleurs au Canada pour autoriser la liquidation d'actifs sous la *LACC*, nous y reviendrons:

> *In Re Anvil Range Mining Corp.*, [...] *Farley J. referred to Olympia & York and Lehndorff as support for the principle that "the CCAA may be used to effect a sale, winding up or liquidation of a company and its assets in appropriate circumstances*".
>
> *It is important to note that in Anvil Range, Farley J. also mentioned "maximizing the value of the stakeholders pie ". In Lehndorff, Farley J. stated that it appeared to him that "the purpose of the CCAA is also to protect the interests of creditors " which may involve a liquidation or downsizing of the business, "provided the same is proposed in the best interests of the creditors generally".*

[67] Dans un deuxième temps, et c'est ici l'argument qui suscite le plus de controverse, les professionnels qui interviennent dans le cadre d'une liquidation encourent des risques moindres si la liquidation est faite sous la *LACC* que si elle procédait sous la *Loi sur la faillite et l'insolvabilité (LFI)*. En effet, lorsqu'un administrateur est nommé sous la *LFI* et qu'il prend possession et administre les actifs de la compagnie, celui-ci engage sa responsabilité [6] . Sous la LACC, la compagnie demeure propriétaire de ses actifs et continue d'assurer ses opérations, ce qui n'engage pas la responsabilité d'un tiers, ce qui peut contribuer à rassurer les créanciers sur la gestion de l'entreprise.

Arguments défavorables à la liquidation

Utilisation contraire à l'objectif de la loi

[68] Le premier argument à l'encontre de la liquidation d'actifs autres qu'excédentaires est que l'objectif de la *LACC* n'est pas de permettre la liquidation d'une entreprise et qu'il existe d'autres régimes, comme la *LFI*, sous lesquels la liquidation devrait se dérouler. Dans l'affaire*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* [7] la Cour d'appel de la Colombie-Britannique définit l'objectif de la LACC et le rôle du tribunal comme suit:

> *The purpose of the CCAA. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business*. [...] *When a company has recourse to the CCAA., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure*.

[69] Cette interprétation est supportée par la décision de la Cour d'appel de la Colombie-Britannique dans *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*. [8] dont nous discuterons plus loin.

[70] Au Québec, la Cour d'appel sous la plume du juge Louis Lebel, abondait dans le même sens et établissait une distinction entre la *LACC* et la *LFI*. Elle mentionnait dans *Banque Laurentienne du Canada c. Groupe Bovac Ltée* [9] :

> 26 Plus que vers la liquidation de la compagnie, cette Loi est orientée vers la réorganisation de l'entreprise et sa protection pendant la période intermédiaire, au cours de laquelle l'on procédera à l'approbation et à la réalisation du plan de réorganisation. A l'inverse, la Loi sur la faillite (L.R.C. 1985, c. B-3) recherche la liquidation ordonée (**sic**) *des biens du failli et la répartition du produit de cette liquidation entre les créanciers, suivant l'ordre de priorité définie par la Loi. La Loi sur les arrangements répond à un besoin et à un objectif distinct, du moins selon l'interprétation qui lui a été généralement donnée depuis son adoption. On veut soit prévenir la faillite, soit faire émerger l'entreprise de cette situation*.

[71] Toutefois, comme le soulève Shelley C. Fitzpatrick [10], la situation demeure non résolue, car aucune cour d'appel au Canada ne s'est récemment penchée sur la question à savoir si la liquidation d'actifs sous la *LACC* est conforme à son objectif.

Les créanciers garantis accomplissent indirectement ce qu'ils ne peuvent faire directement

[72] Comme mentionné un peu plus tôt, la liquidation d'actifs sous la *LACC* a l'avantage de réduire les risques qu'engagent les professionnels qui y sont impliqués. Dans le cas d'une liquidation sous la *LFI*, les créanciers garantis doivent verser une indemnité à ces professionnels pour pallier à ces risques. Bien qu'ils doivent faire de même lors d'une liquidation sous la *LACC*, l'indemnité est inévitablement moindre, car le risque encouru est diminué. Ainsi, avec l'accord de la compagnie débitrice, les créanciers garantis procèdent à une liquidation des actifs de la compagnie sous la *LACC* sans n'avoir jamais eu l'objectif de s'entendre sur un plan d'arrangement ou de voir la compagnie survivre, ce qui est contraire à l'objectif de la loi [11].

Iniquités envers les diverses parties prenantes

[73] Comme le rappelle la Cour d'appel de l'Ontario dans l'affaire *Metcalfe* [12], la *LACC* a été adoptée lors de la grande dépression des années 1930 et avait pour objectif de réduire le nombre de faillites d'entreprises et par le fait même le taux de chômage anormalement élevé. Au fil du temps, les tribunaux ont accordé une visée sociale à cette loi qui doit maintenant servir l'intérêt des investisseurs, créanciers, employés et autres parties prenantes impliquées dans une entreprise.

[74] Cette évolution a eu pour effet de pousser les tribunaux à prendre des positions plus politiques que judiciaires dans certains cas, et ce, dans l'intérêt plus large de la collectivité.

[75] Le fait d'inclure ces critères sociaux dans le processus décisionnel des tribunaux a parfois pour effet de créer certains traitements inégaux entre les diverses parties prenantes impliquées. En effet, il est rare que les intérêts des investisseurs, des créanciers, des employés et des autres parties prenantes se rejoignent dans une même solution. Cette situation s'est produite dans l'affaire *Re Pope & Talbot Ltd.* [13] dans laquelle la Cour suprême de la Colombie-Britannique a autorisé la vente d'actifs de la compagnie non pas à celui qui présentait l'offre la plus lucrative, mais bien à une compagnie qui proposait de continuer les activités de l'entreprise, et ce, malgré l'existence d'une offre plus élevée. Essentiellement, le tribunal a déterminé que l'intérêt de la collectivité et du maintien des emplois dans cette entreprise devait primer sur l'obtention du meilleur prix et de la satisfaction des créanciers, ce que décrie l'auteure Fitzpatrick [14] :

> The court is essentially making a legislative statement grounded in public policy as to whether the community of Nanaimo is better off with pulp mill jobs as opposed to construction/golf course jobs (or whatever alternative use the site would have been put to). It is difficult to see the evidentiary basis upon which the court could come to the conclusion that the interests of the employees, suppliers and the community of Nanaimo outweighed obtaining the best price for the assets.

[76] L'auteure soulève également un point intéressant dans ce passage en mentionnant que le tribunal prend une position législative. En effet, comme elle le soulève plus loin, ce type de position à caractère social devrait être laissé au pouvoir législatif et non aux tribunaux [15] .

Impacts sur les droits des tiers

[77] Lorsqu'une compagnie est placée sous la protection de la *LACC*, ses fournisseurs n'ont pas à remplir leurs obligations contractuelles si la compagnie ne le souhaite pas ou si elle n'entend pas exécuter ses obligations corrélatives [16] .

[78] Dans l'affaire *Pope & Talbot*, Canfor, un fournisseur de Pope & Talbot, s'est vu imposer de continuer à remplir ses obligations contractuelles envers Pope & Talbot par ordonnance du tribunal à l'occasion de la demande initiale. De plus, le tribunal a ordonné de surseoir au droit de Canfor de mettre fin au contrat la liant à Pope & Talbot, et ce, malgré les inexécutions contractuelles de cette dernière [17] .

[79] Ainsi, Pope & Talbot, et par le fait même ses créanciers, pouvaient maintenir le contrat en vie sans remplir leurs obligations et éventuellement le transférer à un acheteur de l'entreprise. Cette situation a pour effet d'accorder plus de droits aux créanciers de la compagnie qui bénéficie de la protection de la *LACC* que la compagnie elle-même si elle ne bénéficiait pas de cette protection, et ce, aux dépens de fournisseurs tels Canfor [18] . Pour reprendre une métaphore employée dans le texte de Shelley C. Fitzpatrick, les créanciers utilisent la loi comme une épée leur permettant d'obtenir une meilleure position stratégique et donc un prix supérieur pour les actifs de la compagnie et non comme un bouclier permettant de maintenir le statu quo comme il se doit [19] .

Circonstances et paramètres de la liquidation

[80] Le nouvel article 36 de la loi règle la question du pouvoir des tribunaux de permettre la liquidation. Par contre, il donne très peu d'indications quant à la façon dont le tribunal devra exercer ce pouvoir. Le nouvel article 36 prévoit tout de même que le tribunal pourra autoriser la liquidation sans l'accord des créanciers.

Diverses applications de la discrétion exercée par les tribunaux

Ontario

[81] Comme nous l'avons mentionné précédemment, les tribunaux ontariens sont significativement plus actifs qu'ailleurs au Canada dans l'exercice de leur discrétion d'autoriser la liquidation d'actifs sous la *LACC*. Ainsi, des liquidations ont été autorisées sans qu'un plan d'arrangement ait été préalablement approuvé.

[82] C'est le cas dans *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* [20] . Alors que l'organisme faisait face à des poursuites de près de 8 milliards de dollars de victimes ayant contracté diverses maladies par des transfusions de sang contaminé, le tribunal a autorisé le transfert de ses actifs à d'autres organismes avant qu'un plan d'arrangement ait été proposé aux créanciers. Le juge Blair justifie sa décision par la flexibilité de la *LACC* qui lui permet d'agir de la sorte et par les circonstances en l'espèce qui en font la meilleure solution [21] :

> *[45] It is very common in CCAA restructurings for the Court to approve the sale and distribution of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy.*
>
> [...]
>
> *[46]* [...] *There is no realistic alternative to the sale and transfer that is proposed and the alternative is a liquidation/ bankruptcy scenario, which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To forego that purchase price supported as it is by reliable expert evidence would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.*

[83] L'auteur Bill Kaplan donne également l'exemple de l'affaire *Re Anvil Range Mining Corp.* [22] dans laquelle le tribunal a autorisé la liquidation des actifs de la compagnie suite à un plan d'arrangement qui n'avait été voté que par les créanciers garantis. Le plan prévoyait que seuls les créanciers garantis étaient autorisés à voter et que les créanciers non garantis ne recevraient aucun

montant des suites de la liquidation. Le tribunal s'appuya sur le fait que ces derniers créanciers n'en souffriraient aucun préjudice, car, peu importe la solution retenue, la liquidation ne permettrait en aucun cas de leur verser une quelconque indemnité [23] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* .

[84] Bill Kaplan résume la position des tribunaux ontariens quant à la liquidation d'actifs sous la *LACC* comme suit, tout en précisant qu'elle s'éloigne de celle des autres provinces [24] :

> The Ontario authority demonstrates not only that the courts in Ontario have embraced liquidating CCAAs, but will approve asset sales under the CCAA without requiring that a plan of arrangement be filed. That is not an approach sanctioned by the Alberta Court of Appeal, or apparently by the British Columbia Court of Appeal, nor as we shall see, is it an approach that as met favour with Courts in the province of Quebec.

Colombie-Britannique

[85] La situation en Colombie-Britannique est intéressante, car jusqu'à récemment les tribunaux de cette province emboîtaient le pas aux tribunaux ontariens lorsqu'il s'agissait d'autoriser la liquidation d'actifs sous la *LACC*. Toutefois, la situation a été diamétralement modifiée depuis la décision . [25]

[86] Dans cette décision, la Cour d'appel de la Colombie-Britannique conclut que, conformément à l'objectif de la *LACC*, elle ne peut octroyer la protection de la *LACC* lorsque la compagnie débitrice n'a pas l'intention de proposer un plan d'arrangement à ses créanciers. Comme l'explique Bill Kaplan [26] :

> The Court of Appeal observed that the fundamental purposes of the CCAA was to facilitate, comprises and arrangements between companies and their creditors. Section 11, the stay provision, was merely ancillary to that fundamental purpose, and should only be granted in furtherance of that fundamental purpose. While the filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11, the Court concluded that a stay should not be granted if the debtor company does not intend to propose a compromise or arrangement to its creditors.

Alberta

[87] La jurisprudence en Alberta est plus exigeante qu'ailleurs qu'au Canada lorsque vient le temps d'autoriser une liquidation d'actifs sous la *LACC*. L'affaire *Royal Bank c. Fracmaster Ltd.* [27] en est un bon exemple. En effet, la Cour d'appel de l'Alberta a profité de cette décision pour prendre position sur les conditions qui devraient guider le tribunal lors de l'autorisation d'une liquidation sous la *LACC* [28] :

> « *Although there are infrequent situations in which a liquidation of a company's assets has been concluded under the CCAA, the proposed transaction must be in the interests of the creditors generally [...] There must be an ongoing business entity that will survive the asset sale [...] A sale of all or substantially all of the assets of the company to an entirely different entity with no continued involvement by former creditors and shareholders does not meet this requirement*. »
>
> **[citation provenant du texte *Liquidating CCAAs: Discretion Gone Awry*?]**

[88] En imposant la condition de la survie de l'entreprise pour qu'une liquidation des actifs sous la *LACC* soit autorisée, l'affaire *Fracmaster* a eu pour effet de rendre cette procédure significativement plus difficile à obtenir en Alberta qu'ailleurs au Canada [29] .

Québec

[89] Selon l'auteur Bill Kaplan, les tribunaux québécois exigent qu'il existe une preuve matérielle de la structure générale et du contenu d'un éventuel plan d'arrangement à être présenté aux créanciers avant d'octroyer la protection de la *LACC* à une compagnie [30] .

[90] Au soutien de ses dires, il invoque la décision *Re Boutiques San Francisco Incorporées*[31] . Dans cette affaire, le tribunal refuse d'octroyer la protection de la loi sous l'article 11 *LACC* au motif que le plan présenté par la compagnie débitrice était incomplet[32] :

> 20 As a result, while it is receptive to issue some Initial Order to allow the BSF Group the possibility to avail itself of some of the protections of the CCAA under the circumstances, the Court will not grant all the conclusions sought at this stage because of this situation and the lack of information on the proposed plan.

[91] Au soutien de cette décision, le tribunal réfère au jugement du juge LeBel de la Cour d'appel dans *Banque Laurentienne du Canada c. Groupe Bovac Ltée*[33] :

> *56* [...] *Si les art.4 et 5 indiquent que l'ordre de convoquer les créanciers ou, le cas échéant, les actionnaires de la compagnie dépend de la discrétion du juge, l'exercice de celui-ci suppose l'existence d'un élément de base. Cet événement survient lorsqu'une transaction ou un arrangement "est proposé". Il faut que, matériellement, existe un projet d'arrangement. L'on ne peut se satisfaire d'une simple déclaration d'intention. Autrement, l'on transforme radicalement les mécanismes de la Loi. On fait de celle-ci une méthode pour obtenir un simple sursis, sans que l'on ait à établir qu'il existe un projet d'arrangement et sans que l'on puisse faire évaluer sa plausibilité. La Loi n'est pas formaliste. Elle n'exige pas que le projet d'arrangement soit incorporé dans le texte de la requête. Il peut se retrouver dans des documents annexes, dans des projets de lettres aux créanciers, pourvu que l'on puisse indiquer au juge, auquel on demande la convocation de l'assemblée, qu'il existe et que l'on puisse en décrire les éléments principaux*. [...]
>
> *57 Non seulement cette nécessité se dégage-t-elle du texte de Loi mais correspond-elle aussi aux exigences d'un exercice suffisamment éclairé de la discrétion du tribunal de convoquer les créanciers et actionnaires et, dans certains cas, d'émettre des ordres de sursis en vertu de l'art. 11*.
>
> *58 En l'absence d'une description du projet d'arrangement des éléments principaux, certaines des informations nécessaires pour permettre au tribunal d'exercer sa discrétion en connaissance de cause font défaut. Elles sont requises pour assurer la prise en compte des intérêts de tous les groupes concernés. En effet, les conséquences de la mise en oeuvre des mécanismes de la Loi sur les arrangements avec les créanciers des compagnies sont plus draconiennes, particulièrement pour les créanciers garantis et comportent, à l'inverse, moins de risques d'abord pour la débitrice, puisque le recours infructueux à la Loi ou le rejet de ces propositions n'entraîne pas la faillite. Par surcroît, l'on peut arrêter toutes les procédures de réalisation des créanciers, de quelque nature que ce soit, pour des périodes indéterminées*.
>
> *59 Le recours à la Loi suppose un contrôle judiciaire. Il appartient au juge de peser, au départ, l'intérêt pour l'entreprise de présenter une proposition, la plausibilité de sa réussite, les conséquences de cette proposition et des ordres de sursis qui sont demandés pour les créanciers, les risques qu'elle ferait courir pour ses créanciers garantis, le juge doit examiner ces intérêts divers avant d'autoriser la convocation des créanciers et de déclencher la mise en oeuvre de la Loi. La Loi n'est pas une législation conçue pour accorder, sans conditions ni réserves, des termes de grâce à des débiteurs en difficulté. Elle se veut une loi de réorganisation d'entreprises en difficulté. À ce titre, saisi de la demande de convocation d'une assemblée et de sursis, le juge doit être en mesure d'apprécier, d'abord si l'entreprise est susceptible de survivre pendant la période intermédiaire jusqu'à l'approbation du compromis puis s'il est raisonnable d'estimer que l'accord projeté est réalisable. Pour savoir s'il est réalisable, l'une des conditions de base est d'en connaître les termes essentiels, quitte à ce que ceux-ci soient précisés ou modifiés par la suite*. [...]

92 Malgré les dires de l'auteur Kaplan, il ne semble pas que cette exigence de présenter des preuves matérielles suffisantes d'un éventuel plan d'arrangement ait été suivie uniformément par les tribunaux québécois. L'affaire *Re Papier Gaspésia Inc.*[34] en est un exemple alors que la protection de la loi a été accordée sans que des éléments d'un plan d'arrangement aient été présentés.

93 Comme le mentionne la Cour d'appel dans cette même cause [35] , le processus de vente d'actif en l'espèce devra être soumis à l'accord des créanciers:

> « *[14] Par ailleurs, l'appel d'offres permis à certaines conditions par le jugement de première instance n'équivaut pas à liquidation pure et simple, malgré qu'on puisse le considérer comme l'amorce d'un éventuel processus de liquidation, qui pourrait cependant ne pas avoir lieu si un acheteur se manifestait et se montrait intéressé à la relance de l'entreprise (quoique cela paraisse peu probable). En outre, afin d'assurer la protection de l'intérêt des créanciers (dont les requérantes), le premier juge ordonne que leur soient soumis les termes et conditions de cet appel d'offres, les recommandations d'acceptation ou de refus des soumissions reçues et le mode de distribution du prix de vente, le tout par le biais d'un amendement au plan d'arrangement déjà proposé (voir par. 101 du jugement de première instance). Non seulement ce plan d'arrangement doit-il être présenté aux créanciers, mais il doit en outre être homologué par la Cour supérieure. S'il y a lieu, les requérantes pourront s'assurer alors que leurs droits soient convenablement protégés (notamment en réclamant la constitution d'une classe particulière de créanciers) et elles pourront s'adresser au tribunal dans ce but. Les requérantes pourront aussi, ce qu'elles n'ont d'ailleurs pas manqué de faire valoir à plusieurs reprises lors de l'audition, voter contre le plan d'arrangement, s'il ne leur convient pas, ou en déférer au tribunal si elles estiment que leurs droits ne sont pas pris en considération ou sont bafoués*. »
>
> **[Citation omise]**

[94] Ainsi, bien que l'exigence d'un plan d'arrangement pour octroyer la protection de la loi ne soit pas automatique au Québec, on exige tout de même qu'un tel plan soit soumis au vote des créanciers.

La voie à suivre

[95] On se retrouve donc dans une situation où l'application et l'interprétation d'une loi de juridiction fédérale diffèrent de façon importante d'une province à l'autre. Malgré certaines décisions plus drastiques, telles *Fracmaster* ou *Cliffs Over Maple*, il semble faire l'unanimité que la liquidation d'actifs sous la *LACC* est possible, surtout depuis l'adoption de l'article 36 *LACC.* On peut être en désaccord avec cette situation, mais l'état du droit à ce jour est à cet effet.

[96] Il existe toutefois des divergences fondamentales dans l'application de cette discrétion à travers le Canada, et ce, tant en ce qui a trait aux actifs qui peuvent faire l'objet d'une telle liquidation qu'aux critères qui doivent guider le tribunal dans l'application de son pouvoir.

[97] Dans la recherche d'une solution, il faut garder à l'esprit les objectifs de la *LACC* qui doivent guider l'interprétation qu'on en fait et que Kaplan résume comme suit [36] :

> The judicial and academic pronouncements all identify the following general policy objectives: maximization of creditor recovery, minimization of the detrimental impact upon employment and supplier, customer and other economic relationships, preservation of the tax base and other contributions the enterprise makes to its local community, and the rehabilitation of the debtor company.

Solutions proposées par Bill Kaplan

[98] L'auteur Bill Kaplan débute son appréciation de l'état de la jurisprudence en affirmant que les affaires *Fracmaster* et *Cliffs Over Maple* ne viennent pas condamner les liquidations sous la *LACC.* Selon lui, ces deux décisions d'importances viennent surtout prévenir contre un usage abusif de la *LACC* pour effectuer la liquidation des actifs d'une compagnie et mettre l'emphase sur les droits des créanciers qui sont brimés lorsque la liquidation est permise.

[99] Kaplan précise toutefois qu'il est d'avis que l'affaire *Fracmaster* est trop drastique lorsqu'on l'interprète comme posant l'exigence de la survie de l'affaire pour octroyer la protection de la loi. Kaplan voit toutefois une utilité dans la décision quand elle suggère qu'une partie qui requiert la protection de la *LACC*, alors que les objectifs commerciaux en jeu seraient remplis par

une d'autres procédures d'insolvabilité, telles la *LFI* ou l'exécution de droits hypothécaires, doit démontrer pourquoi l'application de la *LACC* est nécessaire.

[100] Pour ce qui est du vote des créanciers avant de procéder à une liquidation d'actifs, Kaplan est d'avis que le vote n'est pas nécessaire en tout temps et qu'il revient au tribunal de déterminer lorsqu'il est nécessaire. Il souligne que l'accord du tribunal est nécessaire pour procéder à une telle liquidation, ce qui assure un certain contrôle, et qu'il serait néfaste de rendre le vote obligatoire peu importe la situation, car il s'agit d'un processus long et coûteux. Afin de déterminer s'il doit y avoir un vote, le tribunal devrait évaluer le degré d'opposition des créanciers à une telle liquidation et soupeser la valeur des alternatives à une liquidation sous la *LACC.* Il précise que le tribunal doit accorder une plus grande importance aux droits des créanciers qu'à ceux des autres parties prenantes lorsque vient le temps d'évaluer les bénéfices et les inconvénients d'une liquidation sous la *LACC* par rapport aux autres solutions proposées.

[101] Enfin, l'auteur propose de rendre obligatoire la présentation d'un plan d'arrangement aux créanciers dans tous les cas. Il ajoute que ledit plan devrait être présenté à tous les créanciers, incluant les créanciers ordinaires même dans les cas où ces derniers ne recevraient rien de la liquidation des actifs. Cette mesure irait davantage dans l'objectif de la loi qui demeure d'obtenir un arrangement avec les créanciers.

[102] Il est important de préciser que la position proposée dans l'affaire Fracmaster ne ferme pas complètement la porte à la liquidation d'actifs sous la *LACC.* En effet, et je suis également de cet avis, la liquidation d'actifs excédentaires peut et doit être possible sous la *LACC* afin d'assainir les finances de la compagnie. Le critère devrait donc revenir à déterminer si l'affaire, et pas nécessairement la compagnie elle-même, survivra suite au plan d'arrangement.

[103] La solution de Bill Kaplan est intéressante, mais elle a pour effet d'accorder une très grande latitude aux tribunaux, ce qui est à la base même du courant jurisprudentiel qui est aujourd'hui critiqué. L'approche de *Fracmaster* est plus draconienne et a pour effet de restreindre le large pouvoir d'interprétation des tribunaux, mais elle est nécessaire dans les circonstances.

[104] Bien que le soussigné aurait été porté à privilégier la thèse que la *LACC* et la *LFI* sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la *LACC* et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la *LACC.*

[105] Tous les facteurs à prendre en considération mentionnés à l'article 36(3) *LACC* militaient en faveur de l'autorisation d'une vente des actifs. Non seulement cela a permis une réalisation supérieure à ce qui aurait pu être obtenu de n'importe quelle autre façon, elle a aussi permis le maintien d'un chemin de fer indispensable à l'économie régionale.

[106] Le jugement rendu par le soussigné autorisant la vente des actifs a été rendu du consentement de toutes les parties impliquées. D n'y a pas eu appel de ce jugement. Le jugement a donc l'autorité de la chose jugée sur l'opportunité de vendre les actifs de la compagnie.

[107] C'est également en tenant compte de l'intérêt de la collectivité et du maintien des emplois que le tribunal avait permis que la vente puisse se faire même si ce n'était pas au meilleur prix. Finalement, nous avons obtenu le meilleur prix mais il y avait possibilité que ce ne soit pas le cas.

[108] Cela étant dit, que faisons-nous pour la suite du dossier?

[109] Dans l'état actuel du dossier, il semble peu probable qu'un plan d'arrangement puisse être déposé. Il est donc inutile pour le moment de prévoir un processus coûteux de dépôt de preuves de réclamation puisqu'aucun vote ne sera nécessaire si aucun plan d'arrangement n'est proposé.

La seule possibilité de continuation du processus en vertu de la LACC

[110] Plusieurs pourraient être portés à penser qu'il n'y a plus de raison de continuer le présent dossier.

[111] Par contre, la seule lecture du *service list* et la présence des personnes représentées à chaque étape des procédures peuvent laisser penser qu'un arrangement est possible.

[112] Nous avons déjà mentionné qu'exceptionnellement, notre collègue Martin Castonguay avait ordonné le sursis des procédures contre *XL Insurance Company Limited.* Cela a été fait de façon exceptionnelle et pour éviter le chaos et la course aux jugements contre la compagnie d'assurance.

[113] Nous l'avons déjà dit, en principe, la *Loi sur les arrangements des créanciers et des compagnies* ne s'applique qu'aux compagnies débitrices. Par contre, exceptionnellement, des ordonnances peuvent être rendues pour libérer certains tiers qui participent au plan d'arrangement par une contribution monétaire, mais en échange d'une quittance.

[114] Le soussigné dans l'affaire du plan d'arrangement de la *Société industrielle de décolletage et d'outillage (SIDO)* [37] avait homologué un plan d'arrangement qui prévoyait la quittance à certains tiers en plus des administrateurs.

[115] La juge Marie-France Bich dans un jugement rejetant une requête pour permission d'appeler de ce jugement mentionnait [38] :

> [32] **Les quittances.** L'article 7.2 du plan d'arrangement approuvé par le juge de première instance comporte les dispositions suivantes:
>
> **Article 7.2 Quittances**
>
> À la date de prise d'effet, la Débitrice et/ou les autres Personnes nommées ci-dessous bénéficieront des quittances et des renonciations suivantes, lesquelles prendront effet à l'Heure de prise d'effet:
>
> 7.2.1 Une quittance complète, finale et définitive des Créanciers quant à toute Réclamation contre la Débitrice et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard des Réclamations;
>
> 7.2.2 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation, autre qu'une réclamation visée au paragraphe 5.1(2) LACC, qu'ils ont ou pourraient avoir, directement ou indirectement, contre les administrateurs, dirigeants, employés ou autres représentants ou mandataires de la Débitrice en raison ou à l'égard d'une Réclamation Visée et une renonciation des Créanciers à exercer tout droit personnel ou réel à l'égard de toute telle réclamation;
>
> 7.2.3 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre DCR et Fortin, de même que leurs dirigeants, administrateurs, directeurs, employés, conseillers financiers, conseillers juridiques, banquiers d'affaires, consultants, mandataires et comptables actuels et passés respectifs à l'égard de l'ensemble des demandes, réclamations, actions, causes d'action, demandes reconventionnelles, poursuites, dettes, sommes d'argent, comptes, engagements, dommages-intérêts, décisions, jugements, dépenses, saisies, charges et autres recouvrements au titre d'une créance, d'une obligation, d'une demande ou d'une cause d'action de quelque nature que ce soit qu'un Créancier pourrait avoir le droit de faire valoir à l'encontre de DCR ou Fortin;
>
> 7.2.4 Une quittance complète, finale et définitive des Créanciers quant à toute réclamation qu'ils ont ou pourraient avoir, directement ou indirectement, contre la Débitrice ou le Contrôleur ou leurs administrateurs, dirigeants, employés ou autres représentants ou mandataires ainsi que leurs conseillers juridiques à l'égard de toute mesure prise ou omission faite de bonne foi dans le cadre des Procédures ou de la préparation et la mise en oeuvre du Plan ou de tout contrat, effet, quittance ou autre convention ou document créé ou conclu, ou de toute autre mesure prise ou omise relativement aux Procédures ou au Plan, étant entendu qu'aucune disposition du présent paragraphe ne limite la responsabilité d'une Personne à l'égard d'une faute relativement à une obligation expressément formulée qu'elle a aux termes du Plan ou aux termes de toute convention ou autre document conclu par cette Personne après la Date de détermination

> ou conformément aux modalités du Plan, ni à l'égard du manquement à un devoir de prudence envers quelque autre Personne et survenant après la Date de prise d'effet. À tous égards, la Débitrice et le Contrôleur et leurs employés, dirigeants, administrateurs, mandataires et conseillers respectifs ont le droit de s'en remettre à l'avis de conseillers juridiques relativement à leurs obligations et responsabilités aux termes du Plan; et
>
> 7.2.5 Une quittance complète, finale et définitive de la Débitrice quant à toute réclamation qu'elle a ou pourrait avoir, directement ou indirectement, contre ses administrateurs, dirigeants et employés.

[...]

[37] Or, devant la Cour supérieure, se basant principalement sur l'arrêt de la Cour d'appel de l'Ontario dans *A.T.B. Financial v. Metcalfe & Mansfield Alternative Invesments II Corp.*, l'intimée faisait à cet égard valoir que la quittance en faveur de DCR était légale et appropriée en l'espèce, considérant que cette quittance a un lien raisonnable avec la réorganisation proposée. Dans l'argumentaire écrit remis au juge de première instance, l'intimée citait les passages suivants de l'arrêt *Metcalfe*:

> [113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
>
> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

[38] Manifestement, le juge de première instance a estimé que la quittance dont DCR est bénéficiaire selon la clause 7.2.3 du plan d'arrangement répondait à ces exigences.

[39] Le plan d'argumentation produit par l'intimée devant la Cour supérieure et, de même, le plan d'argumentation déposé aux fins du présent débat citent aussi, entre autres, l'affaire *Muscletech Research and Development Inc.*, où l'on reconnaît la possibilité, dans le cadre d'un arrangement régi par la *L.a.c.c* de stipuler une quittance en faveur du tiers qui finance la restructuration de l'entreprise débitrice. Or, c'est précisément, en l'espèce, le cas de DCR, qui versera une somme considérable afin de soutenir la réorganisation des affaires de l'intimée dans le cadre du plan d'arrangement.

[40] Il n'est pas inutile de reproduire ici quelques-uns des passages de l'affaire *Muscletech*:

> [7] With respect to the relief sought relating to Claims against Third Parties, the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight

loss and sports nutrition or other products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

> the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.

[8] Moreover, it is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made. In addition, the Claims Resolution Order, which was not appealed, clearly defines Product Liability Claims to include claims against Third Parties and all of the Objecting Claimants did file Proofs Of Claim settling out in detail their claims against numerous Third Parties.

[9] It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties. In *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), Paperney J. stated at p. 92:

> While it is true that section 5.2 of the CCAA does not authorize a release of claims against third parties other than directors, it does not prohibit such releases either. The amended terms of the release will not prevent claims from which the CCAA expressly prohibits release.
>
> [Soulignements ajoutés]

[41] Ultérieurement, la Cour supérieure de justice de l'Ontario, dans une décision rendue dans le même dossier en 2007, écrira que:

> [20] A unique feature of this Plan is the Releases provided under the Plan to Third Parties in respect of claims against them in any way related to "the research, development, manufacture, marketing, sale, distribution, application, advertising, supply, production, use or ingestion of products sold, developed or distributed by or on behalf of the Applicants (see Article 9.1 of the Plan). It is self-evident, and the Subject Parties have confirmed before this court, that the Contributed Funds would not be established unless such Third Party Releases are provided and accordingly, in my view it is fair and reasonable to provide such Third Party releases in order to establish a fund to provide for distributions to creditors of the Applicants. With respect to support of the Plan, in addition to unanimous approval of the Plan by the creditors represented at meetings of creditors, several other stakeholder groups support the sanctioning of the Plan, including Iovate Health Sciences Inc. and its subsidiaries (excluding the Applicants) (collectively, the "Iovate Companies"), the Ad Hoc Committee of MuscleTech Tort Claimants, GN Oldco, Inc. f/k/a General Nutrition Corporation, Zurich American Insurance Company, Zurich Insurance Company, HVL, Inc. and XL Insurance America Inc. It is particularly significant that the Monitor supports the sanctioning of the Plan.
>
> [21] With respect to balancing prejudices, if the Plan is not sanctioned, in addition to the obvious prejudice to the creditors who would receive nothing by way of distribution in respect of their claims, other stakeholders and Third Parties would continue to be mired in extensive, expensive and in some cases conflicting litigation in the United States with no predictable outcome.
>
> [...]
>
> [23] The representative Plaintiffs opposing the sanction of the Plan do not appear to be rearguing the basis on which the class claims were disallowed. Their position on this motion appears to be that the Plan is not fair and reasonable in that, as a result of the sanction of the Plan, the members of their classes of creditors will be

> precluded as a result of the Third Party Releases from taking any action not only against MuscleTech but against the Third Parties who are defendants in a number of the class actions. I have some difficulty with this submission. As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. Not only is it fair and reasonable: it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided. The representative Plaintiffs and all the members of their classes had ample opportunity to submit individual proofs of claim and have chosen not to do so, except for two or three of the representative Plaintiffs who did file individual proofs of claim but withdrew them when asked to submit proof of purchase of the subject products. Not only are the claims of the representative Plaintiffs and the members of their classes now barred as a result of the Claims Bar Order, they cannot in my view take the position that the Plan is not fair and reasonable because they are not participating in the benefits of the Plan but are precluded from continuing their actions against MuscleTech and the Third Parties under the terms of the Plan. They had ample opportunity to participate in the Plan and in the benefits of the Plan, which in many cases would presumably have resulted in full reimbursement for the cost of the product and, for whatever reason, chose not to do so.
>
> [...]
>
> [Soulignements ajoutés]

[42] Dans le même sens, on pourra consulter la décision de la Cour supérieure dans *Charles-Auguste Fortier inc. (Arrangement relatif à)*, qui fait une étude approfondie de la question et conclut à l'opportunité d'une quittance en faveur de la caution de la société débitrice, caution qui joue un rôle central dans la réorganisation des affaires de celle-ci et sans le concours de laquelle le plan échouera.

[43] La situation de l'espèce est analogue: DCR injectera des sommes substantielles dans la réorganisation de l'intimée en vertu du plan d'arrangement, ce qu'elle ne fera pas si elle ne peut bénéficier de la quittance prévue par la clause 7.2.3. La requête pour permission d'appeler et les observations présentées à l'audience ne permettent pas de conclure que le requérant conteste ce fait ou conteste l'absence d'une autre source de financement, son argument étant plutôt que cette quittance est sans lien avec les activités de l'entreprise. Avec égards, cet argument ne peut être retenu et, à mon avis, il n'a pas de chance raisonnable de succès devant cette Cour. La permission d'appeler ne saurait donc, sur le fondement de ce moyen, être accordée.

[116] La débitrice ne s'en cache pas, elle désire continuer les procédures sous la *LACC* pour ultimement obtenir la libération des administrateurs.

[117] Divers recours collectifs ont été intentés contre la débitrice. Un des recours déposés au Québec et dont les requérants ont produit des requêtes qui ont été remises au 26 février implique non seulement la débitrice et ses administrateurs, mais aussi plus de 35 défendeurs.

[118] Ce sont ces défendeurs que la débitrice veut faire asseoir à la table pour tenter d'en venir à un règlement qui profiterait à tous. Plusieurs de ces défendeurs sont présents à toutes les étapes dans le présent dossier.

[119] Un règlement dans le présent dossier aurait l'avantage d'éviter, à tous ceux qui y participent, des recours judiciaires qui s'échelonneront sur plusieurs années.

[120] Dans l'état actuel du dossier, il est impossible pour un tribunal d'ordonner que les sommes que reconnaît devoir la Compagnie d'Assurance XL soient payées à un créancier plutôt qu'à un autre.

[121] La seule façon pratique, économique et juridiquement possible de régler le présent dossier est que des tiers participent à une proposition d'arrangement qui devra être soumise à la masse des créanciers.

[122] Rien n'empêchera les requérants au recours collectif de continuer les procédures contre les défendeurs qui n'y participeront pas, mais cela leur permettra de participer à la distribution de l'indemnité d'assurance totalisant 25 000 000 $.

[123] Évidemment, pour réussir, il faudra que des tiers participent pour des montants substantiels. Les requérants du recours collectif ne peuvent se voir attribuer les sommes des assurances, ils n'y ont pas droit. Il y a d'autres victimes, pas seulement les requérants en recours collectif. Ces autres victimes ont autant le droit au bénéfice de l'assurance que les requérants en recours collectif. Un autre facteur à tenir en considération est que le gouvernement du Québec par la voix de ses procureurs déclare depuis le début qu'il désire que le montant des assurances soit remis aux victimes. Ce souhait a été mentionné lors des différentes auditions, mais ne lie personne pour le moment. Le procureur du gouvernement a aussi déclaré que sa définition de victimes n'est pas la même que celle du tribunal. En effet, une compagnie d'assurance qui aurait indemnisé un commerçant pour la perte d'un immeuble ou pour perte de chiffres d'affaires est aussi une victime de la tragédie ferroviaire. Légalement cette compagnie d'assurance aurait parfaitement le droit de recevoir une part du 25 000 000 $ de XL Assurance.

[124] Le gouvernement du Québec peut bien vouloir préférer les victimes physiques, cela ne lie pas XL Assurance.

[125] Évidemment si la province de Québec a une réclamation de 200 000 000 $ et qu'elle réussit à récupérer des sommes, elle pourra en faire ce qu'elle veut.

[126] La somme de 200 000 000 $ mentionnée semble d'ailleurs conservatrice. Si la province récupère des sommes, elle est en droit d'en faire ce qu'elle veut.

[127] Mais pour le moment, nous sommes dans une situation où il n'y a aucun actif possiblement partageable entre les créanciers. Il est donc inutile d'établir un processus de réclamation très coûteux. D'ailleurs, qui financerait ce processus? Les requérants en recours collectif et le gouvernement du Québec ne peuvent non plus agir comme s'ils étaient les seuls créanciers de MMA. On peut facilement croire que la valeur des réclamations autres dépasse aussi la centaine de millions de dollars. Mais les créanciers entre eux sont souverains. S'ils décident qu'une catégorie de créanciers recevra des sommes alors que d'autres auraient été en droit d'en recevoir, mais y renoncent, ils en ont le droit. Ils en ont peut-être le droit, mais les moyens d'y arriver rapidement ne sont pas nombreux. Pour le moment, les procédures engagées pourraient mener à un tel règlement pourvu qu'un plan soit déposé et que les créanciers l'acceptent. Oublions une proposition concordataire en vertu de la *LFI*, le processus serait trop coûteux dans l'état actuel du dossier. La *LACC* a aussi l'avantage d'être plus flexible. La seule solution possible et rapide est donc celle proposée par la débitrice. Que des tiers participent à l'élaboration d'une proposition. Un apport monétaire est essentiel pour y participer. Si un plan acceptable est proposé, les créanciers pourront l'accepter et pourront décider de catégories de créanciers pouvant participer au partage. Ils pourraient également accepter que des tiers soient libérés.

[128] Si le tribunal lève le sursis des procédures contre XL Compagnie d'Assurance, ce sera le chaos et la course aux jugements.

[129] Le procureur de XL a déjà mentionné au tribunal que son interprétation du contrat lui permet d'affirmer que le contrat d'assurance oblige la compagnie à payer les indemnités en payant le premier arrivé.

[130] D'innombrables recours pourraient donc être intentés contre la débitrice et la compagnie d'assurance et celle-ci n'aurait plus l'obligation de payer lorsqu'une somme de 25 000 000 $ aurait été déboursée.

[131] Les chances d'obtenir un jugement suite à un recours collectif avant les recours intentés par la voie ordinaire seraient illusoires surtout lorsque les défendeurs admettent leur responsabilité.

[132] Le tribunal ne voit pas comment les procédures devant d'autres instances pourraient être suspendues en attendant le résultat du recours collectif. Nul n'est tenu de participer à un tel recours.

12 À la suite de ce jugement, un processus de négociation, avec les tiers potentiellement responsables, débute. C'est cette négociation qui permet la formation d'un fonds d'indemnisation de 430 millions de dollars pour indemniser les victimes de la tragédie ferroviaire qui, rappelons-le, sont toutes créancières de la débitrice.

13 Tous les défendeurs poursuivis dans un recours collectif intenté au Québec ont accepté de participer au fonds d'indemnisation, à l'exception de l'opposante, la compagnie de chemin de fer Canadien Pacifique (CP).

14 L'honorable Martin Bureau, j.c.s. a accordé la requête pour autorisation d'exercer un recours collectif contre le CP et World Fuel Services qui s'est par la suite jointe au groupe contribuant au fonds d'indemnisation.

15 Le CP refuse de participer au fonds plaidant qu'elle n'est pas responsable de la tragédie ferroviaire. Cela est parfaitement son droit.

16 Par contre, pour les motifs ci-après exposés, il est évident que la contestation de CP n'a pour seul but que de faire avorter le plan d'arrangement proposé ou de se donner un avantage stratégique de négociation qui lui créerait même plus de droits qu'elle n'en aurait, si les parties avaient tout simplement décidé de régler hors cour le recours collectif intenté. Nous y reviendrons.

17 Dans son plan d'argumentation, CP soulève les questions suivantes:

a) L'article 4 de la LACC confère-t-il à un tribunal siégeant en vertu de la LACC la compétence d'homologuer un « plan » qui ne propose pas de transaction ni d'arrangement entre un débiteur en vertu de la LACC et ses créanciers?

b) Si le Tribunal répond à la question a) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer une quittance en faveur d'un tiers solvable qui n'est pas « raisonnablement liée à la restructuration » du débiteur en vertu de la LACC?

c) Si le Tribunal répond à la question b) par l'affirmative, a-t-il compétence en vertu de la LACC pour homologuer un « plan » qui contient des quittances en faveur des tierces parties sans rapport avec la résolution de toutes les réclamations contre le débiteur insolvable, c'est-à-dire que les réclamations contre le débiteur ne sont pas visées par le plan et que ce plan ne confère aucun avantage à ce débiteur?

d) Une réponse affirmative à la question b) ou à la question c) constitue-t-elle une interprétation constitutionnelle valide de la compétence du Tribunal pour homologuer un plan d'arrangement ou de transaction en vertu de la LACC?

e) Si le Tribunal répond à toutes les questions précédentes par l'affirmative, le Plan et les conventions de règlement partielles qui en font partie intégrante sont-ils raisonnables, justes et équitables pour toutes les parties concernées, y compris les entités non parties au règlement?

18 Le 31 mars 2015, MMAC dépose un plan de transaction et d'arrangement, dont l'article 2.1 stipule l'objet:

2.1 Objet

Le Plan vise:

a) à proposer un compromis, une quittance, une libération et une annulation complètes, finales et irrévocables de toutes les Réclamations Visées contre les Parties Quittancées;

b) à permettre la distribution des Fonds pour Distribution et le paiement des Réclamations Prouvées, tel qu'il est indiqué aux paragraphes 4.2 et 4.3;

Le Plan est présenté eu égard au fait que les Créanciers, lorsqu'ils sont considérés globalement, tireront un plus grand avantage de sa mise en oeuvre que cela ne serait le cas dans l'éventualité d'une faillite de MMAC.

19 Le *Dix-neuvième rapport du Contrôleur sur le plan d'arrangement de la requérante* du 14 mai 2015 indique le contexte dans lequel le plan a été mis de l'avant par MMAC, et plus précisément, son objectif sous-jacent.

• Les paragraphes 11 et 13 du Dix-neuvième rapport:

> « 11. Afin de compenser les créanciers pour les dommages subis en raison du Déraillement, il était clair dès le départ pour toutes les parties intéressées que cela ne pouvait être accompli qu'avec la contribution de tiers potentiellement responsables (les "Tiers"), en échange de quittances totales et finales à l'égard de tout litige pouvant découler du Déraillement.
>
> [...]
>
> 13. Le Plan est le résultat de plusieurs mois de discussions multilatérales entre le conseiller juridique de la Requérante, [...] le Syndic, les principales parties intéressées de la Requérante, soit la province de Québec (la "Province"), les Représentants d'un groupe de créanciers, les avocats des victimes du déraillement dans le cadre des procédures en vertu du Chapitre 11 (les "Conseillers juridiques américains") et l'avocat du Comité officiel des victimes dans le cadre des procédures en vertu du Chapitre 11 (le "Comité officiel") (collectivement les "Principales parties intéressées"), avec les Tiers, qui visaient à négocier des contributions à un Fonds de Règlement au profit des victimes du Déraillement. [...]
>
> [nos soulignés]

20 CP plaide que l'objectif exclusif du plan est par conséquent irréfutable, à savoir le *règlement des réclamations des créanciers victimes contre des tiers potentiellement responsables*, et que le plan ne porte d'aucune façon sur la restructuration de MMAC.

21 Cela est inexact. Si l'on suit la logique du CP, il faudrait obligatoirement que la restructuration de l'entreprise se fasse après l'approbation du plan par les créanciers.

22 Or, il arrive fréquemment que la restructuration soit complétée avant l'approbation du plan par les créanciers. C'est ce qui s'est produit dans le présent dossier.

23 En l'instance, le chemin de fer est sauvé, les emplois sont sauvés et toutes les industries et les municipalités bénéficiant du chemin de fer sont assurées de pouvoir continuer d'en bénéficier.

24 Ce n'est pas parce qu'une partie des objectifs de départ sont atteints qu'il faut faire abstraction de cette réussite.

25 Sans le bénéfice de la *LACC*, les rails de chemin de fer auraient bien pu être vendus à la ferraille. Cette deuxième catastrophe a été évitée.

26 En contrepartie de leurs contributions respectives au Fonds d'indemnisation, les parties quittancées bénéficieront de « Quittances et Injonctions » ayant une portée très générale.

27 MMAC n'est pas une partie quittancée aux termes du plan.

28 Plus précisément, le paragraphe 5.1 du plan prévoit l'exécution (i) de quittances ayant une portée très large en faveur des parties quittancées, et (ii) des injonctions interdisant toute future réclamation contre les parties quittancées:

> **5.1 Quittances et Injonctions aux termes du Plan**
>
> Toutes les Réclamations Visées feront entièrement, définitivement, absolument, inconditionnellement, complètement, irrévocablement et à jamais, l'objet d'un compromis, d'une remise, d'une quittance, d'une libération, d'une annulation et seront proscrites à la Date de Mise en oeuvre du Plan contre les Parties Quittancées.

Toutes les Personnes (peu importe si ces Personnes sont ou non des Créanciers ou des Réclamants) seront empêchées et il leur sera interdit, en permanence et à jamais, i) de poursuivre toute Réclamation, directement ou indirectement, contre les Parties Quittancées, ii) de poursuivre ou d'entreprendre, directement ou indirectement, toute action ou autre procédure à l'égard d'une Réclamation contre les Parties Quittancées ou de toute Réclamation qui pourrait donner lieu à une Réclamation contre les Parties Quittancées, au moyen d'une demande reconventionnelle, d'une réclamation de tiers, d'une réclamation au titre d'une garantie, d'une réclamation récursoire, d'une réclamation par subrogation, d'une intervention forcée ou autrement, iii) de tenter d'obtenir une exécution, une imposition, une saisie-arrêt, une perception, une contribution ou un recouvrement concernant un jugement, une sentence, un décret ou une ordonnance contre les Parties Quittancées ou leurs biens relativement à une Réclamation, iv) de créer, de parfaire ou de faire valoir autrement, de quelque manière que ce soit et directement ou indirectement, toute priorité ou charge de quelque nature que ce soit contre les Parties Quittancées ou leurs biens à l'égard d'une Réclamation, v) d'agir ou de procéder de quelque manière que ce soit et à tout endroit quel qu'il soit qui ne serait pas conforme aux dispositions des Ordonnances d'Approbation ou qui ne les respecteraient pas dans toute la mesure permise par les lois applicables, vi) de faire valoir tout droit de compensation, de dédommagement, de subrogation, de contribution, d'indemnisation, de réclamation ou d'action en garantie ou d'intervention forcée, de recouvrement ou en annulation de quelque nature que ce soit à l'égard des obligations dues aux Parties Quittancées relativement à une Réclamation ou de faire valoir un droit de cession ou de subrogation concernant une obligation due par l'une des Parties Quittancées relativement à une Réclamation et vii) de prendre toute mesure destinée à entraver la mise en oeuvre ou la conclusion du présent Plan; il est toutefois entendu que les interdictions précitées ne s'appliqueront pas à l'exécution des obligations aux termes du Plan. Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.

Malgré ce qui précède, les Quittances et Injonctions en vertu du Plan prévues au présent paragraphe 5.1i) n'auront aucun effet sur les droits et obligations prévus dans l'Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic intervenue le 19 février 2014 entre le Canada et la Province, et ii) ne s'appliqueront pas aux Réclamations Non Visées ni ne seront interprétées comme s'y appliquant.

[nos soulignés]

29 En plus de ce qui précède, le paragraphe 5.3 du plan stipule expressément que toute réclamation contre des tiers défendeurs:

a) n'est pas visée par le plan;

b) n'est pas quittancée;

c) pourra suivre son cours;

d) ne sera pas limitée ni restreinte de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement; et

e) ne constitue pas une réclamation visée.

De plus, le paragraphe 5.3 du plan réitère qu'aucune personne ne peut faire valoir de réclamation contre l'une ou l'autre des parties quittancées.

5.3 Réclamations contre des Tiers Défendeurs

Toute Réclamation d'une Personne, y compris MMAC et MMA, contre les Tiers Défendeurs qui ne sont pas également des Parties Quittancées: a) n'est pas visée par le présent Plan; b) n'est pas libérée, quittancée, annulée ou exclue conformément au présent Plan; c) pourra suivre son cours contre lesdits Tiers Défendeurs; d) ne sera pas limitée ni restreinte par le présent Plan de quelque manière que ce soit quant au montant dans la mesure où il n'y a aucun double recouvrement par suite

de l'indemnisation reçue par les Créanciers ou les Réclamants conformément au présent Plan; et e) ne constitue pas une Réclamation Visée aux termes du présent Plan. Pour plus de précision et malgré toute autre disposition des présentes, si une Personne, y compris MMAC et MMA, fait valoir une Réclamation contre un Tiers Défendeur qui n'est pas également une Partie Quittancée, tous les droits de ce Tiers Défendeur d'intenter une action récursoire, d'opposer une demande ou de faire ou de poursuivre autrement des droits ou une Réclamation contre l'une des Parties Quittancées à quelque moment que ce soit seront libérés, quittancés et proscrits à jamais selon les modalités du présent Plan et des Ordonnances d'Approbation.

30 Enfin, le paragraphe 3.3 du plan stipule expressément que certaines réclamations ne sont pas visées par le plan:

« 3.3 Réclamations Non Visées

Malgré toute disposition contraire aux présentes, le présent Plan ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant:

(a) les droits ou réclamations des Professionnels Canadiens et des Professionnels Américains pour les honoraires et débours engagés ou devant être engagés pour les services rendus dans le Dossier LACC ou le Dossier de Faillite ou s'y rapportant, y compris la mise en oeuvre du présent Plan et du Plan Américain.

(b) dans la mesure où il existe ou peut exister une couverture d'assurance pour ces réclamations aux termes d'une police d'assurance émise par Great American ou un membre de son groupe, y compris, notamment, la Police de Great American, et seulement dans le mesure où une telle couverture d'assurance est réellement fournie, laquelle couverture d'assurance est cédée au Syndic et à MMAC, sans que les Parties Rail World ou les Parties A&D n'aient l'obligation de verser un paiement ou d'effectuer une contribution pour accroître ce que le Syndic ou MMAC obtient réellement aux termes de cette police d'assurance: i) les réclamations de MMAC ou du Syndic (et seulement du Syndic, de MMAC, de leur personne désignée ou, dans la mesure applicable, des Patrimoines) contre les Parties Rail World et(ou) les Parties A&D; et ii) les réclamations des détenteurs de Réclamations dans les Cas de Décès contre Rail World, Inc., à condition, de plus, que tout droit ou tout recouvrement par ces détenteurs d'un droit ou de recouvrement par les détenteurs de Réclamations dans les Cas de Décès par suite de la mesure autorisée au présent sous-paragraphe soit, à tous égards, subordonné aux réclamations du Syndic et de MMAC, ainsi que de leurs successeurs aux termes du Plan, aux termes des Polices précitées, et iii) les Réclamations de MMAC ou du Syndic contre les Parties A&D pour toute prétendue violation de l'obligation fiduciaire ou toute réclamation similaire fondée sur l'autorisation, par les Parties A&D, des paiements aux porteurs de billets et de bons de souscription émis conformément à une certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la vente de certains biens de MMA à l'État du Maine.

c) les Réclamations de MMAC et du Syndic en vertu des lois, notamment celles relatives à la faillite et l'insolvabilité, destinées à annuler et(ou) à recouvrer les transferts de MMA, de MMAC ou de MMA Corporation aux porteurs de billets et de bons de souscription émis conformément à cette certaine convention d'achat de billets et de bons de souscription intervenue en date du 8 janvier 2003 entre MMA et certains porteurs de billets (telle qu'amendée de temps à autre), dans la mesure où de tels paiements résultent de la distribution du produit tiré de la vente de certains biens de MMA à l'État du Maine.

(d) les réclamations ou causes d'action de toute Personne, y compris MMAC, MMA et les Parties Quittancées (sous réserve des limitations contenues dans leur Convention de Règlement respective) contre des tiers autres que les Parties Quittancées (sous réserve du paragraphe 3.3 (e)).

(e) les Réclamations ou les autres droits préservés par l'une ou l'autre des Parties Quittancées, tel qu'il est indiqué à l'annexe A.

(f) les obligations de MMAC aux termes du Plan, des Conventions de Règlement et des Ordonnances d'Approbation;

(g) les Réclamations contre MMAC. sauf les Réclamations des Parties Quittancées autres que le procureur général du Canada. Toutefois, sous réserve du fait que les Ordonnances d'Approbation deviennent des ordonnances finales, le procureur général du Canada i) s'est engagé à retirer irrévocablement la Preuve de Réclamation produite pour le compte du ministère des Transports du Canada et la Preuve de Réclamation produite pour le compte du Department of Public Safety and Emergency Preparedness, ii) a consenti à une réaffectation en faveur des Créanciers de tous les dividendes payables aux termes du présent Plan ou du Plan Américain sur la Preuve de Réclamation produite pour le compte du Développement économique Canada pour les régions du Québec, tel qu'il est indiqué à la clause 4.3, et iii) a convenu de ne pas produire de Preuve de Réclamation additionnelle au dossier LACC ou au Dossier de Faillite;

(h) toute responsabilité ou obligation des Tiers Défendeurs et toute Réclamation contre ceux-ci. pour autant qu'ils ne soient pas des Parties Quittancées, de quelque nature que ce soit à l'égard du Déraillement ou s'y rapportant, y compris, notamment, le Recours Collectif et les Actions dans le Comté de Cook:

(i) toute Personne pour fraude ou des accusations criminelles ou quasi-criminelles qui sont ou peuvent être produites et, pour plus de précision, pour toute amende ou pénalité découlant de telles accusations;

(j) toute Réclamation que l'une des Parties Rail World ou des Parties A&D peut avoir pour tenter de recouvrer auprès de ses assureurs les dépenses, coûts et honoraires d'avocats qu'elle a engagés avant la Date d'Approbation.

(k) les Réclamations qui font partie de celles décrites au paragraphe 5.1 (2) de la LACC.

Tous les droits et Réclamations précités indiqués au présent paragraphe 3.3, inclusivement, sont collectivement appelés les « Réclamations Non Visées » et, individuellement, une « Réclamation Non Visée ».

[nos soulignés]

31 C'est ce qui est fait dire à CP que:

Le plan « ne compromet pas, ne quittance pas, ne libère pas, n'annule ou ne proscrit pas, ni n'a d'autre incidence concernant » les réclamations contre MMAC, c'est-à-dire que les réclamations contre MMAC ne sont pas visées par le plan. MMAC ne fait pas l'objet d'une restructuration.

32 Aussi le CP plaide que:

a) Les réclamations de toutes les « victimes » et même possiblement des parties quittancées pourront être poursuivies, ou de nouveaux recours pourront être intentés, tant au Canada qu'aux États-Unis, contre les entités non parties au règlement, y compris le CP;

b) Les demandeurs, aux termes du recours collectif peuvent continuer leur action en justice contre les défenderesses CP et World Fuel Services, avec le bénéfice supplémentaire que ces défenderesses « héritent » ainsi de la responsabilité de MMAC, alors que celles-ci se voient empêchées de réclamer toute contribution ou indemnité des parties quittancées!

33 C'est d'ailleurs là le principal argument du CP. Ce qu'elle reproche au plan d'arrangement est que CP se retrouve maintenant seule poursuivie dans le recours collectif. Elle se plaint également que, puisqu'elle n'est pas quittancée en vertu du plan, elle pourrait être poursuivie par toutes personnes ayant subi des dommages à la suite du déraillement. Elle se plaint également qu'elle devrait supporter la part qui reviendrait à MMA. Nous y reviendrons.

34 CP résume bien les critères d'exercice du pouvoir discrétionnaire du tribunal dans l'approbation d'un plan, lorsqu'elle mentionne:

a) Le plan doit être strictement conforme à toutes les exigences prévues par les lois et aux ordonnances antérieures du Tribunal;

b) Tous les documents déposés et les procédures entreprises doivent être examinés pour déterminer si toute mesure prise ou supposée avoir été prise est interdite en vertu de la *LACC;*

c) Le plan doit être juste et équitable. [39]

35 CP plaide que le plan est illégal et dépasse la portée autorisée par la *LACC*.

36 Il est vrai qu'au stade de l'audition sur l'homologation, le tribunal doit s'assurer que le processus en vertu de la *LACC* a été suivi sans enfreindre celle-ci et que rien dans le plan proposé n'y soit contraire [40] .

37 CP plaide qu'une transaction ou un arrangement implique nécessairement la réorganisation des affaires du débiteur.

38 Or, CP fait abstraction du fait que, comme déjà mentionné, la réorganisation des affaires de la débitrice a eu lieu, il y a déjà plus d'un an.

39 D'autre part, le CP allègue:

Dans tous les cas, au moment de la vente de tous les éléments d'actifs de MMAC à RAH, l'« objectif secondaire » consistant à maximiser la valeur des actifs de MMAC avait été accompli et l'application de la LACC ne pouvait donc plus accomplir un objectif légitime; en effet, toutes les affaires de MMAC, à l'exception de ses passifs, avaient été complètement et définitivement liquidées.

40 Encore une fois, CP semble plaider que, puisque les éléments d'actifs sont vendus, le tribunal devrait mettre fin au processus en vertu de la *LACC*.

41 Cette prétention n'a aucune assise juridique, et a d'ailleurs déjà fait l'objet d'un jugement [41] par le soussigné dans le présent dossier dont personne ne s'est plaint.

42 Il faut rappeler que les représentants de CP ont participé à toutes les auditions présidées par le soussigné.

43 CP plaide à titre subsidiaire que le tribunal n'a pas compétence pour sanctionner les quittances et injonctions prévues en faveur des parties quittancées.

44 En plus d'avoir déjà fait l'objet d'une décision du soussigné dans le présent dossier, le tribunal croit qu'il est maintenant bien établi que les tribunaux peuvent, en vertu de la *LACC*, homologuer des plans d'arrangement qui prévoient des quittances en faveur de tierces parties.

45 Dans l'affaire *Metcalfe* [42] , la Cour d'appel de l'Ontario énonce les critères d'analyse à appliquer afin de déterminer si l'octroi de quittances en faveur de tiers peut être approuvé:

[113] At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here - with two additional findings - because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;

c) The Plan cannot succeed without the releases;

> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

46 Dans cette affaire, le juge Blair en est venu à la conclusion que les quittances recherchées en faveur des tierces parties sont justifiées. Il conclut également que les quittances doivent être raisonnablement liées au plan:

> [63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. **In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them.** Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).
>
> [...]
>
> [66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. **The court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51).**
>
> [...]
>
> [69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).
>
> [70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

47 Dans l'affaire *Muscletech* [43] , la Cour supérieure de l'Ontario approuve également l'octroi de quittances à des tiers ayant financé un plan de liquidation. Bien qu'il juge que l'opposition aux quittances envisagées est prématurée (cette opposition devant plutôt se faire lors d'une éventuelle requête pour homologation), l'honorable juge Ground conclut néanmoins que la *LACC* permet ce type de quittances:

> [7] With respect to the relief sought relating to Claims against Third Parties the position of the Objecting Claimants appears to be that this court lacks jurisdiction to make any order affecting claims against third parties who are not applicants in a CCAA proceeding. I do not agree. In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties arising out of "the development, advertising and marketing, and sale of health supplements, weight loss and sports nutrition or other

products by the Applicants or any of them" as part of a global resolution of the litigation commenced in the United States. In his Endorsement of January 18, 2006, Farley J. stated:

> the Product Liability system vis-à-vis the Non-Applicants appears to be in essence derivative of claims against the Applicants and it would neither be logical nor practical/functional to have that Product Liability litigation not be dealt with on an all encompassing basis.
>
> [...]
>
> [9] **It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties.**
>
> [11] In any event, it must be remembered that the Claims of the Objecting Claimants are at this stage unliquidated contingent claims which may in the course of the hearings by the Claims Officer, or on appeal to this court, be found to be without merit or of no or nominal value. **It also appears to me that, to challenge the inclusion of a settlement of all or some claims against Third Parties as part of a Plan of compromise and arrangement, should be dealt with at the sanction hearing when the Plan is brought forward for court approval and that it is premature to bring a motion before this court at this stage to contest provisions of a Plan not yet fully developed.**

48 En l'espèce, les quittances recherchées sont une condition essentielle pour la viabilité du plan puisque les parties quittancées sont les seules qui financent celui-ci. Cet élément militant fortement en faveur du caractère juste et raisonnable des quittances recherchées:

> [23] [...] As stated above, in my view, it must be found to be fair and reasonable to provide Third Party Releases to persons who are contributing to the Contributed Funds to provide funding for the distributions to creditors pursuant to the Plan. **Not only is it fair and reasonable; it is absolutely essential. There will be no funding and no Plan if the Third Party Releases are not provided.** [44]

49 [45] À titre subsidiaire, CP plaide également que le plan ne peut servir d'outil pour régler des différends entre des tiers solvables, sans octroyer une quittance à MMAC. Cet argument subsidiaire rejoint l'argument du CP qui plaide que le plan a une incidence négative sur les droits du CP.

50 En effet, CP plaide:

> Puisque la responsabilité du CP est, entre autres choses, recherchée sur une base solidaire dans le cadre du recours collectif, et puisque le CP n'est pas une partie quittancée aux termes du plan, ses droits seront directement et considérablement touchés.

51 CP plaide entre autres que le règlement partiel d'un litige multipartite doit être, à tout le moins, un évènement neutre pour les défendeurs non parties au règlement.

52 Elle plaide que le plan ne confère pas au CP le titre de protection ordinaire qu'elle pourrait recevoir au terme d'un règlement partiel d'un recours collectif en droit civil.

53 Comme déjà mentionné, rien n'empêchera CP de se défendre à toute action intentée contre elle. Si elle n'est pas responsable, l'action sera rejetée.

54 Si elle prétend que les dommages ont été causés par la faute d'un tiers, elle peut le plaider sans que ce tiers soit partie aux procédures.

55 En fait, cela donnera même un avantage au CP, qui pourra continuer de plaider que la tragédie est la faute de tous, sauf elle.

56 D'ailleurs, la Cour suprême nous rappelait très récemment que [46] :

> [138] À notre avis, la Cour d'appel a aussi eu raison d'intervenir sur la question des dommages. L'analyse de la juge du procès était entachée d'une erreur déterminante. Elle a fait défaut de tenir compte de la solidarité et de fixer les montants accordés en fonction de la responsabilité respective de chacun des débiteurs solidaires. Comme le souligne la Cour d'appel, « dans toute la mesure où des postes de réclamation pouvaient relever de la responsabilité de plus d'un débiteur solidaire, les remises consenties par M. Hinse rendaient nécessaires l'examen des fautes causales et le partage des parts de responsabilité »: par. 189. M. Hinse aurait dû supporter la part des débiteurs solidaires qu'il a libérés: art. 1526 et 1690 *C.c.Q.*
>
> [139] La juge de première instance a abordé la question des dommages comme si le Ministre était le seul fautif et que le préjudice de M. Hinse ne découlait que de son « inertie institutionnelle »: par. 75-77. De fait, au lieu de déterminer les montants des dommages-intérêts précisément imputables au PGC, la juge s'en est simplement remise aux revendications de M. Hinse:
>
> Comme, de plus, à la suite de la transaction conclue entre le PGQ et Hinse, ce dernier a amendé sa procédure afin de ne réclamer au PGC que la portion qu'il lui attribue selon les différents chefs de dommages qu'il invoque, pour les fins du présent débat, respectant les dispositions plus haut citées, le Tribunal n'analysera que les demandes adaptées à cette nouvelle réalité et qui ne concernent que le PGC. [par. 22]
>
> [140] À l'exception des dommages-intérêts punitifs, elle a ainsi accordé les sommes réclamées en supposant que M. Hinse les avait correctement limitées à ce qui concerne le PGC uniquement. Or, la part de responsabilité des divers codébiteurs de M. Hinse devait s'évaluer en fonction de la gravité de leur faute respective: art. 1478 *C.c.Q.* La juge ne pouvait pas s'en tenir simplement à la répartition suggérée par M. Hinse; son rôle d'arbitre des dommages-intérêts exigeait qu'elle fixe elle-même la part de responsabilité de chacun.
>
> [141] Au-delà de cette erreur déterminante, qui fausse tous les chefs de dommages accordés, les fondements à l'appui de chacun étaient en outre déficients.
>
> **(1) Dommages pécuniaires**
>
> [142] La juge Poulin a condamné le PGC à verser un total de 855 229,61 $ au titre des dommages pécuniaires. Ce montant paraît démesuré compte tenu de la somme de 1100 000 $ déjà versée à ce chapitre par le PGQ aux termes de la transaction intervenue entre ce dernier et M. Hinse. Au minimum, il appartenait à M. Hinse de démontrer que les sommes visaient des compensations distinctes. Il ne l'a pas fait. La ventilation des sommes accordées révèle d'ailleurs que rien ne justifiait les montants réclamés.

57 Bref, si CP n'est pas responsable, l'action sera rejetée contre elle.

58 Si elle est responsable, et que des tiers également responsables ont été quittancés, CP sera libérée de la part des débiteurs solidaires qui ont été libérés.

59 En fait, ce qui serait injuste, serait que CP bénéficie d'une quittance alors qu'elle n'a pas contribué financièrement au plan, contrairement aux autres codéfendeurs.

60 CP plaide également qu'elle devrait être libérée de sa quote-part de la part de responsabilité avec MMA.

61 Il ne relève certainement pas de la juridiction du juge soussigné d'en décider.

62 Le juge saisi du recours contre CP en décidera.

63 Quant à la question constitutionnelle soulevée dans le plan d'argumentation de CP et pour lequel des avis en vertu de l'article 95 *Cpc* ont été expédiés, le tribunal prend acte du peu d'insistance du CP à plaider cet argument lors de l'audition.

64 Le tribunal fait siens les arguments proposés par le Procureur général du Canada lorsqu'il affirme:

> 4. Le 15 mai 2015, le PGC recevait un avis de la part de la Compagnie de Chemin de fer Canadien Pacifique (CP) en vertu de l'article 95 du *Code de procédure civile (Cpc)*.
>
> 5. CP ne conteste pas la constitutionnalité de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* ») ni aucune de ses dispositions.
>
> • *Plan d'argumentation au soutien de la contestation par la Compagnie de Chemin de Fer Canadien Pacifique du Plan de transaction et d'arrangement*, paragr. 110.
>
> 6. CP soutient plutôt que l'homologation par le tribunal, sous l'égide de la *LACC*, du Plan de MMAC, empièterait de manière massive et illégitime sur la compétence des législatures provinciales en matière de propriété et de droits civils.
>
> 7. En l'absence d'argument de la part de CP quant à l'applicabilité constitutionnelle, la validité ou l'opérabilité de la *LACC*, l'avis en vertu de l'article *CPC* n'était pas requis.
>
> 8. Il faut par ailleurs rappeler que la validité constitutionnelle d'une loi est fonction de son caractère véritable et du fait que celui-ci se rattache à une matière relevant de la compétence de la législature qui l'a adoptée. Le caractère véritable de la loi est déterminé en fonction du but de la loi et de ses effets juridiques. Or, la validité constitutionnelle d'une loi ne dépend pas des effets qu'elle peut produire dans un cas en particulier.
>
> • *Canadian Western Bank c. Alberta*, [2007] 2 S.C.R. 3, paragr. 25-27 (autorités de MMAC, onglet 44).
>
> 9. De même, et bien que ce ne soit pas le cas en l'espèce, l'existence d'un conflit entre une loi fédérale et une loi provinciale n'est pas pertinente quant à la validité constitutionnelle de la loi. L'existence d'un conflit de lois pourrait être pertinente en vertu de la doctrine de la prépondérance fédérale - mais cette doctrine aurait pour effet de rendre inopérante la loi provinciale dans la mesure de son incompatibilité avec la loi fédérale.
>
> • Peter HOGG, *Constitutional Law of Canada*, 5&sup-e; éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 16-1 -16-3 (autorités du PGC, onglet 1)
>
> 10. La *LACC* porte en son caractère dominant et véritable sur l'insolvabilité. Son objet et ses effets favorisent la conclusion de compromis et d'arrangements justes et raisonnables en tenant compte des intérêts des compagnies débitrices, de leurs créanciers, des autres parties intéressées et de l'intérêt public.
>
> • *Century Services Inc. c. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010 CSC 60, paragr. 60 (autorités de MMAC, onglet 14)
>
> 11. Ainsi, la *LACC* relève manifestement du domaine de la faillite et de l'insolvabilité, un champ de compétence attribué au Parlement par le paragraphe 91(21) de la *Loi constitutionnelle* de 1867.
>
> • *Reference re constitutional validity of the Compagnies Creditors Arrangement Ace* (Dom.) [1934] S.C.R. 659, p. 660 (autorités de MMAC, onglet 46)
>
> 12. Il ne fait pas aucun doute que *LACC* n'est pas inconstitutionnelle du seul fait que l'exercice, par les tribunaux, des pouvoirs qui leurs **(sic)** sont conférés produise des effets sur la propriété et les droits civils des parties impliquées, compétence autrement réservée à la législature des provinces
>
> • *Canadian Western Bank c. Alberta*, [2007] 2 S.C.R. 3, paragr. 28 (autorités de MMAC, onglet 44)

« Le corollaire fondamental de cette méthode d'analyse constitutionnelle est qu'une législation dont le caractère véritable relève de la compétence du législateur qui l'a adoptée pourra, au moins dans une certaine mesure, toucher les matières qui ne sont pas de la compétence sans nécessairement toucher sa validité constitutionnelle. »

13. Autrement, l'efficacité de la *LACC* serait complètement paralysée.

• Peter HOGG *Constitutional Law of Canada*, 5&sup-e; éd., vol.1, feuilles mobiles, Thomson/Carswell, p. 25-3 (autorités de MMAC, onglet 45)

14. La *LACC* est constitutionnelle même dans la mesure où les pouvoirs qu'elle octroie aux tribunaux leur permettent d'approuver des plans accordant des quittances à des tiers.

• *Metcalfe & Mansfield Alternative Investments II Corp.*, (Re), 2008 ONCA 587, paragr. 104 (autorités de MMAC, onglet 24)

15. Par ailleurs, le Conseil Privé a confirmé la validité constitutionnelle d'une loi du Parlement, découlant de sa compétence en matière de faillite et d'insolvabilité, permettant à des agriculteurs de conclure des plans d'arrangements avec leurs créanciers sans que ces agriculteurs soient pour autant libérés de leurs dettes.

• *Farmers' Creditors Arrangement Act (FCAA)*, [1937] A.C. 391, p. 403-404 (autorités de MMAC, onglet 49), confirmant *Reference re legislative jurisdiction of Parliament of Canada to enact the Farmers' Creditors Arrangement Act, 1934, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935*, [1936] S.C.R. 384, p. 398 (autorités de MMAC, onglet 48)

16. Par le fait même, dans la mesure où la *LACC* permet aux tribunaux d'homologuer un plan d'arrangement par lequel la compagnie débitrice n'est pas libérée, cette loi est également *intra vires* du pouvoir du Parlement.

17. La nature réparatrice et flexible de cette loi permet aux tribunaux de rendre des ordonnances innovatrices dans la mesure où elles sont faites en conformité avec la loi, ce qui est le cas en l'espèce.

18. D'ailleurs, un plan d'arrangement octroyant des quittances à des tiers mais non à la débitrice principale a déjà été entériné par la Cour fédérale d'Australie.

• *Lehman Brother Australia Ltd. In the matter of Lehman Brothers Australia Ltd ((in liq) No2)*, [2013] FCA 965, paragr. 34-57 (Australie) (autorités de MMAC, onglet 52)

19. Notons également que les doctrines constitutionnelles reconnaissent que, concrètement, « le maintien de l'équilibre des compétences relève avant tout des gouvernements, et doivent faciliter et non miner ce que la Cour [suprême] a appelé un « fédéralisme coopératif ».

• *Canadian Western Bank c. Alberta*, [2007] 2 S.C.R. 3, paragr. 24 (autorités de MMAC, onglet 44)

20. Dans les circonstances, l'avis de question constitutionnelle signifiée par CP aux procureurs généraux, n'a pas sa raison d'être et doit donc être rejeté.

65 Bref, non seulement le soussigné croit que le plan proposé est juste et raisonnable, mais retenir les arguments présentés par le CP déconsidérait la confiance du public envers les tribunaux.

66 En effet, depuis plus de deux ans, les victimes de la terrible tragédie de Lac-Mégantic s'en sont remises au processus judiciaire. Depuis deux ans, toutes les actions faites dans le présent dossier étaient orientées vers la présentation du plan d'arrangement qui fut voté à l'unanimité par les créanciers de la débitrice.

67 Malgré que les ressources judiciaires soient limitées, des ressources considérables ont été mises à contribution pour pouvoir faire en sorte que les victimes de Lac-Mégantic obtiennent justice.

68 Les procureurs et les justiciables des districts de Mégantic, Saint-François et Bedford étaient conscients que les ressources judiciaires utilisées dans le dossier de Lac-Mégantic ne pouvaient être utilisées par eux.

69 L'utilisation de ces ressources judiciaires a eu pour effet de retarder d'autres dossiers.

70 Faire avorter aujourd'hui ce plan d'arrangement pour le seul bénéfice d'un tiers contre qui un recours collectif a été autorisé, alors que ce tiers est partie aux procédures depuis le début, serait injuste et déraisonnable.

71 Une dernière remarque s'impose. La requérante a déposé sous scellé les quittances et transactions intervenues entre les tiers responsables dans ce dossier. Un jugement du soussigné a été rendu sur la possibilité pour CP de prendre connaissance de ces quittances.

72 CP a été autorisée à prendre connaissance des quittances caviardées. Elle ne connaît donc pas les montants pour lesquels les tiers responsables ont contribués, sauf en ce qui concerne Irving Oil et World Fuel Services qui ont rendu public le montant de leur contribution.

73 Le tribunal s'est interrogé, séance tenante, sur la possibilité pour lui de prendre connaissance de la contribution de chaque tiers qui contribue au fonds d'indemnisation sans que le CP en ait connaissance.

74 En effet, la règle *audi alteram partem* et la règle de la publicité des débats pourraient ne pas être respectées si le tribunal prend en considération une preuve dont n'a pas bénéficié une des parties opposantes.

75 C'est pourquoi, le tribunal n'a pas pris connaissance de la contribution de chaque partie ayant cotisé au fonds d'indemnisation.

76 Le tribunal peut apprécier que la contribution totale de 430 M$ est raisonnable en l'espèce.

77 De plus, le tribunal a été informé tout au long du processus des démarches faites par MMA. Le tribunal a nommé des procureurs pour représenter les victimes de la tragédie de Lac-Mégantic qui ont participé à la négociation pour la constitution du fonds d'indemnisation. Le Gouvernement du Québec a également participé à cette négociation.

78 Puisque le tribunal connaît la somme finale qui sera payée à même le fonds d'indemnisation, il n'est pas nécessaire de savoir le montant exact de participation de chacune des parties. Le tribunal considère raisonnable le règlement intervenu qui a été voté à l'unanimité par les créanciers.

POUR CES MOTIFS. LE TRIBUNAL:

79 *ACCUEILLE* la requête en approbation du plan d'arrangement amendé;

Definitions

80 *ORDERS* that capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Amended Plan of Compromise and Arrangement of the Petitioner dated June 8, 2015 and filed in the court record on June 17, 2015, a copy of which is attached hereto as Schedule "*A*" (the "*Plan*") or in the Creditors' Meeting Order granted by the Court on May 5, 2015 (the "*Meeting Order*"), as the case may be;

Service and Meeting

81 *ORDERS AND DECLARES* that that the Notification Procedures set out in paragraphs 61 to 66 of the Meeting Order have been duly followed and that there has been valid and sufficient notice of the Creditors' Meeting and service, delivery and notice

of the Meeting Materials including the Plan and the Monitor's Nineteenth Report dated May 14, 2015, for the purpose of the Creditors' Meeting, which service, delivery and notice was effected by (i) publication on the Monitor's Website, (ii) sending to the Service List, (iii) mailing of the documents set out in paragraph 64 of the Meeting Order to all known Creditors, by prepaid regular mail, courier, fax or email, at the address appearing on a Creditor's Proof of Claim, and (iv) publication of the Notice to Creditors in the Designated Newspapers, and that no other or further notice is or shall be required;

82 *ORDERS AND DECLARES* that the Creditors' Meeting was duly called, convened, held and conducted in accordance with the CCAA and the Orders of this Court in these proceedings, including without limitation the Meeting Order;

Sanction of the Plan

83 *ORDERS AND DECLARES* that:

a) the Petitioner is a debtor company to which the CCAA applies, and the Court has jurisdiction to sanction the Plan;

b) the Plan has been approved by the required majority of Creditors with Voting Claims in conformity with the CCAA and the Meeting Order;

c) the Petitioner has complied in all respects with the provisions of the CCAA and all the Orders made by this Court in the CCAA Proceedings;

d) the Court is satisfied that the Petitioner has neither done nor purported to do anything that is not authorized by the CCAA; and

e) the Petitioner, Creditors having Government Claims, the Class Representatives, and the Released Parties have each acted in good faith and with due diligence, and the Plan (and its implementation) is fair and reasonable, and in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan;

84 *ORDERS AND DECLARES* that the Plan and its implementation, are hereby sanctioned and approved pursuant to Section 6 of the CCAA;

Plan Implementation

85 *DECLARES* that the Petitioner and the Monitor are hereby authorized and directed to take all steps and actions, and to do all such things, as determined by the Monitor and the Petitioner, respectively, to be necessary or appropriate to implement the Plan in accordance with its terms and as contemplated thereby, and to enter into, adopt, execute, deliver, implement and consummate all of the steps, transactions and agreements, including, without limitation, the Settlement Agreements, as required by the Monitor or the Petitioner, respectively, as contemplated by the Plan, and all such steps, transactions and agreements are hereby approved;

86 *ORDERS* that as of the Plan Implementation Date, the Petitioner, represented by the Trustee, the sole shareholder of the Petitioner, shall be authorized and directed to issue, execute and deliver any and all agreements, documents, securities and instruments contemplated by the Plan, and to perform its obligations under such agreements, documents, securities and instruments as may be necessary or desirable to implement and effect the Plan, and to take any further actions required in connection therewith;

87 *ORDERS* that the Plan and all associated steps, compromises, transactions, arrangements, releases, injunctions, offsets and cancellations effected thereby are hereby approved, shall be deemed to be implemented and shall be binding and effective in accordance with the terms of the Plan or at such other time, times or manner as may be set forth in the Plan, in the sequence provided therein, and shall enure to the benefit of and be binding upon the Petitioner, the Released Parties and all Persons affected by the Plan and their respective heirs, administrators, executors, legal personal representatives, successors and assigns;

88 *ORDERS*, subject to the terms of the Plan, that from and after the Plan Implementation Date, all Persons shall be deemed to have waived any and all defaults of the Petitioner then existing or previously committed by the Petitioner, or caused by the Petitioner, directly or indirectly, or noncompliance with any covenant, warranty, representation, undertaking, positive or negative pledge, term, provision, condition or obligation, expressed or implied, in any contract, instrument, credit document, lease, guarantee, agreement for sale, deed, licence, permit or other agreement, written or oral, and any and all amendments or supplements thereto, existing between such Person and the Petitioner arising directly or indirectly from the filing by the Petitioner under the CCAA and the implementation of the Plan and any and all notices of default and demands for payment or any step or proceeding taken or commenced in connection therewith under any such agreement shall be deemed to have been rescinded and of no further force or effect, provided that nothing shall be deemed to excuse the Petitioner from performing its obligations under the Plan or be a waiver of defaults by the Petitioner under the Plan and the related documents;

89 *ORDERS* that from and after the Plan Implementation Date, and for the purposes of the Plan only, if the Petitioner does not have the ability or the capacity pursuant to applicable law to provide its agreement, waiver, consent or approval to any matter requiring its agreement, waiver, consent or approval under the Plan, such agreement, waiver, consent or approval may be provided by the Trustee, or that such agreement, waiver, consent or approval shall be deemed not to be necessary;

90 *ORDERS* that upon fulfillment or waiver of the conditions precedent to implementation of the Plan as set out and in accordance with Article 6 of the Plan, the Monitor shall deliver the Monitor's Certificate, substantially in the form attached as Schedule "B" to this Order, to the Petitioner in accordance with Article 6.1 of the Plan and shall file with the Court a copy of such certificate as soon as reasonably practicable on or forthwith following the Plan Implementation Date and shall post a copy of same, once filed, on the Monitor's Website;

Distributions by the Monitor

91 *ORDERS* that on the Plan Implementation Date, the Monitor shall be authorized and directed to administer and finally determine the Affected Claims of Creditors and to manage the distribution of the Funds for Distribution in accordance with the Plan and the Claims Resolution Order;

92 *ORDERS AND DECLARES* that all distributions to and payments by or at the direction of the Monitor, in each case on behalf of the Petitioner, to the Creditors with Voting Claims under the Plan are for the account of the Petitioner and the fulfillment of its obligations under the Plan including to make distributions to Affected Creditors with Proven Claims;

93 *ORDERS AND DECLARES* that, notwithstanding:

a) the pendency of these proceedings and the declarations of insolvency made therein;

b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., c. B-3, as amended (the "*BIA*") in respect of the Petitioner and any bankruptcy order issued pursuant to any such application; and

c) any assignment in bankruptcy made in respect of the Petitioner;

the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or after the Filing Date, and any action taken in connection therewith, including, without limitation, under this Order shall not be void or voidable and do not constitute nor shall they be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable transaction under the BIA, article 1631 and following of the Civil Code or any other applicable federal or provincial legislation, and the transactions contemplated in the Plan, the payments or distributions made in connection with the Plan and the Settlement Agreements contemplated thereby, whether before or after the Filing Date, and any action taken in connection therewith, do not constitute conduct meriting an oppression remedy under any applicable statute and shall be binding on an interim receiver, receiver, liquidator or trustee in bankruptcy appointed in respect of the Petitioner;

Approval of Settlement Agreements

94 *ORDERS AND DECLARES* that (i) the Petitioner has entered into the Settlement Agreements in exchange for fair and reasonable consideration; (ii) each Settlement Agreement is a good faith compromise, in the best interests of the Petitioner, the Creditors, the other stakeholders of the Petitioner and all other Persons stipulated in the Plan; (iii) each Settlement Agreement is fair, equitable and reasonable and an essential element of the Plan and (iv) each of the Settlement Agreements be and is hereby approved;

95 *ORDERS* that the Settlement Agreements shall be sealed and shall not form part of the public record, subject to further Order of this Court;

96 *ORDERS AND DIRECTS* the Monitor to do such things and take such steps as are contemplated to be done and taken by the Monitor under the Plan. Without limitation: (i) the Monitor shall hold the Indemnity Fund to which the Settlement Funds will be deposited; and (ii) hold and distribute the Funds for Distribution in accordance with the terms of the Plan and the Claims Resolution Order;

Releases and Injunctions

97 *ORDERS AND DECLARES* that the compromises, arrangements, releases, discharges and injunctions contemplated in the Plan, including those granted by and for the benefit of the Released Parties, are integral components thereof and are necessary for, and vital to, the success of the Plan and that all such releases, discharges and injunctions are hereby sanctioned, approved, binding and effective as and from the Effective Time on the Plan Implementation Date. For greater certainty, nothing herein or in the Plan shall release or affect any rights or obligations provided under the Plan;

98 *ORDERS* that, without limiting anything in this Order, including without limitation, paragraph 19 hereof, or anything in the Plan, any Claim that any Person (regardless of whether or not such Person is a Creditor or Claimant) holds or asserts or may in the future hold or assert against any of the Released Parties or that could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, arising out of, in connection with and/or in any way related to the Derailment, the Policies, MMA, and/or MMAC, is hereby permanently and automatically released and the enforcement, prosecution, continuation or commencement thereof is permanently and automatically enjoined and forbidden. Any and all Claims against the Released Parties are permanently and automatically compromised, discharged and extinguished, and all Persons and Claimants, whether or not consensually, shall be deemed to have granted full, final, absolute, unconditional, complete and definitive releases of any and all Claims to the Released Parties;

99 *ORDERS* that all Persons (regardless of whether or not such Persons are Creditors or Claimants) shall be permanently and forever barred, estopped, stayed and enjoined from (i) pursuing any Claim, directly or indirectly, against the Released Parties, (ii) continuing or commencing, directly or indirectly, any action or other proceeding with respect to any Claim against the Released Parties, or with respect to any claim that, with the exception of any claims preserved pursuant to Section 5.3 of the Plan against any Third Party Defendants that are not also Released Parties, could give rise to a Claim against the Released Parties whether through a cross-claim, third-party claim, warranty claim, recursory claim, subrogation claim, forced intervention or otherwise, (iii) seeking the enforcement, levy, attachment, collection, contribution or recovery of or from any judgment, award, decree, or order against the Released Parties or property of the Released Parties with respect to any Claim, (iv) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or the property of the Released Parties with respect to any Claim, (v) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the Approval Orders to the full extent permitted by applicable law, and (vi) asserting any right of setoff, compensation, subrogation, contribution, indemnity, claim or action in warranty or forced intervention, recoupment or avoidance of any kind against any obligations due to the Released Parties with respect to any Claim or asserting any right of assignment of or subrogation against any obligation due by any of the Released Parties with respect to

any Claim; and (vii) taking any actions to interfere with the implementation or consummation of this Plan, provided, however, that the foregoing shall not apply to the enforcement of any obligations under the Plan;

100 *ORDERS* that notwithstanding the foregoing, the Plan Releases and Injunctions as provided in this Order (i) shall have no effect on the rights and obligations provided by the "Entente d'assistance financière découlant du sinistre survenu dans la ville de Lac-Mégantic" signed on February 19, 2014 between Canada and the Province, (ii) shall not extend to and shall not be construed as extending to any Unaffected Claims;

101 *ORDERS* that, without limitation to the Meeting Order and Claims Procedure Order, any holder of a Claim, including any Creditor, who did not file a Proof of Claim before the applicable Bar Date shall be and is hereby forever barred from making any Claim against the Petitioner and Released Parties and any of their successors and assigns, and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished;

Charges

102 *ORDERS* that, subject to paragraphs 25 and 27 hereof, upon the Plan Implementation Date, all CCAA Charges against the Petitioner or its property created by the Initial Order or any subsequent orders (as defined in the Initial Order, the "*CCAA Charges*") shall be terminated, discharged and released;

103 *ORDERS* that, notwithstanding paragraph 24 hereof, the Canadian Professionals and U.S. Professionals are entitled to the Administration Charge set out in Article 7 of the Plan as security for the payment of the fees and disbursements of the Canadian Professionals and U.S. Professionals;

104 *DECLARES* that the Canadian Professionals and U.S. Professionals, as security for the professional fees and disbursements owed or to be owed to them in connection with or relating to the CCAA Proceeding including the Plan and its implementation, be entitled to the benefit of and are hereby granted a charge and security in the Settlement Funds, to the exclusion of the XL Indemnity Payment, to the extent of the aggregate amount of $20,000,000.00, plus any applicable sales taxes for the Canadian Professionals (defined in the Plan as the Administration Charge Reserve). The Administration Charge shall rank in priority to any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances, security or rights of whatever nature or kind or deemed trusts (collectively "*Encumbrances*") affecting the Settlement Funds, to the exclusion of the XL Indemnity Payment, if any;

105 *ORDERS* that the Petitioner shall not grant any Encumbrances in or against the Settlement Funds that rank in priority to, or *pari passu* with, the Administration Charge unless the Petitioner obtains the prior written consent of the Monitor and the prior approval of the Court.

106 *DECLARES* that the Administration Charge shall immediately attach to the Settlement Funds, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

107 *DECLARES* that the Administration Charge and the rights and remedies of the beneficiaries of same, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any agreement or other arrangement which binds the Petitioner (a "*Third Party Agreement*"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of the Administration Charge shall not create or be deemed to constitute a breach by the Petitioner of any Third Party Agreement to which it is a party; and

b) any of the beneficiaries of the Administration Charge shall not have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the Administration Charge;

108 *DECLARES* that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a receiving order filed pursuant to the BIA in respect of the Petitioner and any receiving order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioner, and (iii) the provisions of any federal or provincial statute, the payments or disposition of Settlement Funds made by the Monitor pursuant to the Plan and the granting of the Administration Charge, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law;

109 *DECLARES* that the Administration Charge shall be valid and enforceable as against all Settlement Funds, subject to the Administration Charge Reserve, and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioner, for all purposes;

110 *ORDERS* that, notwithstanding any of the terms of the Plan or this Order, the Petitioner shall not be released or discharged from its obligation in respect of the Unaffected Claims, including, without limitation, to pay the fees and expenses of the Canadian Professionals and the U.S. Professionals;

Stay of Proceedings

111 *EXTENDS* the Stay Period (as defined in the Initial Order and as extended from time to time) to and including December 15, 2015;

112 *ORDERS* that all orders made in the CCAA Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Meeting Order, the Claims Resolution Order or any further Order of this Court;

The Monitor

113 *ORDERS* that all of the actions and conduct of the Monitor disclosed in the Monitor's Reports are hereby approved, and *DECLARES* that the Monitor has satisfied all of its obligations up to and including the date of this Order;

114 *ORDERS* that, effective upon the Plan Implementation Date, any and all claims against (a) the Monitor in connection with the performance of its duties as Monitor of the Petitioner up to the Plan Implementation Date, (b) the Released Parties in connection with any act or omission relating to the negotiation, drafting or execution of their respective Settlement Agreements, or the negotiation, solicitation or implementation of the Plan, (c) Creditors having Government Claims in connection with the negotiation, solicitation and implementation of the Plan, and (d) the Class Representatives in connection with the negotiation, solicitation and implementation of the Plan shall, in each case, be and are hereby stayed, extinguished and forever barred and neither the Monitor, the Released Parties, Creditors having Government Claims nor the Class Representatives shall have any liability in respect thereof except for any liability arising out of gross negligence or willful misconduct on the part of any of them, provided however that this paragraph shall not release (i) the Monitor of its remaining duties pursuant to the Plan and this Order (the "*Remaining Duties*") or (ii) the Released Parties from their remaining duties pursuant to their respective Settlement Agreements;

115 *ORDERS* that no action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity or conduct as Monitor except with prior leave of this Court on notice to the Monitor and upon such terms as may be determined by the Court;

116 *DECLARES* that the protections afforded to Richter Advisory Group Inc., as Monitor and as officer of this Court, pursuant to the terms of the Initial Order and the other Orders made in the CCAA Proceedings shall not expire or terminate on the Plan Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect;

117 *DECLARES* that the Monitor has been and shall be entitled to rely on the books and records of the Petitioner and any information provided by the Petitioner without independent investigation and shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information;

118 *DECLARES* that any distributions under the Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Petitioner for the purposes of section 14 of the Tax Administration Act (Québec) or any other similar provincial or territorial tax legislation (collectively the "*Tax Statutes*") given that the Monitor is only a disbursing agent of the payments under the Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder or under the Plan, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made or to be made under the Plan or this Order and any claims of this nature are hereby forever barred;

119 *DECLARES* that the Monitor shall not, under any circumstances, be liable for any of the Petitioner's tax liabilities regardless of how or when such liability may have arisen;

120 *DECLARES* that neither the Monitor, the Released Parties, Creditors having Governmental Claims nor the Class Representatives shall incur any liability as a result of acting in accordance with the Plan and the Orders, including without limitation, this Order, other than any liability arising out of or in connection with the gross negligence or willful misconduct of any of them;

121 *ORDERS* that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court the Monitor's Plan Completion Certificate, substantially in the form attached as Schedule "C" to this Order (the "*Monitor's Plan Completion Certificate*") stating that all of the Monitor's Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of the Monitor's Plan Completion Certificate, Richter Advisory Group Inc. shall be deemed to be discharged from its duties as Monitor of the Petitioner in the CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings;

122 *ORDERS AND DECLARES* that the Monitor and the Petitioner, and their successors and assigns, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable tax withholding and reporting requirements. All amounts withheld on account of taxes shall be treated for all purposes as having been paid to the Affected Creditors in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate governmental authority;

General

123 *DECLARES* that the Monitor or the Petitioner may, from time to time, apply to this Court for any advice, directions or determinations concerning the exercise of their respective powers, duties and rights hereunder or in respect of resolving any matter or dispute relating to the Plan, the Claims Resolution Order or this Order, or to the subject matter thereof or the rights and benefits thereunder, including, without limitation, regarding the distribution mechanics under the Plan;

124 *DECLARES* that any other directly affected party that wishes to apply to this Court, including with respect to a dispute relating to the Plan, its implementation or its effects, must proceed by motion presentable before this Court after a 10-day prior notice of the presentation thereof given to the Petitioner and the Monitor in accordance with the Initial Order;

125 *DECLARES* that the Monitor is authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for an order recognizing the Plan and this Order and confirming that the Plan and this Order are binding and effective in such jurisdiction and that the Monitor is the Petitioner's foreign representative for those purposes;

126 *REQUESTS* the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms

of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order;

127 *ORDERS* that Schedule B to the Amended Plan and the Settlement agreements included therein, save and except for the XL Settlement Agreement, be filed under seal, the whole subject to further Order of this Court;

128 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

129 *LE TOUT* avec dépens contre la compagnie de chemin de fer Canadien Pacifique.

Requête accordée.

appendix "B"

Monitor's Plan Implementation date Certificate

CANADA *PROVINCE OF QUÉBEC* *DISTRICT OF MONTRÉAL*	*SUPERIOR COURT* *Commercial Division* (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

No.: 500-11-

IN THE MATTER OF THE PLAN OF COMPROMISE OF: • Petitioner -and- • Monitor

CERTIFICATE OF THE MONITOR OF • (Plan Implementation)

All capitalized terms not otherwise defined herein have the meanings ascribed thereto in the Plan of Compromise and Arrangement of • pursuant to the *Companies' Creditors Arrangement Act, R.S.C.* 1985, c. C-36, as amended, dated • (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "*Plan*").

Pursuant to section • of the Plan, • (the "*Monitor*"), in its capacity as Court-appointed Monitor of *[DEBTOR]*, delivers this certificate to *[DEBTOR]* and hereby certifies that all of the conditions precedent to implementation of the Plan as set out in section • of the Plan have been satisfied or waived by •. Pursuant to the Plan, the *[Plan Implementation Date]* has occurred on this day. This Certificate will be filed with the Court and posted on the Monitor's Website.

DATED at the City of Montréal, in the Province of Québec, this _____ day of _____, •.

•, in its capacity as the Court-appointed Monitor of [DEBTOR]

Per:

_____

Name:

Title:

Schedule "C" — Monitor's Plan Completion Certificate

CANADA *PROVINCE OF QUÉBEC*	*SUPERIOR COURT* *Commercial Division*

DISTRICT OF MONTRÉAL

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

No.: 500-11-

IN THE MATTER OF THE PLAN OF COMPROMISE OF: • Petitioner -and- • Monitor

CERTIFICATE OF THE MONITOR (Plan Completion)

Recitals:

A. Pursuant to an Order of the Honourable • of the Québec Superior Court (Commercial Division) (the "*Court*") dated •, • was appointed as the Monitor (the "*Monitor*") of [*DEBTOR*].

B. Pursuant to an Order of the Honourable • of the Court dated • (the "*Sanction Order*"), the Court sanctioned and approved the Plan of Compromise of • pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, dated • (as may be amended, restated, supplemented and/or modified in accordance with its terms, the "*Plan*").

C. Pursuant to the Sanction Order, the Court ordered that upon the completion by the Monitor of its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan, the Monitor shall file with the Court a certificate stating that all of the Remaining Duties have been completed and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties, and upon the filing of such certificate, • shall be deemed to be discharged from its duties as Monitor of • in the CCAA Proceedings and released from any and all claims relating to its activities as Monitor in the CCAA Proceedings.

D. All capitalized terms not otherwise defined herein shall have the meaning set out in the Sanction Order.

Pursuant to paragraph • of the Sanction Order, • in its capacity as Court-appointed Monitor of • (the "*Monitor*") hereby certifies that the Monitor has completed its Remaining Duties, including, without limitation, distributions to be made by or at the direction of the Monitor in accordance with the Plan and that the Monitor is unaware of any claims with respect to its performance of such Remaining Duties.

DATED at the City of Montréal, in the Province of Québec, this _____ day of _____, •.

•, in its capacity as the Court-appointed Monitor of •

Per:

_____

Name:

Title:

Notes de bas de page

1 Shelley C. Fitzpatrick, *Liquidating CCAAs - Are We Praying to False Gods?*, dans *Annual Review of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.41.

2 Bill Kaplan, *Liquidating CCAAs: Discretion gone Awry?*, dans *Annual Review of Insolvency Law 2008*, Janis P. Sarra, Toronto, Thomson/Carswell, 2008, p.79

3 *Ibid*, p.89.

4 *Supra*, note 1, p. 47.

5 *Re Lehndorff General Partner Ltd.* (1993) 17 C.B.R. (3d) 24; *Re Olympia & York Developments Ltd* (1995) 34 C.B.R. (3d) 93; *Re Anvil Range Mining Corp.* (2001) 25 C.B.R. (4th) 1.

6 *Supra*, note 2, p.90.

7 (1990) 4 C.B.R. (3d) 311 (CB C.A.).

8 2008 BCCA 327 (B.C. C.A.) .

9 EYB 1991-63766 (QC C.A.), par. 26.

10 *Supra*, note 1.

11 *Supra*, note 2, p.54, 55.

12 ATB *Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* 2008 ONCA 587, par. 51, 52.

13 2009 BCCS 17 (CanLII).

14 *Supra*, note 1, p.60.

15 *Supra*, note 1, p.61.

16 *Supra*, note 1, p.71.

17 *Supra*, note 1, p.72, 73.

18 *Supra*, note 1, p.73.

19 *Supra*, note 2, p.67.

20 1998 CanLII 14907 (ON S.C.).

21 *Ibid*, par.45, 47.

22 2001 CanLII 28449 (ON S.C.).

23 *Ibid*, par. 12.

24 *Supra*, note 2, p. 103.

25 *Supra*, note 8.

26 *Supra*, note 2, p.85.

27 (1999) 11 C.B.R. (4th) 204.

28 *Ibid*, par. 16.

29 *Supra*, note 2, p.112.

30 *Supra*, note 2, p.113.

31 EYB 2003-51913 (QCCS).

32 *Ibid*, par.20.

33 *Supra*, note 9, par.56-59 (EYB 1991-63766).

34 2004 CanLII 41522 (QC C.S.).

35 *Papier Gaspésia inc., Re* 2004 CanLII 46685, par.14.

36 *Supra*, note 2, p.117.

37 460-11 -001833-097, 2009 QCCS 6121 (C.S. Que.) .

38 2010 QCCA 403 (C.A. Que.) .

39 *Dairy Corp. of Canada Ltd., Re*, [1934] O.R. 436 (Ont. C.A.), paragr. 1, 4; *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), paragr. 24 et 29; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 1; *Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), paragr. 60; *Uniforêt Inc., Re* [2002 CarswellQue 2472 (C.S. Que.)], 2002 CanLII 24468, paragr. 14.

40 *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.), paragr. 23-26;*Canadian Airlines Corp., Re*, 2000 ABQB 442 (Alta. Q.B.), paragr. 64.

41 Voir jugement du 17 février 2014, p. 22-29, paragr.113-123.

42 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.) .

43 *Muscletech Research & Development Inc., Re* [2006 CarswellOnt 6230 (Ont. S.C.J.)], 2006 CanLII 34344.

44 *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 Voir aussi: *Sino-Forest Corporation (Re)*, 2012 ONSC 7050, paragr. 74 (autorisation d'appeler refusée, 2013 ONCA 456).

45 *Muscletech Research & Development Inc., Re* [2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List])], 2007 CanLII 5146 Voir aussi: *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]), paragr. 74 (autorisation d'appeler refusée, 2013 ONCA 456 (Ont. C.A.)).

46 *Hinse v. Canada (Attorney General)*, 2015 SCC 35 (S.C.C.) .

Fin du document

Tab 17

CITATION: CannTrust Holdings Inc., et al. (Re), 2021 ONSC 4408
COURT FILE NO.: CV-20-00638930-00CL
DATE: 20210624

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 OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOO) INC. AND ELMCLIFFE INVESTMENTS INC.

BEFORE: Justice L. A. Pattillo

COUNSEL: *Paul Steep, Jamey Gage, Shane D'Souza* and *Trevor Courtis,* for the Applicants

Steven Graff and *Jonathan Yantzi*, for the Monitor, Ernst & Young Inc.

Alex Morrison and *Karen Fung*, for Ernst & Young Inc.

David Wingfield and *Serge Kalloghlian,* for the CCAA Canadian Representatives

Steven Weisz, Pat Corney, James Johnson and *Michael H. Rogers*, for the CCAA U.S. Representatives

David Bish, for the Underwriters

Paul le Vay and *Carlo Di Carlo,* for Eric Paul

Peter Howard and *Brian Pukier*, for the Litwin Group

Rachel Corrigan U.S. lawyers, for the Litwin Group

John Salmas, for Cortland Credit Lending Corporation

Michael Wright, *Michael Robb* and *Alex Dirnson,* for Zola Finance Holdings Ltd. and Igor Gimelshtein

Linc Rogers, *Andrea Laing*, *Ryan Morris*, *Caitlin McIntyre* and *Justin Manoryk,* for KPMG LLP

Alistair Crawley and *Jonathan Preece,* for Peter Aceto

Michael Krygier-Baum and *Barry Papazian,* for Newline Canada Insurance Limited

David Vaillancourt, for Arch Insurance Canada Ltd.

Colin Empke, for Chubb Insurance Company of Canada and Allied World Assurance Company

Heather Gray, for Allianz Global Risks US Insurance Company

HEARD: June 10 and 16, 2021

ENDORSEMENT

Introduction

[1] The Applicants, CannTrust Holdings Inc. ("CT Holdings"), CannTrust Inc. ("CT"), CTI Holdings (Osoyoos) Inc. ("CTI") and Elmcliffe Investments Inc. ("Elmcliffe") move for an order approving and sanctioning the second amended and restated plan of compromise, arrangement and reorganization of CT Holdings, CT and Elmcliffe under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c, C-36 ("CCAA") and the *Business Corporations Act*, dated June 2, 2021 (the "Plan") and ancillary relief arising therefrom.

Overview

[2] CT Holdings is a public company and is a licensed producer of cannabis in Canada with facilities in Vaughn and Fenwick (Niagara), Ontario. Following audits by Health Canada at its facilities in June and July 2019, shipments of all its cannabis products were stopped and its cannabis licenses were partially suspended.

[3] On July 8, 2019, CT Holdings publicly announced that it was growing cannabis in breach of federal law, resulting in an immediate and substantial decline in the price of its shares. Shortly thereafter, numerous action and Class Actions (collectively the "Securities Claims") were commenced against CT Holdings and others in several provinces in Canada and at the federal and state level in the United States, claiming damages in excess of $500 million.

[4] Despite extensive efforts to resolve its issues, by March 2020, the Applicants determined it was in the best interest of themselves and their stakeholders to commence CCAA proceedings. On March 31, 2020, the Applicants obtained an initial order pursuant to the CCAA which included a stay of proceedings. Ernst & Young Inc. was appointed the Monitor. Subsequently, counsel in the lead securities class actions in Canada and the US were appointed CCAA Representative Counsel.

[5] Since commencing CCAA proceedings, the Applicants have completed each of the business restructuring objectives including completion of the remainder of its remediation work, reinstatement of its cannabis licenses, resumption of production and processing operations and a return to the recreational and medical cannabis markets.

[6] On May 8, 2020, the Applicants obtained a Mediation Order appointing the Honourable Dennis O'Connor, Q.C. to conduct a mediation process between CT Holdings, the plaintiffs and representative plaintiffs in the Securities Claims, co-defendants and insurers with a view to reaching a resolution of some or all of the securities and related claims between the various parties.

[7] On January 19, 2021, following extensive negotiations, facilitated by Mr. O'Connor, the Applicants entered into a Restructuring Support Agreement ("RSA") with the representative plaintiffs in the Ontario Class Action and the U.S. Class Action (the "Securities Claimants"). In general, the RSA provides for the settlement of the Class Actions against the Applicants and the support of the Securities Claimants to enable the Applicants to emerge from the CCAA proceedings.

[8] The settlement framework is set out in Schedule "B" to the RSA and provides, in part, for the establishment of a Securities Claimants Trust (the "Trust") for the benefit of Securities Claimants; that CT Holdings will contribute $50 million and assign all its securities related claims to the Trust and will provide information and cooperation to the Securities Claimants in the prosecution of the continuing litigation; a court order will be obtained, either as part of the Sanction Order or otherwise, barring any claims against the Settlement Parties asserted in the Actions or based on events giving rise to the Actions, including contribution and set-off claims; and if the amounts obtained by the Trust through settlement or prosecution of claims exceeds $250 million net of fees and expenses, CT Holdings will be entitled to receive payments up to the settlement amount of $50 million;

[9] The RSA further provides that additional Settlement Parties can be added to it, providing them the benefit of its provisions. Subsequently, additional settlements have been reached with co-defendants resulting in the Trust having received an additional $83 million.

[10] On May 28, 2021, meetings of four classes of Affected Creditors were held in accordance with a Meeting Order obtained on April 16, 2021, at which the March draft Plan was overwhelmingly approved by each class of creditors both by the numbers voting and by the value of their claims.

[11] In general, the Plan which the Applicants seek approval of, implements the framework for the settlement of all Securities Claims and addresses the other claims and contingent claims against the Applicants, to enable them to continue to carry on business and avoid the social and economic consequences of liquidation. It is supported by the Monitor, the Chief Restructuring Officer (FTI Consulting Canada Inc.) and a broad constituency of stakeholders including the General Unsecured Creditors and the Securities Claimants (the Class Action plaintiffs and other Settling Parties who have joined the RSA).

[12] As a result of many of the issues between the stakeholders and the Applicants being resolved during the proceedings, at the commencement of the hearing, only Zola Finance Holdings Ltd. and Igor Gimelshtein (the "Zola Plaintiffs"), KPMG LLP and Newline Insurance Co. opposed the motion. Further, prior to the conclusion of the hearing, Newline advised it had resolved its issues with the Applicants and was no longer opposing leaving only the Zola Plaintiffs and KPMG in opposition.

Discussion

[13] There is no issue between the parties concerning the requirements that must be met for court approval of a plan of compromise or arrangement under the CCAA. They are well established: a) there must be strict compliance with all statutory requirements; b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA and prior orders of the court in the CCAA proceedings; and c) the plan must be fair and reasonable. See: *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 22; *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 14.

The Zola Plaintiffs

[14] Included in the orders sought is a request for approval of the Allocation and Distribution Scheme ("A&DS"). The Zola Plaintiffs support the Plan but take issue with one aspect of the A&DS.

[15] The A&DS sets out a process for securities claimants who purchased shares in CT Holdings between January 1, 2018 and September 17, 2019 to seek compensation from the net proceeds from settlements or prosecution of actions or assigned claims by the Trust. It arose out of the RSA and was developed by Class Action lead plaintiffs and Class Action counsel with input from an expert financial economist.

[16] The Class Actions are based on allegations of misrepresentation by CT Holdings, among others. They allege CT Holdings share price was artificially inflated by different amounts at different periods of time during the share purchase period because different alleged misrepresentations began at different times and because artificial inflation declined incrementally after certain actions were taken by CT Holdings. The compensation is based, in part, on artificial "share inflation" at the time the shares were acquired and disposed of.

[17] The allegation in the Ontario Class Action is that CT Holdings made separate misrepresentations about compliance at each of the Vaughan and Niagara facilities. The former between June 1, 2018 and September 30, 2018, and the latter from October 1, 2018 forward. The October 1, 2018, date is based on CT Holdings public announcement that the illegal growing in Niagara began in October 2018.

[18] The A&DS provides for an artificial inflation amount between June 1 and September 30, 2018 (when only the Vaughan misrepresentation was outstanding) of $1.29 and $5.02 from October 1, 2018 onward reflecting the effect of both the Vaughan and Niagara misrepresentations on the share price.

[19] The Zola Plaintiffs take issue with the date provided for in the A&DS when CT Holdings began to misrepresent the operations in its Niagara facility. They submit that the October 1, 2018 date is arbitrary and not fair and reasonable and request that the court revise the date to a date a few weeks earlier in September 2018. In support, they have filed the affidavit of Mr. Gimelshtein, Zola's former CFO, who has extensive knowledge of cannabis operations.

[20] Mr. Gimelshtein's evidence is that the October 1, 2018 date is not a logical start date for when CT Holdings illegal growing began at its Niagara facility because the decision and preparation to begin the illegal operation would have begun one to two weeks and up to four weeks before the growth start date.

[21] The Zola Plaintiffs purchased 3 million shares of CT Holdings between September 26 and 28, 2018. There is no question therefore, based on the compensation formula in the A&DS that they will receive significantly less compensation for their loss than if they purchased the shares a few days later. But that does mean that A&DS should be amended as they request.

[22] I am satisfied, based on the evidence, that the compensation formula set out in the A&DS has been developed on a rational basis and is reasonable having regard to the interests of the Securities Claimants as a whole. The CCAA Representatives case theory about when the misrepresentations began and upon which the compensation formula is reasonable and supported by the evidence. While I have concerns about Mr. Gimelshtein's evidence given his obvious conflict, the conception of the illegal growing as deposed by him could still have taken place in October based on CT Holdings public statement.

[23] In my view, the A&DS is fair and reasonable, and I therefore reject the Zola Plaintiffs' objection.

KPMG

[24] KPMG Inc. was the auditor for the applicants during the material time. It is also a Co-Defendant in the Securities Claims. It has objected to the Plan since the first iteration in March 2021. While some of its objections have been resolved along

the way including during the break between the hearing dates, the following issues remain:

1) Was KPMG improperly excluded from voting at the Creditors' Meetings as a result of the creditors being improperly classified, resulting in the vote not reflecting a true consensus of affected creditors;

2) Whether the assignment of the Applicants' claim for auditor's negligence against KPMG to the Trust in the Plan is fair and reasonable; and

3) Whether the Bar Order terms in paragraph 7.3 of the Plan, and specifically the Judgment Reduction Provision in Article7.3(2) is fair and reasonable.

Exclusion from Voting

[25] In my view, KPMG's complaint that it was excluded from voting at the creditors' meeting is one that should have been raised by it at the hearing for the Meetings Order. Instead, KPMG submits that in order to have an opportunity to rectify its concerns with the Applicants regarding the draft Plan, it withdrew its objection to the Meetings Order while reserving all of its rights and arguments with respect to opposing the Plan. That reservation is incorporated into the Meetings Order and acknowledged by the Applicants.

[26] Parties are encouraged to resolve issues with a CCAA plan prior to court approval of the Meetings Order, if possible. A plan that cannot meet the sanction approval criteria at that stage will result in a meeting order not being granted: *Target Canada Co. (Re)*, 2016 ONSC 316. This is particularly so, in my view, where the issue concerns the classification of creditors and whether a creditor has a right to vote on the plan, as here.

[27] That said, KPMG's claim against CT Holdings is a claim for contribution and indemnity as a co-defendant in the Securities Claims. While it is an equity claim under the CCAA, it is derivative to the claims of the Securities Claimants. The Securities Claimants were classified as their own class. Even if KPMG was placed in that class, given the nature of its claim, in my view, it would not have had the right to vote as a result of the rule against double proofs which would apply.

[28] The "rule against double proof" provides that there cannot be two proofs of claim filed for the same debt, even though there may be two separate contracts or sources of liability in respect of that debt: *Aslan (Re)*, 2014 ONCA 245 at para. 16. Further, the rule extends to voting: *Quintette Coal Ltd. (Re)*, 1991 CanLII 303 (B.C.S.C.) at para. 35.

[29] Accordingly, I agree with the Applicants that the classification of the Affected Creditors was appropriate in the circumstances and having regard to the nature of KPMG's claim, it and the other non-settling defendants were not entitled to a vote at the creditors' meetings.

Assignment of Claims

[30] KPMG takes issue with the manner in which the purported assignment of the Applicants' auditor's negligence claim against it is provided for in the Plan.

[31] The SRA provides as part of the settlement between the Applicants and the Securities Claimants, that the Plan provide that the Applicants assign their "Assigned Claims" (if any) to the Trust on the date of the Plan's implementation (para. 3.01(c)). The SRA defines "Assigned Claims" as follows:

> "Assigned Claims" means the claims of CannTrust Holdings against any Co-Defendant that is a Non-Settlement Party and, if applicable, the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for loss or damage up to the date of the CCAA Sanction Order and arise from or relate to the Securities-Related Matters.

[32] The Plan, as well as its earlier iteration in March 2021, provides for the assignment of "Assigned Claims" (if any) to the Trust prior to the Implementation Date. Other than the addition of CannTrust Opco as an assignor, the March draft contained a definition of "Assigned Claims" similar to the one in the SRA.

[33] The definition of "Assigned Claims" in the Plan for approval provides as follows:

> "Assigned Claims" means (i) the claims of CannTrust Holdings and CannTrust Opco against any Co-Defendant that is a Non-Settlement Party, other than contribution and indemnity claims and, if applicable, (ii) the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for the loss or damage up to the date of the Sanction Order and arise from or relate to the Securities-

> Related Matters, and without limiting the generality of the foregoing (iii) the claims of CannTrust Holdings and CannTrust Opco in contract and tort against KPMG LLP as of the Filing Date.

[34] In addition, the bar in respect of claims over by a Settlement Party against a Co-Defendant in Article 7.3(3) of the Plan was also amended subsequent to the March draft "for greater certainty" to exclude all Assigned Claims. It now reads:

> 7.3(3) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, all Claims or the Channelled Claims, which were or could have been brought by a Settlement Party in the Actions or otherwise against a Co-Defendant that is a Non-Settlement Party, excluding for greater certainty all Assigned Claims, will be permanently and forever barred, estopped, stayed and enjoined.

[35] To make matters even more confusing, on June 16, 2021, the day before the resumption of the hearing of the motion, the Applicants provided yet another revision to the proposed definition of "Assigned Claims" in the Plan. The June 16th definition reads:

> "Assigned Claims" means (i) if applicable, the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for loss or damage up to the date of the CCAA Sanction Order and arise from or relate to the Securities-Related Matters, and (ii) the claims of CannTrust Holdings and CannTrust Opco in contract and tort arising from the audit and professional services of KPMG LLP as of the Filing Date.

[36] KPMG submits, relying on *Target*, that the Applicants should not be permitted to amend the initial definition of "Assigned Claims" contained in the March version of the Plan which was approved by the creditors and in the alternative that the definition of "Assigned Claims" in both the June 2 Plan and the June 16 revised definition should be amended to strike out the specific reference to CannTrust Holdings and CannTrust Opco's claim against it. It further submits that the wording in Article 7.3(3) of the Plan excluding "Assigned Claims" from the bar order for all cross-claims by Settlement Parties against Co-Defendants should be removed.

[37] The Applicants submit that the principle in *Target* does not apply given there was never any agreement with KPMG concerning the Plan and the Plan provides that the Applicants can amend it at any time. In addition, both the Applicants and the Securities Claimants submit that the assignment of the KPMG audit claim was

an important factor in reaching their settlement and there is no basis in law for not allowing the assignment.

[38] I agree with the Applicants that the principle discussed in *Target*, to the effect that a proposed CCAA plan which contravenes an agreement previously reached between the debtor and a stakeholder will not be sanctioned, is not applicable. There is no evidence there was ever any agreement between KPMG and the Applicants in respect the Assigned Claims. Further, and as noted by the Applicants, Article 10.3 of the Plan provides that it can be amended by them subsequent to the Meeting.

[39] I have no issue with CannTrust Holdings and CannTrust Opco assigning any claims it may have to the Trust as long as such assignment is not inconsistent with the Plan or otherwise contrary to law. I accept the evidence on behalf of the Securities Claimants that the assignment of the Applicant's claims, including its claim against KPMG for auditors' negligence, is an important element of the settlement with the Applicants. I have a concern, however, with the way in which the Applicants have provided for the assignment in the Plan.

[40] More specifically, the Plan includes a bar on any claim the Applicants may have for contribution and indemnity or other claims over against a Co-Defendant that is a Non-Settlement Party – i.e., KPMG (Article 7.3(3)). At the same time, however, the Applicants seek to exclude "all Assigned Claims" from that bar. The result is that while the Applicants are barred from bringing a contribution and indemnity claim or claims against their Co-Defendants, by assigning that claim, their assignee can. In other words, it permits the Applicants to do indirectly what they can't do directly. In my view, the removal of the bar for all Assigned Claims is neither fair nor reasonable.

[41] Further, I also see no reason why the definition of "Assigned Claims" has to specifically refer to CannTrust Holdings and CannTrust Opco's claims against KPMG other than to provide some sort of legitimacy to the assignment as a result of the court's sanction of the Plan. Specific reference to the claim against KPMG is neither necessary nor appropriate. Any assignment should permit the defendant to raise all defences available to it both in respect of the assigned claim as well as the assignment, including a defence to a claim for contribution and indemnity arising from the bar order in Article 7.3(3) of the Plan.

The Judgment Reduction Provision

[42] KPMG submits that the Bar Order in Article 7.3 of the Plan and specifically

the Judgment Reduction Provision in Article 7.3(2), is unfair and prejudicially affects its rights.

[43] The initial version of the Plan circulated in March 2021 purported, among other things, to release CT Holdings from all securities related indemnity claims. As a result, in the event of joint and several liability of a non-settling defendant in the remaining Securities Action, that defendant would be liable for the full amount of the judgment, including CT Holdings' portion of the liability, without recourse to CT Holdings for contribution and indemnity.

[44] Prior to the motion for the Meetings Order, the Applicants amended the Bar Order provision in Article 7.3 of the Plan to provide for a Judgment Reduction Provision as follows:

> 7.3(2) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, any judgment or other award obtained by a Securities Claimant or the Securities Claimant Trust in respect of any Securities-Related Claim against a Non-Settlement Party or other Person that is not a Released Party shall be reduced by the amount, if any, that the court or other tribunal adjudicating the Securities-Related Claim determines would have been recovered by such Non-Settlement Party or other Person pursuant to a Securities-Related Indemnity Claim held by it against a Released Party in respect of such Securities-Related Claim but for the release of such Securities-Related Indemnity Claim pursuant to the CCAA Plan or the CCAA Sanction Order, determined as of the moment before the Effective Time and, for greater certainty, taking into account (i) the Cash Contribution to be made by CannTrust Holdings to the Securities Claimant Trust and (ii) all other Securities-Related Indemnity Claims of other Non-Settlement Parties or other Persons participating in any recovery on a *pro rata* basis.

[45] KPMG submits that the Judgment Reduction Provision is fundamentally flawed and is not fair and reasonable to the non-settling defendants. It submits that the Bar Order in Article 7.3 deviates from the provisions a *Pierringer* arrangement by not limiting the non-settling defendants' joint and several liability to the Security Claimants in the Securities Claims to several liability resulting in prejudice to the non-settling defendants, including KPMG.

[46] While the Applicants acknowledge that a *Pierringer* arrangement is otherwise appropriate in respect of the settlement of partial claims in class actions, they submit the settlement here occurs within a CCAA proceeding and therefore different considerations apply involving the balancing of the interests of all stakeholders. Accordingly, they submit the Judgment Reduction Provision is

appropriate and places the non-settling defendants, including KPMG, in an economically neutral position. Even if the non-settling defendants had a claim over against the Applicants in the Securities Claimants' action, given that they are insolvent, that claim would not be satisfied leaving the non-settling defendants liable for 100% of the Securities Claimants damages. Further, the Judgment Reduction Provision gives the non-settling defendants a credit for the $50 million the Applicants paid to the Trust as part of its settlement with the Securities Claimants.

[47] The Applicants submit that the Judgment Reduction Provision is appropriate in the circumstances and rely on *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 and *Arrangement relative à 9323-7055 Québec Inc. (Aquadis International Inc.)*, 2018 QCCA 1345.

[48] A *Pierringer* arrangement facilitates settlement between a plaintiff and a defendant in circumstances where other defendants remain against whom the plaintiff wishes to proceed to trial and who have a crossclaim for contribution and indemnity against the settling defendant. The purpose of a *Pierringer* arrangement is to enable the settlement while maintaining a level playing field for the remaining defendants in the action: *Endean* at para. 52. See too: *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 27, [2013] 2 S.C.R. 623 at paras. 23-26.

[49] The essential provisions of a *Pierringer* arrangement are as follows: 1. The settling defendant settles with the plaintiff; 2. The plaintiff discontinues its claim against the settling defendant; 3. The plaintiff continues its action against the non-settling defendant but limits its claim to the non-settling defendant's several liability; 4. The settling defendant agrees to co-operate with the plaintiff in the action against the non-settling defendant; 5. The settling defendant agrees not to seek contribution and indemnity from the non-settling defendants; and 6. The plaintiff agrees to indemnify the settling defendants against any claims over by the non-settling defendant: *Endean* at para. 52. As noted in *Sable Offshore* at para. 26, it is inherent in *Pierringer* agreements that non-settling defendants can only be liable for their share of the damages and are therefore severally, not jointly, liable with the settling defendants.

[50] The objectives of a *Pierringer* arrangement include promoting settlement while ensuring fairness to the non-settling defendants. They have been endorsed by courts in Canada for some time and approved in CCAA proceedings. See: *Hollinger Inc.*, Re, 2012 ONSC 5107.

[51] The settlement between the Applicants and the Securities Claimants as provided for in the RSA contains some but not all the provisions of a *Pierringer* arrangement. It provides for the settlement of the Securities Claimants action against the Applicants; for the co-operation of the Applicants in the continuing action; and for what is referred to as a "Bar Order" which provides that the "Definitive Documents" which include the Plan and the Sanction Order, will provide, among other things, a bar of any and all claims against the Applicants that relate to or arise out of, among other claims, any claims for contribution and indemnity by any non-settling defendants (RSA, s. 3.02(c)). That bar is provided for in Article 7.3(1) of the Plan.

[52] Notably, there is no agreement in the SRA that the Securities Claimants will limit their claims against the non-settling defendants to their several liability or that they will indemnify the Applicants in respect of any claims over against the applicants by the non-settling defendants.

[53] Article 7.3 of the Plan provides for the bar orders required by the SRA. In response to the concerns expressed, in part, by KPMG, rather than limiting the liability of the non-settlings defendants in the Securities Claims to several liability, the Applicants added the Judgment Reduction Provision in Article 7.3(2).

[54] In my view, Article 7.3 of the Plan as it is currently drafted is not fair to the non-settling defendants, including KPMG. While it bars any claims, including contribution and liability, against the Applicants, it fails to restrict the Securities Claimants' claims in the Action against the non-settling defendants to several liability. Having elected to settle with the Applicants, the Securities Claimants bear the risk of an inadequate settlement. By enabling the Securities Claimants to continue their action against the non-settling defendants and recover 100% of their damages, that risk shifts to the non-settling defendants. Rather than balancing the interests of the stakeholders therefore, it favours the Securities Claimants (one group of creditors) over the non-settling defendants (another group of creditors).

[55] Importantly, while there is evidence of the importance of the assignment to the settlement between the Applicant and the Securities Claimants, there is no evidence of the importance of the Securities Claimants being able to maintain their claims against the non-settling defendants and recover 100% of the damages while barring the non-settling defendants right to contribution and indemnity.

[56] The Applicants submit, relying on *Endean*, that because they are insolvent, the non-defendants' right to contribution and indemnity is worthless. While that is true now, it will not necessarily be the case at some point in the future when the issue of any claim over will be decided and when the Applicants have emerged from these insolvency proceedings and hopefully have become a successful and credit worthy corporation.

[57] Nor do I consider that the Judgment Reduction Provision in Article 7.3(2) of the Plan operates to cure the failure to limit the non-settling defendants' joint and several liability to several only. Reducing the non-settling defendants' liability by the amount of the settlement paid by the Applicants has no relationship to the non-settling defendants' several liability to the plaintiffs.

[58] A true *Pierringer* arrangement has no regard to the settlement amount, nor does it have to be disclosed (*Sable Offshore*). The protection for the non-settling defendant (who is not a party to the settlement agreement) is the plaintiff's agreement to limit its claim to the non-settling defendant's several liability, not a credit for the settlement amount against 100% of the liability.

[59] The Applicants submit that *Aquadis* supports the Judgment Reduction Provision. I disagree. *Aquadis* concerned the approval of a proposed settlement of some defendants in a products liability claim where the *Québec Civil Code* provides for 100% liability of each person in the chain of the goods, from the seller to the manufacturer with a right of subrogation. In approving the judgment reduction provision, which effectively indemnified the non-settling parties for any portion of the damages the court may determine it could have effectively recovered from the settling party, the court equated it to a *Pierringer* arrangement. In my view, in circumstances such as here, where there is joint and several liability of the defendants and the non-settling defendants' liability can be restricted to several liability, a judgment reduction provision is neither necessary nor appropriate.

[60] The Applicants rely on *Endean* to support the Judgment Reduction Provision. In *Endean* the trial judge reduced the non-settling defendant's liability by apportioning a percentage of liability to entities who were bankrupt and had not been sued. The Court of Appeal held that liability should be allocated between the defendants and that interpreting the bar order in a *Pierringer* agreement to apply to bankrupt non-defendants was not appropriate. Overall, however, the Court affirmed the underlying policy goals sought to be achieved by a *Pierringer* arrangement.

[61] I also disagree with the way in which the Applicants have drafted the Judgment Reduction Provision to provide for the assessment of recoverability. Apart from being confusing and potentially difficult to determine, by providing for a time when the Applicants were insolvent ("as of the moment before the Effective Time") rather than, as noted above, at some point in the future when a non-settling defendant would actually seek to recover indemnity and after the Applicants have emerged from insolvency proceedings is not appropriate.

[62] For those reasons, I do not consider the Plan, and specifically Article 7.3(2) and the wording of Article 7.3(3) referred to, to be fair and reasonable in the circumstances and as a result, I am not prepared to approve or sanction the Plan in its current form.

Conclusion

[63] For the above reasons, therefore, I dismiss the sanction motion with leave to bring it back on, if, and when the issues I have identified have been addressed.

[64] In the interim and to allow that process to occur, I extend the stay in the proceeding to July 30, 2021.

L. A. Pattillo J.

Released: June 24, 2021

Tab 18

CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7050
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121212

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert W. Staley, Kevin Zych, Derek J. Bell and Jonathan Bell, for Sino-Forest Corporation**

Derrick Tay, Jennifer Stam, and Cliff Prophet for the Monitor, FTI Consulting Canada Inc.

Robert Chadwick and Brendan O'Neill, for the Ad Hoc Committee of Noteholders

Kenneth Rosenberg, Kirk Baert, Max Starnino, and A. Dimitri Lascaris, for the Class Action Plaintiffs

Won J. Kim, James C. Orr, Michael C. Spencer, and Megan B. McPhee, for Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc.

Peter Griffin, Peter Osborne and Shara Roy, for Ernst & Young Inc.

Peter Greene and Ken Dekkar, for BDO Limited

Edward A. Sellers and Larry Lowenstein, for the Board of Directors of Sino-Forest Corporation

John Pirie and David Gadsden, for Poyry (Beijing)

James Doris, for the Plaintiff in the New York Class Action

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

Susan E. Freedman and Brandon Barnes, for Kai Kit Poon

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSED: DECEMBER 10, 2012

REASONS: DECEMBER 12, 2012

ENDORSEMENT

[1] On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

[2] The Applicant, Sino-Forest Corporation ("SFC"), seeks an order sanctioning (the "Sanction Order") a plan of compromise and reorganization dated December 3, 2012 as modified, amended, varied or supplemented in accordance with its terms (the "Plan") pursuant to section 6 of the *Companies' Creditors Arrangement Act* ("CCAA").

[3] With the exception of one party, SFC's position is either supported or is not opposed.

[4] Invesco Canada Ltd., Northwest & Ethical Investments LP and Comité Syndicale Nationale de Retraite Bâtirente Inc. (collectively, the "Funds") object to the proposed Sanction Order. The Funds requested an adjournment for a period of one month. I denied the Funds' adjournment request in a separate endorsement released on December 10, 2012 (*Re Sino-Forest Corporation*, 2012 ONSC 7041). Alternatively, the Funds requested that the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants".

[5] The defined terms have been taken from the motion record.

[6] SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision")

(2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

[7] Counsel submits that the classification of creditors for the purpose of voting on the Plan was proper and consistent with the CCAA, existing law and prior orders of this court, including the Equity Claims Decision and the Plan Filing and Meeting Order.

[8] The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

[9] The Ad Hoc Committee of Purchasers of the Applicant's Securities (the "Ad Hoc Securities Purchasers Committee", also referred to as the "Class Action Plaintiffs") has agreed not to oppose the Plan. The Monitor has considered possible alternatives to the Plan, including liquidation and bankruptcy, and has concluded that the Plan is the preferable option.

[10] The Plan was approved by an overwhelming majority of Affected Creditors voting in person or by proxy. In total, 99% in number, and greater than 99% in value, of those Affected Creditors voting favoured the Plan.

[11] Options and alternatives to the Plan have been explored throughout these proceedings. SFC carried out a court-supervised sales process (the "Sales Process"), pursuant to the sales process order (the "Sales Process Order"), to seek out potential qualified strategic and financial purchasers of SFC's global assets. After a canvassing of the market, SFC determined that there were no qualified purchasers offering to acquire its assets for qualified consideration ("Qualified Consideration"), which was set at 85% of the value of the outstanding amount owing under the notes (the "Notes").

[12] SFC's counsel submits that the Plan achieves the objective stated at the commencement of the CCAA proceedings (namely, to provide a "clean break" between the business operations of the global SFC enterprise as a whole ("Sino-Forest") and the problems facing SFC, with the aspiration of saving and preserving the value of SFC's underlying business for the benefit of SFC's creditors).

Facts

[13] SFC is an integrated forest plantation operator and forest products company, with most of its assets and the majority of its business operations located in the southern and eastern regions of the People's Republic of China ("PRC"). SFC's registered office is located in Toronto and its principal business office is located in Hong Kong.

[14] SFC is a holding company with six direct subsidiaries (the "Subsidiaries") and an indirect majority interest in Greenheart Group Limited (Bermuda), a publicly-traded company. Including SFC and the Subsidiaries, there are 137 entities that make up Sino-Forest: 67 companies incorporated in PRC, 58 companies incorporated in British Virgin Islands, 7 companies incorporated in Hong Kong, 2 companies incorporated in Canada and 3 companies incorporated elsewhere.

[15] On June 2, 2011, Muddy Waters LLC ("Muddy Waters"), a short-seller of SFC's securities, released a report alleging that SFC was a "near total fraud" and a "Ponzi scheme". SFC subsequently became embroiled in multiple class actions across Canada and the United States and was subjected to investigations and regulatory proceedings by the Ontario Securities Commission ("OSC"), Hong Kong Securities and Futures Commission and the Royal Canadian Mounted Police.

[16] SFC was unable to file its 2011 third quarter financial statements, resulting in a default under its note indentures.

[17] Following extensive arm's length negotiations between SFC and the Ad Hoc Noteholders, the parties agreed on a framework for a consensual resolution of SFC's defaults under its note indentures and the restructuring of its business. The parties ultimately entered into a restructuring support agreement (the "Support Agreement") on March 30, 2012, which was initially executed by holders of 40% of the aggregate principal amount of SFC's Notes. Additional consenting noteholders subsequently executed joinder agreements, resulting in noteholders representing a total of more than 72% of aggregate principal amount of the Notes agreeing to support the restructuring.

[18] The restructuring contemplated by the Support Agreement was commercially designed to separate Sino-Forest's business operations from the problems facing the parent holding company outside of PRC, with the intention of saving and preserving the value of SFC's underlying business. Two possible transactions were contemplated:

(a) First, a court-supervised Sales Process to determine if any person or group of persons would purchase SFC's business operations for an amount in excess of the 85% Qualified Consideration;

(b) Second, if the Sales Process was not successful, a transfer of six immediate holding companies (that own SFC's operating business) to an acquisition vehicle to be owned by Affected Creditors in compromise of their claims against SFC. Further, the creation of a litigation trust (including funding) (the "Litigation Trust") to enable SFC's litigation claims against any person not otherwise released within the CCAA proceedings,

preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

[19] SFC applied and obtained an initial order under the CCAA on March 30, 2012 (the "Initial Order"), pursuant to which a limited stay of proceedings ("Stay of Proceedings") was also granted in respect of the Subsidiaries. The Stay of Proceedings was subsequently extended by orders dated May 31, September 28, October 10, and November 23, 2012, and unless further extended, will expire on February 1, 2013.

[20] On March 30, 2012, the Sales Process Order was granted. While a number of Letters of Intent were received in respect of this process, none were qualified Letters of Intent, because none of them offered to acquire SFC's assets for the Qualified Consideration. As such, on July 10, 2012, SFC announced the termination of the Sales Process and its intention to proceed with the Restructuring Transaction.

[21] On May 14, 2012, this court granted an order (the "Claims Procedure Order") which approved the Claims Process that was developed by SFC in consultation with the Monitor.

[22] As of the date of filing, SFC had approximately $1.8 billion of principal amount of debt owing under the Notes, plus accrued and unpaid interest. As of May 15, 2012, Noteholders holding in aggregate approximately 72% of the principal amount of the Notes, and representing more than 66.67% of the principal amount of each of the four series of Notes, agreed to support the Plan.

[23] After the Muddy Waters report was released, SFC and certain of its officers, directors and employees, along with SFC's former auditors, technical consultants and Underwriters involved in prior equity and debt offerings, were named as defendants in a number of proposed class action lawsuits. Presently, there are active proposed class actions in four jurisdictions: Ontario, Quebec, Saskatchewan and New York (the "Class Action Claims").

[24] *The Labourers v. Sino-Forest Corporation Class Action* (the "Ontario Class Action") was commenced in Ontario by Koskie Minsky LLP and Siskinds LLP. It has the following two components: first, there is a shareholder claim (the "Shareholder Class Action Claims") brought on behalf of current and former shareholders of SFC seeking damages in the amount of $6.5 billion for general damages, $174.8 million in connection with a prospectus issued in June 2007, $330 million in relation to a prospectus issued in June 2009, and $319.2 million in relation to a prospectus issued in December 2009; second, there is a $1.8 billion noteholder claim (the "Noteholder Class Action Claims") brought on behalf of former holders of SFC's Notes. The noteholder component seeks damages for loss of value in the Notes.

[25] The Quebec Class Action is similar in nature to the Ontario Class Action, and both plaintiffs filed proof of claim in this proceeding. The plaintiffs in the Saskatchewan Class Action did not file a proof of claim in this proceeding, whereas the plaintiffs in the New York Class Action did file a proof of claim in this proceeding. A few shareholders filed proofs of claim separately, but no proof of claim was filed by the Funds.

[26] In this proceeding, the Ad Hoc Securities Purchasers Committee - represented by Siskinds LLP, Koskie Minsky, and Paliare Roland Rosenberg Rothstein LLP - has appeared to represent the interests of the shareholders and noteholders who have asserted Class Action Claims against SFC and others.

[27] Since 2000, SFC has had the following two auditors ("Auditors"): E&Y from 2000 to 2004 and 2007 to 2012 and BDO from 2005 to 2006.

[28] The Auditors have asserted claims against SFC for contribution and indemnity for any amounts paid or payable in respect of the Shareholder Class Action Claims, with each of the Auditors having asserted claims in excess of $6.5 billion. The Auditors have also asserted indemnification claims in respect the Noteholder Class Action Claims.

[29] The Underwriters have similarly filed claims against SFC seeking contribution and indemnity for the Shareholder Class Action Claims and Noteholder Class Action Claims.

[30] The Ontario Securities Commission ("OSC") has also investigated matters relating to SFC. The OSC has advised that they are not seeking any monetary sanctions against SFC and are not seeking monetary sanctions in excess of $100 million against SFC's directors and officers (this amount was later reduced to $84 million).

[31] SFC has very few trade creditors by virtue of its status as a holding company whose business is substantially carried out through its Subsidiaries in PRC and Hong Kong.

[32] On June 26, 2012, SFC brought a motion for an order declaring that all claims made against SFC arising in connection with the ownership, purchase or sale of an equity interest in SFC and related indemnity claims to be "equity claims" (as defined in section 2 of the CCAA). These claims encapsulate the commenced Shareholder Class Action Claims asserted against SFC. The Equity Claims Decision did not purport to deal with the Noteholder Class Action Claims.

[33] In reasons released on July 27, 2012, I granted the relief sought by SFC in the Equity Claims Decision, finding that the "the claims advanced in the shareholder claims are clearly equity claims." The Auditors and Underwriters appealed the decision and on November 23, 2012, the Court of Appeal for Ontario dismissed the appeal.

[34] On August 31, 2012, an order was issued approving the filing of the Plan (the "Plan Filing and Meeting Order").

[35] According to SFC's counsel, the Plan endeavours to achieve the following purposes:

(a) to effect a full, final and irrevocable compromise, release, discharge, cancellation and bar of all affected claims;

(b) to effect the distribution of the consideration provided in the Plan in respect of proven claims;

(c) to transfer ownership of the Sino-Forest business to Newco and then to Newco II, in each case free and clear of all claims against SFC and certain related claims against the Subsidiaries so as to enable the Sino-Forest business to continue on a viable, going concern basis for the benefit of the Affected Creditors; and

(d) to allow Affected Creditors and Noteholder Class Action Claimants to benefit from contingent value that may be derived from litigation claims to be advanced by the litigation trustee.

[36] Pursuant to the Plan, the shares of Newco ("Newco Shares") will be distributed to the Affected Creditors. Newco will immediately transfer the acquired assets to Newco II.

[37] SFC's counsel submits that the Plan represents the best available outcome in the circumstances and those with an economic interest in SFC, when considered as a whole, will derive greater benefit from the implementation of the Plan and the continuation of the business as a going concern than would result from bankruptcy or liquidation of SFC. Counsel further submits that the Plan fairly and equitably considers the interests of the Third Party Defendants, who seek indemnity and contribution from SFC and its Subsidiaries on a contingent basis, in the event that they are found to be liable to SFC's stakeholders. Counsel further notes that the three most significant Third Party Defendants (E&Y, BDO and the Underwriters) support the Plan.

[38] SFC filed a version of the Plan in August 2012. Subsequent amendments were made over the following months, leading to further revised versions in October and November 2012, and a final version dated December 3, 2012 which was voted on and approved at the meeting. Further amendments were made to obtain the support of E&Y and the Underwriters. BDO availed itself of those terms on December 5, 2012.

[39] The current form of the Plan does not settle the Class Action Claims. However, the Plan does contain terms that would be engaged if certain conditions are met, including if the class action settlement with E&Y receives court approval.

[40] Affected Creditors with proven claims are entitled to receive distributions under the Plan of (i) Newco Shares, (ii) Newco notes in the aggregate principal amount of U.S. $300 million that are secured and guaranteed by the subsidiary guarantors (the "Newco Notes"), and (iii) Litigation Trust Interests.

[41] Affected Creditors with proven claims will be entitled under the Plan to: (a) their *pro rata* share of 92.5% of the Newco Shares with early consenting noteholders also being entitled to their *pro rata* share of the remaining 7.5% of the Newco Shares; and (b) their *pro rata* share of the Newco Notes. Affected Creditors with proven claims will be concurrently entitled to their *pro rata* share of 75% of the Litigation Trust Interests; the Noteholder Class Action Claimants will be entitled to their *pro rata* share of the remaining 25% of the Litigation Trust Interests.

[42] With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate

amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

[43] The Plan includes releases for, among others, (a) the subsidiary; (b) the Underwriters' liability for Noteholder Class Action Claims in excess of the Indemnified Noteholder Class Action Limit; (c) E&Y in the event that all of the preconditions to the E&Y settlement with the Ontario Class Action plaintiffs are met; and (d) certain current and former directors and officers of SFC (collectively, the "Named Directors and Officers"). It was emphasized that non-released D&O Claims (being claims for fraud or criminal conduct), conspiracy claims and section 5.1 (2) D&O Claims are not being released pursuant to the Plan.

[44] The Plan also contemplates that recovery in respect of claims of the Named Directors and Officers of SFC in respect of any section 5.1 (2) D&O Claims and any conspiracy claims shall be directed and limited to insurance proceeds available from SFC's maintained insurance policies.

[45] The meeting was carried out in accordance with the provisions of the Plan Filing and Meeting Order and that the meeting materials were sent to stakeholders in the manner required by the Plan Filing and Meeting Order. The Plan supplement was authorized and distributed in accordance with the Plan Filing and Meeting Order.

[46] The meeting was ultimately held on December 3, 2012 and the results of the meeting were as follows:

(a) the number of voting claims that voted on the Plan and their value for and against the Plan;

(b) The results of the Meeting were as follows:

a. the number of Voting Claims that voted on the Plan and their value for and against the Plan:

	Number of Votes	%	Value of Votes	%
Total Claims Voting For	250	98.81%	$ 1,465,766,204	99.97%
Total Claims Voting Against	3	1.19%	$ 414,087	0.03%
Total Claims Voting	253	100.00%	$ 1,466,180,291	100.00%

b. the number of votes for and against the Plan in connection with Class Action Indemnity Claims in respect of Indemnified Noteholder Class Action Claims up to the Indemnified Noteholder Limit:

	Vote For	Vote Against	Total Votes
Class Action Indemnity Claims	4	1	5

c. the number of Defence Costs Claims votes for and against the Plan and their value:

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	12	92.31%	$	8,375,016	96.10%
Total Claims Voting Against	1	7.69%	$	340,000	3.90%
Total Claims Voting	13	100.00%	$	8,715,016	100.00%

d. the overall impact on the approval of the Plan if the count were to include Total Unresolved Claims (including Defence Costs Claims) and, in order to demonstrate the "worst case scenario" if the entire $150 million of the Indemnified Noteholder Class Action Limit had been voted a “no” vote (even though 4 of 5 votes were "yes" votes and the remaining "no" vote was from BDO, who has now agreed to support the Plan):

	Number of Votes	%		Value of Votes	%
Total Claims Voting For	263	98.50%	$	1,474,149,082	90.72%
Total Claims Voting Against	4	1.50%	$	150,754,087	9.28%
Total Claims Voting	267	100.00%	$	1,624,903,169	100.00%

[47] E&Y has now entered into a settlement (“E&Y Settlement”) with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

[48] As noted in the endorsement dated December 10, 2012, which denied the Funds’ adjournment request, the E&Y Settlement does not form part of the Sanction Order and no relief is being sought on this motion with respect to the E&Y Settlement. Rather, section 11.1 of the Plan contains provisions that provide a framework pursuant to which a release of the E&Y claims under the Plan will be effective if several conditions are met. That release will only be granted if all conditions are met, including further court approval.

[49] Further, SFC’s counsel acknowledges that any issues relating to the E&Y Settlement, including fairness, continuing discovery rights in the Ontario Class Action or Quebec Class Action, or opt out rights, are to dealt with at a further court-approval hearing.

Law and Argument

[50] Section 6(1) of the CCAA provides that courts may sanction a plan of compromise if the plan has achieved the support of a majority in number representing two-thirds in value of the creditors.

[51] To establish the court’s approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

(See *Re Canadian Airlines Corporation*, 2000 ABQB 442, leave to appeal denied, 2000 ABCA 238, aff'd 2001 ABCA 9, leave to appeal to SCC refused July 21, 2001, [2001] S.C.C.A. No. 60 and Re Nelson Financial Group Limited, 2011 ONSC 2750, 79 C.B.R. (5th) 307).

[52] SFC submits that there has been strict compliance with all statutory requirements.

[53] On the initial application, I found that SFC was a "debtor company" to which the CCAA applies. SFC is a corporation continued under the *Canada Business Corporations Act* ("CBCA") and is a "company" as defined in the CCAA. SFC was "reasonably expected to run out of liquidity within a reasonable proximity of time" prior to the Initial Order and, as such, was and continues to be insolvent. SFC has total claims and liabilities against it substantially in excess of the $5 million statutory threshold.

[54] The Notice of Creditors' Meeting was sent in accordance with the Meeting Order and the revised Noteholder Mailing Process Order and, further, the Plan supplement and the voting procedures were posted on the Monitor's website and emailed to each of the ordinary Affected Creditors. It was also delivered by email to the Trustees and DTC, as well as to Globic who disseminated the information to the Registered Noteholders. The final version of the Plan was emailed to the Affected Creditors, posted on the Monitor's website, and made available for review at the meeting.

[55] SFC also submits that the creditors were properly classified at the meeting as Affected Creditors constituted a single class for the purposes of considering the voting on the Plan. Further, and consistent with the Equity Claims Decision, equity claimants constituted a single class but were not entitled to vote on the Plan. Unaffected Creditors were not entitled to vote on the Plan.

[56] Counsel submits that the classification of creditors as a single class in the present case complies with the commonality of interests test. See *Re Canadian Airlines Corporation*.

[57] Courts have consistently held that relevant interests to consider are the legal interests of the creditors hold *qua* creditor in relationship to the debtor prior to and under the plan. Further, the commonality of interests should be considered purposively, bearing in mind the object of the CCAA, namely, to facilitate reorganizations if possible. See *Stelco Inc*. (2005), 78 O.R. (3d) 241 (Ont. C.A.), *Re Canadian Airlines Corporation*, and *Re Nortel Networks Corporation* (2009) O.J. No. 2166 (Ont. S.C.). Further, courts should resist classification approaches that potentially jeopardize viable plans.

[58] In this case, the Affected Creditors voted in one class, consistent with the commonality of interests among Affected Creditors, considering their legal interests as creditors. The classification was consistent with the Equity Claims Decision.

[59] I am satisfied that the meeting was properly constituted and the voting was properly carried out. As described above, 99% in number, and more than 99% in value, voting at the meeting favoured the Plan.

[60] SFC's counsel also submits that SFC has not taken any steps unauthorized by the CCAA or by court orders. SFC has regularly filed affidavits and the Monitor has provided regular reports and has consistently opined that SFC is acting in good faith and with due diligence. The court has so ruled on this issue on every stay extension order that has been granted.

[61] In *Nelson Financial*, I articulated relevant factors on the sanction hearing. The following list of factors is similar to those set out in *Re Canwest Global Communications Corporation*, 2010 ONSC 4209, 70 C.B.R. (5th) 1:

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

[62] The Monitor has considered the liquidation and bankruptcy alternatives and has determined that it does not believe that liquidation or bankruptcy would be a preferable alternative to the Plan. There have been no other viable alternatives presented that would be acceptable to SFC and to the Affected Creditors. The treatment of shareholder claims and related indemnity claims are, in my view, fair and consistent with CCAA and the Equity Claims Decision.

[63] In addition, 99% of Affected Creditors voted in favour of the Plan and the Ad Hoc Securities Purchasers Committee have agreed not to oppose the Plan. I agree with SFC's submission to the effect that these are exercises of those parties' business judgment and ought not to be displaced.

[64] I am satisfied that the Plan provides a fair and reasonable balance among SFC's stakeholders while simultaneously providing the ability for the Sino-Forest business to continue as a going concern for the benefit of all stakeholders.

[65] The Plan adequately considers the public interest. I accept the submission of counsel that the Plan will remove uncertainty for Sino-Forest's employees, suppliers, customers and other stakeholders and provide a path for recovery of the debt owed to SFC's non-subordinated creditors. In addition, the Plan preserves the rights of aggrieved parties, including SFC through the Litigation Trust, to pursue (in litigation or settlement) those parties that are alleged to share some or all of the responsibility for the problems that led SFC to file for CCAA protection. In addition, releases are not being granted to individuals who have been charged by OSC staff, or to other individuals against whom the Ad Hoc Securities Purchasers Committee wishes to preserve litigation claims.

[66] In addition to the consideration that is payable to Affected Creditors, Early Consent Noteholders will receive their *pro rata* share of an additional 7.5% of the Newco Shares ("Early Consent Consideration"). Plans do not need to provide the same recovery to all creditors to be considered fair and reasonable and there are several plans which have been sanctioned by the courts featuring differential treatment for one creditor or one class of creditors. See, for example, *Canwest Global* and *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Gen. Div.). A common theme permeating such cases has been that differential treatment does not necessarily result in a finding that the Plan is unfair, as long as there is a sufficient rational explanation.

[67] In this case, SFC's counsel points out that the Early Consent Consideration has been a feature of the restructuring since its inception. It was made available to any and all noteholders and noteholders who wished to become Early Consent Noteholders were invited and permitted to do so until the early consent deadline of May 15, 2012. I previously determined that SFC made available to the noteholders all information needed to decide whether they should sign a joinder agreement and receive the Early Consent Consideration, and that there was no prejudice to the noteholders in being put to that election early in this proceeding.

[68] As noted by SFC's counsel, there was a rational purpose for the Early Consent Consideration. The Early Consent Noteholders supported the restructuring through the CCAA proceedings which, in turn, provided increased confidence in the Plan and facilitated the negotiations and approval of the Plan. I am satisfied that this feature of the Plan is fair and reasonable.

[69] With respect to the Indemnified Noteholder Class Action Limit, I have considered SFC's written submissions and accept that the $150 million agreed-upon amount reflects risks faced by both sides. The selection of a $150 million cap reflects the business judgment of the parties making assessments of the risk associated with the noteholder component of the Ontario Class Action and, in my view, is within the "general range of acceptability on a commercially reasonable basis". See *Re Ravelston Corporation*, (2005) 14 C.B.R. (5^{th}) 207 (Ont. S.C). Further, as noted by SFC's counsel, while the New York Class Action Plaintiffs filed a proof of claim, they have not appeared in this proceeding and have not stated any opposition to the Plan, which has included this concept since its inception.

[70] Turning now to the issue of releases of the Subsidiaries, counsel to SFC submits that the unchallenged record demonstrates that there can be no effective restructuring of SFC's business and separation from its Canadian parent if the claims asserted against the Subsidiaries arising out of or connected to claims against SFC remain outstanding. The Monitor has examined all of the releases in the Plan and has stated that it believes that they are fair and reasonable in the circumstances.

[71] The Court of Appeal in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corporation*, 2008 ONCA 587, 45 C.B.R. (5th) 163 stated that the "court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring".

[72] In this case, counsel submits that the release of Subsidiaries is necessary and essential to the restructuring of SFC. The primary purpose of the CCAA proceedings was to extricate the business of Sino-Forest, through the operation of SFC's Subsidiaries (which were protected by the Stay of Proceedings), from the cloud of uncertainty surrounding SFC. Accordingly, counsel submits that there is a clear and rational connection between the release of the Subsidiaries in the Plan. Further, it is difficult to see how any viable plan could be made that does not cleanse the Subsidiaries of the claims made against SFC.

[73] Counsel points out that the Subsidiaries who are to have claims against them released are contributing in a tangible and realistic way to the Plan. The Subsidiaries are effectively contributing their assets to SFC to satisfy SFC's obligations under their guarantees of SFC's note indebtedness, for the benefit of the Affected Creditors. As such, counsel submits the releases benefit SFC and the creditors generally.

[74] In my view, the basis for the release falls within the guidelines previously set out by this court in *ATB Financial*, *Re Nortel Networks*, 2010 ONSC 1708, and *Re Kitchener Frame Limited*, 2012 ONSC 234, 86 C.B.R. (5th) 274. Further, it seems to me that the Plan cannot succeed without the releases of the Subsidiaries. I am satisfied that the releases are fair and reasonable and are rationally connected to the overall purpose of the Plan.

[75] With respect to the Named Directors and Officers release, counsel submits that this release is necessary to effect a greater recovery for SFC's creditors, rather than having those directors and officers assert indemnity claims against SFC. Without these releases, the quantum of the unresolved claims reserve would have to be materially increased and, to the extent that any such indemnity claim was found to be a proven claim, there would have been a corresponding dilution of consideration paid to Affected Creditors.

[76] It was also pointed out that the release of the Named Directors and Officers is not unlimited; among other things, claims for fraud or criminal conduct, conspiracy claims, and section 5.1 (2) D&O Claims are excluded.

[77] I am satisfied that there is a reasonable connection between the claims being compromised and the Plan to warrant inclusion of this release.

[78] Finally, in my view, it is necessary to provide brief comment on the alternative argument of the Funds, namely, the Plan be altered so as to remove Article 11 "Settlement of Claims Against Third Party Defendants". The Plan was presented to the meeting with Article 11 in place. This was the Plan that was subject to the vote and this is the Plan that is the subject of this motion. The alternative proposed by the Funds was not considered at the meeting and, in my view, it is not appropriate to consider such an alternative on this motion.

Disposition

[79] Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

[80] Accordingly, the motion is granted and the Plan is sanctioned. An order has been signed substantially in the form of the draft Sanction Order.

MORAWETZ J.

Date: December 12, 2012

Tab 19

2018 CarswellAlta 951
Alberta Court of Queen's Bench

Poseidon Concepts Corp., Re

2018 CarswellAlta 951, [2018] A.W.L.D. 4059, 297 A.C.W.S. (3d) 27

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

In the Matter of Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership and Poseidon Concepts Inc. (Applicants)

K. Horner J.

Judgment: May 4, 2018
Docket: Calgary 1301-04364

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Insolvency; Insurance

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Applicants, class representatives and senior secured creditors brought application for order pursuant to Companies' Creditors Arrangement Act approving and giving effect to amended plan of compromise and arrangement and settlement agreement — Application granted — Plan, settlement agreement, and all terms and conditions thereof, and matters and transactions contemplated thereby, were fair and reasonable — Plan was sanctioned and approved pursuant to s. 6 of Act — Settlement agreement was approved pursuant to s. 11 of Act — Court would retain ongoing supervisory role for purposes of implementing, administering and enforcing plan and settlement agreement and matters related to class settlement funds.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
ss. 95-101 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 6 — considered

s. 11 — considered

s. 36.1 [en. 2007, c. 36, s. 78] — considered

APPLICATION by applicants, class representatives and senior secured creditors for order pursuant to *Companies' Creditors Arrangement Act* approving and giving effect to amended plan of compromise and arrangement and settlement agreement.

***K. Horner J.*:**

UPON THE APPLICATION OF Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership, and Poseidon Concepts Inc. (collectively, the "Applicants") and by the Class Representatives, in their own and in a representative capacity, and by the Senior Secured Creditors, in the proceeding in the Court of Queen's Bench of Alberta bearing Court File No. 1301-04364 (the *"CCAA Proceedings")* for an Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the *"CCAA")* approving and giving effect to: (i) the Amended Plan of Compromise and Arrangement dated April 6, 2018 attached as Schedule "A" hereto, as amended, varied or supplemented from time to time in accordance with its terms (the *"Plan");* and, (ii) the Settlement Agreement, dated April 6, 2018 attached as Schedule "B" to the Plan (the *"Settlement Agreement")*, was considered this day, at the Court of Queen's Bench of Alberta at the Calgary Court Centre, 601-5th Street SW, City of Calgary, in the Province of Alberta;

UPON READING the Notice of Application; the Forty-Fifth Report of PricewaterhouseCoopers Inc., in its capacity as monitor of the Applicants (the *"Monitor")*, dated April 26, 2018 (the *"Monitor's Report");* as well as the other materials filed by the parties;

AND UPON HEARING the submissions of counsel for the Applicants, counsel for the Monitor, Class Counsel, and such other counsel as were present;

AND UPON BEING ADVISED that all of the Settling Parties support the Plan and the Settlement Agreement;

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINED TERMS

1 Any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan and the Settlement Agreement.

SERVICE, NOTICE, AND MEETING

2 The time for service of the Notice of Application and the Monitor's Report is hereby abridged and validated so that this Application is properly returnable today, and the Court hereby dispenses with further service.

3 There has been good and sufficient notice, service, and delivery of the Meeting and Hearing Order, Plan, and Settlement Agreement to all Persons upon which notice, service, and delivery was required. All applicable parties adhered to, and acted in accordance with, the Meeting and Hearing Order and the Global Settlement Notice Order. All Persons shall be forever barred from raising any further objection to the Plan or the Settlement Agreement.

4 The Meeting was duly convened and held, all in conformity with the CCAA and the orders of this Court, including, without limitation, the Meeting and Hearing Order.

APPROVAL OF THE PLAN AND THE SETTLEMENT AGREEMENT

5 The Plan, the Settlement Agreement, and all the terms and conditions thereof, and matters and transactions contemplated thereby, are fair and reasonable.

6 The Plan is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

7 The Settlement Agreement is hereby approved pursuant to Section 11 of the CCAA.

8 The terms of the Plan and the Settlement Agreement are incorporated by reference into this Order and are hereby approved.

PLAN AND SETTLEMENT AGREEMENT IMPLEMENTATION

9 At the Effective Time on the Plan Implementation Date, the Plan shall be final, binding, and effective in accordance with its terms against, and enure to the benefit of, as the case may be, the Applicants, the Released Parties, the Affected Creditors, the Class Representatives, the Class Members, and all other Persons and parties named or referred to in, affected by, or subject to the Plan, including, without limitation, respective heirs, executors, administrators, legal representatives, successors, and assigns of all of them without any ability to "opt-out" or otherwise not be bound by the Plan.

10 At the Effective Time on the Plan Implementation Date, the Settlement Agreement shall be final, binding, and effective against the Class Representatives and Class Members, as well as any Person who is a plaintiff/applicant, defendant/respondent, third, fourth, or subsequent party or mis-en-cause in any Claim, including the Class Actions, without any ability to "opt-out" or otherwise not be bound by the Settlement Agreement.

11 Each Person named or referred to in, or subject to, the Plan is hereby deemed to have consented and agreed to all of the provisions of the Plan, in its entirety, and is hereby deemed to have executed and delivered all consents, releases, assignments, and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

12 Each of the Applicants is authorized and directed, and the Monitor, Senior Secured Creditors, Released Parties, and the Class Representatives are authorized and empowered, to take all steps and actions, and to do all things, necessary or appropriate to implement the Plan and the Settlement Agreement in accordance with their terms, and to enter into, execute, deliver, complete, implement, and consummate all of the steps, transactions, distributions, deliveries, allocations, instruments, and agreements contemplated pursuant to the Plan including but not limited to the Monitor executing the release at Schedule "E" to the Plan, the amending agreement at Schedule "F" to the Plan, and such steps and actions are hereby authorized, ratified and approved.

13 On or after the Plan Implementation Date, the Class Settlement Funds shall be held, allocated, and distributed by Class Counsel in accordance with the further order of this Court.

14 Upon being provided with confirmation satisfactory to it that the conditions precedent set out in article 6.1 of the Plan have been satisfied or waived, as applicable, in accordance with the terms of the Plan, the Monitor is hereby authorized and directed to deliver to the Applicants, the Class Representatives, the Senior Secured Creditors, the Settling Defendants and the other parties to the service list in the CCAA Proceeding, a certificate signed by the Monitor (the *"Monitor's Certificate")* certifying that the Plan Implementation Date has occurred and that the Plan and this Sanction Order are effective in accordance with their respective terms, and, following delivery of the Monitor's Certificate as contemplated above, the Monitor shall file the Monitor's Certificate with this Court and with the United States Bankruptcy Court.

15 Section 36.1 of the CCAA, sections 95 to 101 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and any other federal or provincial law relating to preferences, fraudulent conveyances, transfers at undervalue or oppressive misconduct, shall not apply to the Plan or to any transactions, distributions, transfers, allocations, transactions, or payments implemented pursuant to the Plan, the Settlement Agreement, or this Order.

16 The steps, compromises, releases, injunctions, discharges, cancellations, transactions, arrangements, and reorganizations to be effected on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated in the Plan, without any further act or formality, beginning at the Effective Time.

17 On the Plan Implementation Date, (a) Poseidon shall establish an Administration Charge Reserve in the approximate amount of $200,000, or such other amount as agreed to by the Monitor and the Senior Secured Creditors, which cash reserve: (i) shall be maintained and administered by the Monitor, in trust, for the purpose of paying any amounts secured by the Administration Charge; and (ii) upon the termination of the Administration Charge pursuant to the Plan, shall be paid to the Senior Secured Creditors in addition to any other amounts payable pursuant to the Plan; and (b) the Directors' Charge and the previously existing Administration Charge shall be vacated and discharged in all respects.

COMPROMISE OF CLAIMS, RELEASE AND DISCHARGE OF CLAIMS

18 On the Plan Implementation Date, any and all Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, and barred, subject only to the right of the applicable Persons to receive the distributions and interests to which they are entitled pursuant to the Plan.

19 Pursuant to Article 5.1 of the Plan, and subject to Article 5.2 of the Plan, the Released Parties are fully, finally, irrevocably, absolutely, and forever released, remised and discharged from all Claims, including those identified in Article 5.1 of the Plan, as of the Effective Time on the Plan Implementation Date pursuant to the Plan and this Order.

20 Pursuant to Articles 5.1 and 5.3 of the Plan, and subject to Articles 5.2, 5.4 and 5.8 of the Plan, as of the Plan Implementation Date, the ability of any Person to proceed against the Released Parties in respect of any Released Claim shall be forever discharged, barred and restrained, and all proceedings with respect to, in connection with or relating to any such matter shall be permanently barred, estopped, stayed and enjoined.

21 Pursuant to Article 5.3 of the Plan and subject to Articles 5.4 and 5.8 of the Plan, all Persons (regardless of whether or not such Persons are creditors or Claimants), including the Settling Defendants, Class Representatives, Class Members, Poseidon, and the Released Parties shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Time on the Plan Implementation Date, from taking any step, or doing any activity or other thing, identified in Article 5.3 of the Plan,

22 Pursuant to section 4(a) of the Settlement Agreement, and subject to section 4(b) of the Settlement Agreement, the Released Parties are fully, finally, irrevocably, absolutely, and forever released, remised and discharged from all Claims, including those identified in section 4(a) of the Settlement Agreement, as of the Effective Time on the Plan Implementation Date pursuant to the Settlement Agreement and this Order,

23 Pursuant to section 4(c) of the Settlement Agreement and subject to section 4(d) of the Settlement Agreement, all Persons (regardless of whether or not such Persons are creditors or Claimants), including the Settling Defendants, Class Representatives, Class Members, Poseidon, and the Released Parties shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Time on the Plan Implementation Date, from taking any step, or doing any activity or other thing, identified in section 4(c) of the Settlement Agreement. Nothing in the Settlement Agreement or in this Order shall bar, estop, stay or enjoin any of the steps or activities or other things identified in section 4(d) of the Settlement Agreement.

24 The Class Actions, the Monitor Action, the Senior Secured Creditor Action and any and all claims, counterclaims, crossclaims, and third (or subsequent) party claims related thereto, including the KPMG Claim, are to be dismissed, with prejudice and without costs, pursuant to the Plan and the Settlement Agreement.

25 No further Claims by or against the Released Parties may be commenced.

26 In accordance with Article 4.7 of the Plan and section 3(d) of the Settlement Agreement:

(a) under no circumstances shall the Released Parties be liable to make any further financial contribution or payment in respect of any Claim including the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, nor shall the Released Parties have any liability whatsoever for or have any exposure whatsoever to anything directly or indirectly, related to, arising out of, based on, or connected with the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, over and above the payment of the Poseidon Settlement Funds and the Class Settlement Funds;

(b) costs associated with any notices required in connection with the Plan and the Settlement Agreement shall not be paid for by the Released Parties; and

(c) the Poseidon Settlement Funds and the Class Settlement Funds are:

(i) the full monetary contribution or payment of any kind to be made by the Released Parties, and is inclusive of all costs, interest, legal fees, taxes (inclusive of any GST, HST, or any other taxes that may be payable in respect

of the Plan or the Settlement Agreement), costs associated with any distributions, further litigation, administration or otherwise; and

(ii) a tangible and meaningful contribution on behalf of the Released Parties to the resolution of issues on the terms set out in the Plan and the Settlement Agreement.

POWERS OF THE MONITOR

27 In connection with its role holding funds and making or facilitating payments and distributions contemplated by the Plan:

(a) the Monitor is solely doing so as administrative payment agent for the Applicants and neither the Monitor nor PricewaterhouseCoopers Inc. has agreed to become, and neither is assuming any responsibility as a receiver, assignee, curator, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Applicants within the meaning of any relevant tax legislation;

(b) the Monitor shall be provided with and is entitled to have access to all of the non-privileged books and records of the Applicants and to all non-privileged documents and other information required by it from time to time, whether in the possession of the Applicants or a third party, in connection with its role hereunder; and

(c) the Monitor shall not exercise discretion over the funds to be paid or distributed hereunder and shall only make payments as contemplated by the Plan, this Order and any future Order of this Court.

28 Any payments and deliveries made by, or with the consent of, the Monitor in accordance with the Plan or this Order (including without limitation payments made to or for the benefit of the Affected Creditors) shall not constitute a "distribution" for the purposes of any federal, provincial or territorial tax legislation (collectively, the *"Tax Statutes"*), and the Monitor, in making any such payments is merely a disbursing agent under the Plan and is not exercising any discretion in making payments under the Plan and is not "distributing" such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of payments or deliveries made by it, or with its consent, and the Monitor is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of payments made by, or with the consent of the Monitor in accordance with the Plan and this Order and any claims of this nature are hereby forever barred.

29 From and after the Plan Implementation Date, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Plan, the Monitor shall be empowered and authorized, but not obligated, to:

(a) take such actions and execute such documents, in the name of and on behalf of the Applicants, as the Monitor considers necessary or desirable in order to:

(i) effect the liquidation, bankruptcy, winding-up or dissolution of the Applicants;

(ii) facilitate the completion and administration of the estates of the Applicants in the CCAA Proceeding and any other proceedings commenced in respect of the Applicants or any of them; and,

(iii) act, if required, as trustee in bankruptcy, liquidator, receiver or a similar official of such entities;

(b) exercise any powers which may be properly exercised by any officer, any member of the board of directors or of the board of directors of any of the Applicants except for the waiver of privilege belonging to the Applicants;

(c) cause the Applicants to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Applicants in dealing with their operations, restructuring, wind-down, liquidation or other activities except for the waiver of privilege belonging to the Applicants;

(d) engage assistants or advisors or cause the Applicants to engage assistants or advisors as the Monitor deems necessary or desirable to carry out the terms of the Orders in the CCAA Proceeding or for purposes of the Plan; and

(e) apply to this Court for any orders necessary or advisable to carry out its powers and obligations under any other Order granted by this Court including for advice and directions with respect to any matter,

and in each case where the Monitor takes any such actions or steps it shall not be deemed to be a director or officer of the Applicants, and it shall be exclusively authorized and empowered to take any such actions or steps, to the exclusion of all other Persons, and without interference from any other Person, provided that the Monitor shall comply with all applicable law.

30 Without limiting the provisions of the Initial Order or the provisions of any other Order granted in the CCAA Proceeding, including this Order, the Applicants shall remain in possession and control of the Property (as defined in the Plan) and Business (as defined in the Initial Order) and the Monitor shall not take possession or be deemed to be in possession and/or control of the Property or Business.

31 Nothing herein shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Applicants within the meaning of any relevant legislation.

32 The Monitor's Report, and the Monitor's activities and conduct in relation to the Applicants up to the date hereof, including the activities described in the foregoing Report, are hereby approved.

33 That: (i) in carrying out the terms of this Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of and exercising the powers given to it under this Order and the Plan, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicants and any information provided by the Applicants without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

DECLARATIONS RE INSURANCE

34 The Contribution:

(a) does not violate the interests of the Class Representatives, the Class, the Monitor, the Senior Secured Creditors, KPMG, the Underwriters, or any other Person who might have a claim against any person or entity potentially covered under the Insurance Policies;

(b) constitutes covered Loss (as defined in the Insurance Policies);

(c) reduces the Limits of Liability (as defined in the Insurance Policies) under the Insurance Policies for all purposes, regardless of any subsequent finding by any court, tribunal, administrative body or arbitrator, in any proceeding or action, that the Settling Defendants, or any of them, engaged in conduct that triggered or may have triggered any exclusion, term or condition of the Insurance Policies, or any of them, so as to disentitle them to coverage under the Insurance Policies, or any of them;

(d) is without prejudice to any coverage positions or reservations of rights taken by the Insurers in relation to any other matter advised to the Insurers or any other Claim (as defined in the Insurance Policies) made or yet to be made against the Insureds, provided that neither coverage nor payment in respect of the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, nor the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, will be voided or impacted by any such coverage position or reservation of rights; and

(e) fully and finally releases the Insurers from any further obligation, and from any and all claims against them under or in relation to the Insurance Policies, in respect of the portion of the Limits of Liability that were expended to fund the Contribution.

35 Once the Contribution has been funded, there is no further coverage under the Insurance Policies for Poseidon. For clarity, this declaration is not intended to, and does not, extinguish any remaining coverage under the Insurance Policies for the individual Insureds.

36 With the exception of payment in the aggregate amount of CAD $30,000 by the Insurers towards the settlement of regulatory proceedings by the Chartered Professional Accountants of Alberta against Lyle Michaluk, which shall be treated as Criminal /Regulatory Defence Costs, the determination of what constitutes reasonable Defence Costs paid or payable by any of the Insurers for Criminal/Regulatory Defence Costs and which reduce the amount of the Final Instalment of the Poseidon Settlement Funds and the Final Instalment of the Class Settlement Funds, all such terms as defined in Article 1.1 of the Plan, shall be within the sole purview and discretion of the Insurer paying them in accordance with the applicable litigation guidelines and, except for the individual Insured on whose behalf they are being paid, shall not be subject to review or challenge by any other Person, including but not limited to the Monitor, the Senior Secured Creditors, Class Members or the Class Representatives.

37 In addition to the reduction of the Limits of Liability under the Policies pursuant to Article 5.8(a)(iii) of the Plan and section 4(h)A.III. of the Settlement Agreement, the Limits of Liability under the following Policies will be deemed to have been further reduced by the following amounts pursuant to an agreement between the Insurers and the Insureds under the Policies:

Policy Issued by:	***Policy***	***Limits of Liability to be Reduced by:***
Encon Group Inc.	[880# omitted]	$250,000
Chubb Insurance Company of Canada	[964# omitted]	$250,000
Travelers Insurance Company of Canada	[516# omitted]	$250,000
Royal & Sun Alliance Insurance Company of Canada	[854# omitted]	$250,000
Chartis Insurance Company of Canada, now known as AIG Insurance Company of Canada	[202# omitted]	$2,500,000
Lloyd's Underwriters	[150# omitted]	$0

STAY EXTENSION

38 The Stay Period in the Initial Order be and is hereby extended until and including September 7, 2018, or such later date as this Court may order,

EFFECT, RECOGNITION AND ASSISTANCE

39 This Court shall retain an ongoing supervisory role for the purposes of implementing, administering and enforcing the Plan and the Settlement Agreement and matters related to the Class Settlement Funds. Any disputes arising with respect to the performance or effect of, or any other aspect of, the Settlement Agreement shall be determined by this Court, and, except with leave of this Court first obtained, no person or party shall commence or continue any proceeding or enforcement process in any other court or tribunal, with respect to the performance or effect of, or any other aspect of the Plan or Settlement Agreement.

40 This Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

41 The Applicants, the Released Parties, Class Representatives, the Senior Secured Creditors, and the Monitor shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order, or any further order as may be contemplated by the Plan or the Settlement Agreement or be otherwise required, and for assistance in carrying out the terms of this Orders, the Plan and the Settlement Agreement,

42 The aid and recognition of any court or any judicial, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Released Parties, the Monitor, the Class Representatives, the Senior Secured Creditors and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, the Monitor, the Class Representatives, and the Senior Secured Creditors, as may be necessary or desirable to give effect to this Order or to assist them in carrying out the terms of this Order, including, without limitation, by granting representative status to the Monitor in any foreign proceeding.

43 Any conflict or inconsistency between the Plan and this Order shall be governed by the terms, conditions and provision of the Plan, which shall take precedence and priority.

44 Any conflict or inconsistency between the Settlement Agreement and this Order shall be governed by the terms, conditions and provision of the Settlement Agreement, which shall take precedence and priority.

Application granted.

Schedule"A"

SCHEDULE "A"

Court File No. 1301-04364

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP AND POSEIDON CONCEPTS INC. APPLICANT

AMENDED PLAN OF COMPROMISE AND ARRANGEMENT pursuant to the *Companies' Creditors Arrangement Act* concerning, affecting and involving POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP AND POSEIDON CONCEPTS INC.

April 6, 2018

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PLAN OF COMPROMISE AND ARRANGEMENT (THE CAPITALIZED TERMS USED IN THIS DOCUMENT HAVE THE MEANING ASCRIBED THERETO IN ARTICLE 1.1 HEREOF)

RECITALS

WHEREAS Poseidon is insolvent;

AND WHEREAS, on the Filing Date, the CCAA Court granted the Initial Order in respect of Poseidon pursuant to the CCAA;

AND WHEREAS, on May 15, 2013, a Recognition Order was granted by the United States Bankruptcy Court under Chapter 15 of the United States Bankruptcy Code, recognizing Canada as the foreign main proceeding for Poseidon;

AND WHEREAS by the Representation Order, the CCAA Court appointed the Class Representatives to formally represent, in the CCAA Proceeding, the interests of the persons comprising the proposed classes in the Class Actions, and authorized the Class Representatives to settle or compromise Claims on behalf of all Class Members, and to take all steps and to do all acts necessary or desirable to carry out the terms of that order;

AND WHEREAS there have been allegations of inadequate financial disclosure and other tortious conduct by Poseidon and its directors, officers, and employees, as well as allegations of wrongful conduct by KPMG and the Underwriters, resulting in the

Class Actions both in Canada and the United States of America, the Senior Secured Creditor Action, the Monitor Action, and various related claims;

AND WHEREAS the following actions have been dismissed or discontinued, as set out below:

(a) *Goldsmith v National Bank of Canada*, Ontario Superior Court of Justice File No. CV-13-474486-00CP, was dismissed by Order reported as 2015 ONSC 2746, aff'd 2016 ONCA 22;

(b) *Goldsmith v National Bank Financial Inc*, Ontario Superior Court of Justice File No. CV-14-509246-00CP, was discontinued by Order dated July 12, 2016;

(c) *Kegel v National Bank of Canada*, Quebec Superior Court File No. 500-06-000642-138, was discontinued by Order dated June 29, 2016; and

(d) *Lewis v National Bank Financial Inc*, Quebec Superior Court File No. 500-06-000702-148, was discontinued by Order dated June 29, 2016;

AND WHEREAS through the concerted efforts of the Monitor, the Senior Secured Creditors, the Class Representatives, and the Settling Defendants and the Insurers, all of the Claims are proposed to be resolved pursuant to the Settlement Agreement and this Plan;

AND WHEREAS the Monitor proposed an initial Plan of Compromise and Arrangement and obtained a Meeting and Hearing Order pursuant to which, among other things, Poseidon was authorized to file a Plan and to convene a meeting of Affected Creditors to consider and vote on the Plan;

AND WHEREAS it is essential to the Released Parties that by virtue of this Plan and the Settlement Agreement, all Claims and possible Claims related in any way to Poseidon be fully and finally resolved so as to bring finality to their potential liability, and without such finality, the financial contributions under this Plan and the Settlement Agreement would not have been made, and the Parties agree that this Plan and the Settlement Agreement together provide finality to the Released Parties;

AND WHEREAS pursuant to that initial Plan of Compromise and Arrangement, the Insurers paid CDN $29,000,000 to the Monitor in satisfaction of the amounts owing under the initial Plan of Compromise and Arrangement in respect of the Initial Instalment of the Class Settlement Funds and the Initial Instalment of the Poseidon Settlement Funds, which moneys continue to be held by the Monitor, in trust, and shall be credited towards the new higher aggregate amount payable under Article 4.1 of this Plan in respect of the Initial Instalment of the Class Settlement Funds and the Initial Instalment of the Poseidon Settlement Funds;

AND WHEREAS the Parties engaged in settlement negotiations that have resulted in a global settlement, as set out in this Plan and the Settlement Agreement;

NOW THEREFORE, the Monitor hereby proposes this Plan.

ARTICLE 1 INTERPRETATION

1.1 Defined Terms

Additional Proceeds	means the aggregate amount of CAD $23,000,000.
Administration Charge	has the meaning ascribed thereto in the Initial Order.
Administration Charge Reserve	means the cash reserve to be established by Poseidon on the Plan Implementation Date in the approximate amount of $200,000 or such other amount as agreed to by the Monitor and the Senior Secured Creditors, which cash reserve: (i) shall be maintained and administered by the Monitor, in trust, for the purpose of paying any amounts secured by the Administration Charge; and (ii) upon the termination of the Administration Charge pursuant to the Plan, shall be paid to the Senior Secured Creditors in addition to any other amounts payable pursuant to the Plan.
Affected Creditors	means the Senior Secured Creditors of Poseidon.

Affected Claims	means the Senior Secured Creditors' secured Claims.
Alberta Class Actions	means, collectively, the following proceedings and any and all claims, counterclaims, crossclaims, and third (or subsequent) party claims related thereto: Alberta Court of Queen's Bench Action Nos. 1301-00935, 1401-07353, and 1301-11455.
Alberta Dismissal Orders	means Orders granted in each of the Alberta Class Actions dismissing the Alberta Class Actions with prejudice and without costs.
Approval and Settlement Motion	means the motion brought before the CCAA Court for the Approval and Settlement Order.
Approval and Settlement Order	means an Order, substantially in the form set out in Schedule C hereof granted in the CCAA Proceeding which shall, among other things, (a) approve, sanction and/or confirm the Plan; (b) provide for the releases and bar order / injunction set forth herein; (c) [Intentionally deleted] (d) [Intentionally deleted] (e) declare that the applicable parties have adhered to and complied with the Meeting and Hearing Order, and that all Persons shall be forever barred from objecting to the Settlement Agreement and the Plan; (f) approve the Settlement Agreement; (g) confirm that the Settlement Agreement shall be binding Class Member, named defendant/respondent, third, and given full effect against parties designated in or part of the Class Actions, whether as a Class Representative, fourth or subsequent parties, or mis-en-cause and without any ability to "opt-out" or otherwise allow any Person not be bound by such Orders; (h) [Intentionally deleted] (i) [Intentionally deleted] (j) grant the bar order / injunction, releases, and declarations provided for in the Plan and the Settlement Agreement; and, (k) be in form and content acceptable to all of the Settling Parties, acting reasonably, incorporating, among other things, the releases, bar order/ injunction, declarations and other protections provided for in the Plan and Settlement Agreement.
Approval Orders	means the Approval and Settlement Order, the Alberta Dismissal Orders, the U.S. Approval Order, and the Settlement Recognition Orders.
Business Day	means a day, other than Saturday, Sunday or a statutory holiday, on which banks are generally open for business in Calgary, Alberta, Canada.
CCAA	means the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.
CCAA Court	means the Court of Queen's Bench of Alberta, as presiding over the CCAA Proceeding.
CCAA Proceeding	means Alberta Court of Queen's Bench, Action No. 1301-04364.
Claim	means any and all manner of actions, causes of action, counterclaims, cross claims, third (or subsequent) party claims, proceedings, suits, debts, dues, accounts, bonds, covenants, contracts, complaints, rights, obligations, claims, and demands, or other related proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) of any Person that has been, could have been, or may be asserted or made against any other Person, whether personal or subrogated, existing or possible, asserted or made, known or unknown, existing or potential, suspected or unsuspected, actual or contingent, liquidated or unliquidated, in whole or in part, for Damages of any kind, based in any way whatsoever upon, arising in any way whatsoever out of, relating in any way whatsoever to, or in connection in any way whatsoever with, any conduct anywhere, from the beginning of time to the date of the last signed Approval Order,

based in any way whatsoever upon, arising in any way whatsoever out of, relating in any way whatsoever to, or in connection in any way whatsoever with, Poseidon or the affairs of Poseidon
including as set out in the Class Actions, the Monitor Action, the Senior Secured Creditor Action, the KPMG Claim, the Underwriter Claim or otherwise
including by reason of the commission of a tort (whether intentional, wilful, reckless, negligent or unintentional, including for negligence, negligent misrepresentation, fraud, fraudulent misrepresentation, deceit, conspiracy, conversion, breach of trust, or any other tort), by reason of any breach of contract or other agreement (oral or written or otherwise), by reason of breach of corporate by-laws, corporate policies, corporate directives, or statutory duties or obligations (including any legal, statutory, equitable or fiduciary duty, or otherwise), by reason of any breach of statute (including breach of the *Securities Acts* of every province, the oppression remedy, s. 43 of the *Alberta Business Corporations Act* and the equivalent provisions of other provinces, the Securities Act of 1933, the Securities Exchange Act of 1934, or otherwise), or by reason of any breach of right of ownership of or title to property or assets or right to a trust or deemed trust (statutory, express, implied, resulting, constructive or otherwise), by reason of any right to contribution and/or indemnity (including pursuant to statute or contract or otherwise),
whether by action or inaction, statement, misstatement, or omission, transaction, conduct, misconduct, dealing, misdealing or by reason of inducing any of same, whether or not any such Damages have been reduced to judgment, are liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, restitutionary, secured, or unsecured, present or future, known or unknown, by guarantee, surety or otherwise, and whether or not any right or claim is executory or anticipatory in nature.
For greater certainty, a Claim includes a D&O Claim.

Claimant means any Person holding or potentially holding any Claim against Poseidon and/or any of the Released Parties.

Claims Procedure means the procedure established for the filing of Claims in the CCAA Proceeding pursuant to the Claims Procedure Order.

Claims Procedure Order means the Order under the CCAA of the Honourable Justice MacLeod dated November 4, 2014, establishing, among other things, a claims procedure in respect of Poseidon, as such Order may be amended, restated or varied from time to time.

Class means the Class Representatives and the Class Members.

Class Actions means collectively the following proceedings and any and all claims, counterclaims, crossclaims, and third (or subsequent) party claims related thereto:
the Alberta Class Actions;
Ontario Superior Court Action Nos. CV-12-468736 00CP, CV-14-512823 OOCP, CV-13-474553 00CP, CV-14-517015, and CV-14-507785 OOCP;
Quebec Court Action Nos. 500-06-000633-129 and 500-06-000699-146; and
the U.S. Actions,

Class Counsel means Jensen Shawa Solomon Duguid Hawkes LLP, Siskinds LLP, Siskinds Demeules LLP, Paliare Roland Rosenberg Rothstein LLP, and The Rosen Law Firm.

Class Counsel Fees means the fees, disbursements, costs, HST and other applicable taxes or charges of Class Counsel and a *pro rata* share of all interest earned on the Class Settlement Funds to the date of payment, as approved by the CCAA Court.

Class Members has the meaning ascribed to the term "Class Members" in the Representation Order, and includes the U.S. Class Members.

Class Representatives means Franz Auer, Mohammed Ramzy, Thomas James, and Marian Lewis, in their capacity as representatives appointed pursuant to the Representation Order, as amended from time to time, and/or such other persons as may be appointed in that capacity by the CCAA Court.

Class Settlement Funds means:

(a) the monetary payment(s) representing damages payable by the Insurers pursuant to the Settlement Agreement in settlement of the claims of Class Members, including the Class Actions, in the all-inclusive

amounts of the Initial Instalment of the Class Settlement Funds and the Final Instalment of the Class Settlement Funds; and
(b) the Additional Proceeds.

Competent Court	means the following courts: in respect of proceedings in the Province of Alberta, the Court of Queen's Bench; in respect of proceedings in the Province of Ontario, the Superior Court of Justice; in respect of proceedings brought in the Province of Quebec, the Superior Court; and, in respect of proceedings brought in the State of New York, the United States District Court for the Southern District of New York.
Contribution	means the Class Settlement Funds (excluding the Additional Proceeds) and the Poseidon Settlement Funds, and the amounts paid by the Insurers for the defence of the Class Actions, the Monitor Action, the Senior Secured Creditor Action, the KPMG Claim, the Underwriter Claim and all related Claims, as well as all related regulatory or other investigations or proceedings.
Damages	means any general, punitive, aggravated, consequential, exemplary, restitutionary, by unjust enrichment, and by disgorgement, monies, losses, setoff, indemnity, injuries, indebtedness, liabilities or obligations of any kind whatsoever and however arising, and any interest, taxes, legal fees, expenses, Class Counsel Fees, administration fees, and costs payable in addition to or in respect thereof, whether incurred or suffered in the past, present or future.
D&Os	means, collectively and individually, all current and former directors and officers of Poseidon and for greater clarity specifically includes the following Persons: Matthew Mackenzie, Clifford Wiebe, Joseph Kostelecky, Lyle Michaluk, Scott Dawson, Dean Jensen, Jim McKee, Neil Richardson, David Belcher, Harley Winger, Kenneth Faircloth, and Wazir (Mike) Seth.
D&O Claim	means any Claim that has been, could have been, or may be asserted or made in whole or in part against one or more D&Os or Employees.
Employee Priority Claim	means any of the following Claims of employees and former employees of Poseidon: (a) Claims equal to the amounts that such employees and former employees would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act*, R. S. C. 1985, c. B-3, as amended, if Poseidon had become bankrupt on the Filing Date; and (b) Claims for wages, salaries, commissions or compensation for services rendered by them after the Filing Date and on or before the Plan Implementation Date.
Employees	means collectively and individually, all current and former employees of Poseidon, including but not limited to Sonja Kuehnle and Doug Robinson.
Effective Time	means 12:01 a.m. (Calgary time) on the Plan Implementation Date.
Filing Date	means April 9, 2013.
Final Instalment of the Class Settlement Funds	means an amount equal to 26.32% of the aggregate amount of: CAD $7.5 million (being CAD $6.5 million plus a notional gross-up of CAD $1.0 million) less defence costs incurred by the D&Os, Kuehnle and Robinson, subject to the limits set out in s. 5.9(c), during the Relevant Period that have been paid by, or that are payable by, the Insurers under the Insurance Policies (or any of them) for the defence of any criminal or regulatory (including enforcement) proceedings actually commenced, on or before April 10, 2019, against one or more of them ("Criminal / *Regulatory* Defence Costs") (i.e. 0.2632 * (CAD $7,500,000 - Criminal / Regulatory Defence Costs)), to a maximum of the difference between CAD $6.5 million and the Criminal Regulatory Defence Costs. For greater clarity, the amount of the Final Instalment of the Class Settlement Funds shall in no event exceed CAD $6.5 million or be a negative number. For the purposes of this definition: (a) the term "Relevant Period" means April 10, 2017 until the later of (i) the date upon which all such criminal and/or regulatory proceedings are completed (i.e. any appeals that could be brought have been completed or the time for bringing such appeals has expired) and (ii) April 10, 2019; and (b) payment in the aggregate amount of CAD $30,000 by the Insurers towards the settlement of regulatory proceedings by the Chartered

	Professional Accountants of Alberta against Lyle Michaluk shall be treated as Criminal / Regulatory Defence Costs.
Final Instalment of the Poseidon Settlement Funds	means an amount equal to CAD $6.5 million less the Criminal Regulatory Defence Costs less the amount of the Final Instalment of the Class Settlement Funds. For greater clarity, the Poseidon Settlement Funds shall in no event be a negative number.
Final Order	means any order that is no longer subject to: (a) any application to amend, vary, or set aside; and (b) any appeals, either because the time to appeal has expired without an appeal being filed, or because it has been affirmed by any and all courts with jurisdiction to consider any appeals therefrom.
Global Settlement Notice Order	means the order of the CCAA Court dated March 13, 2018 in respect of notice of the Settlement Agreement to the Class Members.
Governmental Entity	means any government, regulatory authority, governmental department, agency, commission, bureau, official, minister, Crown corporation, court, board, tribunal or dispute settlement panel or other law, rule or regulation-making organization or entity: (a) having or purporting to have jurisdiction on behalf of any nation, province, territory or state or any other geographic or political subdivision of any of them; or (b) exercising, or entitled or purporting to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power.
Government Priority Claims	means all Claims of a Governmental Entity in respect of amounts that are outstanding as of the Plan Implementation Date and that are of a kind that could be subject to a demand under: (a) subsections 224(1.2) of the Canadian Tax Act; (b) any provision of the Canada Pension Plan or the *Employment Insurance Act* (Canada) that refers to subsection 224(1.2) of the *Income Tax Act* (Canada) and provides for the collection of a contribution, as defined in the Canada Pension Plan, or employee's premium or employer's premium as defined in the *Employment Insurance Act* (Canada), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or (c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act* (Canada) or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum: (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act* (Canada); or, (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection
Hearing Notice	means the notice advising Class Members as to the terms of the Plan and Settlement Agreement and of the date of the Approval and Settlement Motion, in a form to be approved by the Settling Parties, acting reasonably, and by the CCAA Court.
Initial Order	means the order made by the CCAA Court in respect of Poseidon on the Filing Date, as amended from time to time.
Initial Instalment of the Class Settlement Funds	means the aggregate amount of CAD $11,632,800.
Initial Instalment of the Poseidon Settlement Funds	means the aggregate amount of CAD $18,367,200.
Insurance Policies	means the insurance policies issued by Encon Group Inc. on behalf of the subscribing insurers of the insurance policies bearing policy numbers [880# omitted] [691# omitted] and [046# omitted] the insurance policies issued by Chubb Insurance Company of Canada bearing policy numbers [964# omitted] [406# omitted] and [249# omitted] the insurance policies issued by Travelers Insurance Company of Canada bearing policy numbers [516# omitted][156# omitted] and [036# omitted] the insurance policy issued by Royal & Sun Alliance Insurance Company of Canada bearing policy number [854# omitted] the insurance policy issued by Chartis

	Insurance Company of Canada, now known as AIG Insurance Company of Canada, bearing policy number [202# omitted] and the insurance policy issued by Lloyd's Underwriters bearing policy number [150# omitted]
Insureds	means any Person who is insured under the Insurance Policies.
Insurers	means Chubb Insurance Company of Canada, Travelers Insurance Company of Canada, Royal & Sun Alliance Insurance Company of Canada, Chartis Insurance Company of Canada, now known as AIG Insurance Company of Canada, Lloyd's Underwriters, and the subscribing insurers on the Insurance Policies issued by Encon Group Inc. being Continental Casualty Company, Temple Insurance Company, Aviva Insurance Company of Canada and XL Reinsurance America Inc.
KPMG	means KPMG LLP.
KPMG Claim	means all of the Claims commenced by KPMG against one or more of the Released Parties including the Claim commenced in Alberta with court file no. 1401-07353.
Lien Claim	means the single unresolved U.S. lien claim for which the Monitor has set aside the amount of its total claim pending resolution, being U.S. $495,000.
Meeting	means a meeting of the Affected Creditors to consider and vote on the Plan held pursuant to the Meeting and Hearing Order and includes any meeting or meetings resulting from the adjournment thereof.
Meeting and Hearing Order	means one or more orders of the CCAA Court, if necessary: (a) directing the calling and holding of the Meeting; (b) approving the form and content of the Hearing Notice; (c) appointing Siskinds LLP to receive and report on objections to the Settlement, if any; and (d) scheduling the Approval and Settlement Motion.
Monitor	means PricewaterhouseCoopers Inc., in its capacity as Monitor of Poseidon in the CCAA Proceeding.
Monitor Action	means collectively the following proceedings and any and all claims, counterclaims, crossclaims, and third (or subsequent) party claims related thereto: Alberta Court of Queen's Bench Action No. 1301-12927; and Ontario Superior Court of Justice Action No. CV-14-517017.
New Open Range	means Open Range Energy Corp. as it existed after the Plan of Arrangement completed on November 1, 2011.
Old Open Range	means Open Range Energy Corp. as it existed prior to the Plan of Arrangement completed on November 1, 2011.
Person	means and includes an individual, a natural person or persons, a group of natural persons acting as individuals, a group of natural individuals acting in collegial capacity (e.g., as a committee, board of directors, etc.), a corporation, partnership, limited liability company or limited partnership, a proprietorship, joint venture, trust, legal representative, or any other unincorporated association, business organization or enterprise, any government entity and any successor in interest, heir, executor, administrator, trustee, trustee in bankruptcy, or receiver of any person or entity, wherever resident in the world.
Plan	means this Amended Plan of Compromise and Arrangement, including the schedules hereto, in the CCAA Proceeding as such plan may be amended from time to time with approval of the Settling Parties, acting reasonably, or by the Monitor alone pursuant to Article 7.5(b).
Plan Implementation Date	means the Business Day on which the Monitor has filed with the CCAA Court the certificate contemplated in Article 6.2 hereof.
Poseidon	means Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership and Poseidon Concepts Inc. and Old Open Range.
Poseidon Settlement Funds	means the following monetary payment(s) representing damages payable by the Insurers in settlement of the Monitor Action and the Senior Secured Creditor Action in the all-inclusive amounts of: (a) the Initial Instalment of the Poseidon Settlement Funds; and (b) the Final Instalment of the Poseidon Settlement Funds.
Priority Claims means, in descending order of priority:	(a) claims secured by the Administration Charge; (b) the Administration Charge Reserve;

(c) Government Priority Claims, if any;
(d) Employee Priority Claims, if any; and
(e) the Senior Secured Creditors' Claim.

Property means the present and after acquired real and personal property of Poseidon, including the residual interest in the Administration Charge Reserve and the funds set aside in respect of the Lien Claim, but excluding the Monitor Action, the Insurance Policies, and any rights under or pursuant to the Policies, any rights as against the Settling Defendants, and any rights as against the Released Parties.

Released Claims means, collectively, all of the Claims released in accordance with Article 5.1, subject to Article 5.2.

Released Parties means the Persons identified in Schedule "A" hereto.

Representation Order means the order granted on May 30, 2013 in the CCAA Proceeding by the CCAA Court appointing the Class Representatives, as representatives of the class members designated in the Class Actions, for the purposes of the CCAA Proceeding as amended from time to time.

Senior Secured Creditor Action means the action commenced by the Senior Secured Creditors against Poseidon and certain officers and directors of Poseidon in the Court of Queen's Bench of Alberta with court file no. 1401-12410 and any and all claims, counterclaims, crossclaims, and third (or subsequent) party claims related thereto.

Senior Secured Creditors means, collectively, The Toronto-Dominion Bank, National Bank of Canada, The Bank of Nova Scotia and HSBC Bank of Canada.

Settlement means the settlement provided for in the Settlement Agreement and the Plan.

Settlement Agreement means the agreement among the Settling Parties attached to this Plan as Schedule "B", and the schedule thereto,

Settlement Recognition Motion means the motions brought before the Competent Courts in Ontario, and Quebec, and, in the United States, the United States Bankruptcy Court and/or the Competent Court, as the case may be, for the Settlement Recognition Orders.

Settlement Recognition Orders means the Orders of the Competent Courts in Ontario and Quebec, and in the United States, the Orders of the Competent Courts and/or the United States Bankruptcy Court, as the case may be, in form and content acceptable to all of the Settling Parties, acting reasonably, recognizing and giving effect to the Plan and the Approval and Settlement Order in respect of each applicable Class Action and, among other things:

(a) confirming that the Plan and Settlement Agreement shall be binding and given full effect against parties designated and part of the Class Actions, whether as a Class Representative, Class Member, named defendant/respondent or mis-en-cause and without any ability to "opt-out" or otherwise allow any Class Member -to not be bound by such Orders;
(b) [Intentionally deleted]
(c) dismissing the Class Actions, with prejudice and without costs; and
(d) incorporating the bar orders, releases, injunctions, and other protections granted and/or provided for in the CCAA Proceeding, including, without limitation, those granted and/or provided for in the Claims Procedure Order, the Plan, the Settlement Agreement and the Approval and Settlement Order.
(e) [Intentionally deleted]

Settling Defendants means KPMG, the Underwriters, Poseidon, New Open Range, Peyto Exploration and Development Corp., Matthew Mackenzie, Clifford Wiebe, Joseph Kostelecky, Lyle Michaluk, Scott Dawson, Dean Jensen, Jim McKee, Neil Richardson, David Belcher, Sonja Kuehnle, Harley Winger, Doug Robinson, Kenneth Faircloth, and Wazir (Mike) Seth.

Settling Parties means the Settling Defendants, the Class Representatives, the Senior Secured Creditors, and Poseidon by the Monitor.

Unaffected Claims means the following Claims as against Poseidon:

(a) the Claim secured by the Administration Charge;
(b) the Government Priority Claim;
(c) the Employee Priority Claim;
(d) the Lien Claim;

(e) any Claim by the Senior Secured Creditors, except to the extent that:
(i) they receive any payment or distribution pursuant to this Plan (and then only to that extent);
(ii) they are compromised and rearranged pursuant to Article 3.3 hereof; and
(iii) the claim is a Released Claim; and
(f) any unsecured Claim.
(g) [Intentionally deleted]
(h) [Intentionally deleted]

Unaffected Creditor	means a person who holds or held an Unaffected Claim, to the extent of that Claim.
Underwriters	means National Bank Financial Inc., BMO Nesbitt Burns Inc., CIBC World Markets Inc., Haywood Securities Inc., Peters & Co. Limited, Canaccord Genuity Corp., Cormark Securities Inc., Dundee Securities Ltd. and First Energy Capital Corp.
Underwriter Claim	means all of the Claims commenced by the Underwriters against one or more of the Released Parties including the Claim commenced in Ontario with court file no. CV-13-474553 CPA1.
Underwriter Releasees	means National Bank Financial Inc., BMO Nesbitt Burns Inc., CIBC World Markets Inc., Haywood Securities Inc., Peters & Co, Limited, Canaccord Genuity Corp., Cormark Securities Inc., Dundee Securities Ltd. and First Energy Capital Corp. and all of their respective present and former affiliates, partners, associates, employees, servants, agents, contractors, directors, officers, insurers and successors, administrators, heirs and assigns of each.
United States Bankruptcy Case	means the case styled In Re Poseidon Concepts Corp. commenced in the United States Bankruptcy Court, District of Colorado, Case No. 13-15893HRT.
United States Bankruptcy Code	means Title 11 of the United States Code.
United States Bankruptcy Court	means the United States Bankruptcy Court for the District of Colorado, as presiding over the United States Bankruptcy Case,
U.S. Actions	means United States District Court for the Southern District of New York Action Nos. 1:13-cv-01213-DLC and 1:13-cv-01412-DLC.
U.S. Approval Order	means an order entered in the United States Bankruptcy Case pursuant to the applicable sections of Chapter 15 of the United States Bankruptcy Code, which order recognizes and enforces the terms of the Approval and Settlement Order.
U.S. Class Members	means all persons and entities, other than Settling Defendants and their affiliates, wherever they may reside, who acquired the publicly traded common stock of Poseidon on or before February 14, 2013, in domestic U.S. transactions, transactions on a domestic U.S. exchange or on a secondary market in the United States, which includes securities acquired over-the-counter.
U.S. Class Representative	means Gerald Kolar, in his capacity as Lead Plaintiff appointed pursuant to the Order of the United State's District Court for the Southern District of New York in the U.S. Action (ECF No. 24) and/or such other persons as may be appointed in that capacity by the United States District Court for the Southern District of New York.

1.2 Certain Rules of Interpretation

For the purposes of this Plan:

(a) any reference in the Plan to an order, agreement, contract, instrument, release, exhibit or other document means such order, agreement, contract, instrument, release, exhibit or other document as it may have been or may be validly amended, modified or supplemented;

(b) the division of the Plan into "articles" and the insertion of a table of contents are for convenience of reference only and do not affect the construction or interpretation of the Plan, nor are the descriptive headings of "articles" intended as complete or accurate descriptions of the content thereof;

(c) unless the context otherwise requires, words importing the singular shall include the plural and vice versa, and words importing any gender shall include all genders;

(d) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(e) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Calgary, Alberta and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. (Calgary time) on such Business Day;

(f) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(g) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation; and

(h) references to a specified "article" or "section" shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified article of the Plan or a section of the Settlement Agreement, whereas the terms "the Plan", "hereof", "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Plan and not to any particular article or other portion of the Plan and include any documents supplemental hereto.

ARTICLE 2 PURPOSE AND EFFECT OF THE PLAN

2.1 Purpose

The purpose of the Plan and the related Approval Orders is, among other things:

(a) to effect a compromise of certain Claims of the Senior Secured Creditors;

(b) to effect the distribution of the consideration to the Priority Claims as set forth in Article 4 hereof;

(c) to facilitate and approve the settlement and resolution of outstanding issues between all of the parties involved in litigation concerning the activities of Poseidon, its auditors, underwriters, D&Os and other related parties, including certain insured claims against Poseidon and its D&Os and Employees, so as to maximize recoveries for all stakeholders and provide finality for the Released Parties with respect to any and all exposure to Claims or potential Claims; and

(d) to give effect to the releases in favour of parties who have made contributions to this Plan.

ARTICLE 3 CLASSIFICATION, VOTING AND RELATED MATTERS

3.1 Class of creditors

There shall be one class of creditors for the purposes of considering and voting on this Plan: the Senior Secured Creditors, who shall be the only Affected Creditors. No other creditors shall vote on or receive consideration under the Plan.

3.2 Claims Procedure

The Claim of the Senior Secured Creditors, is allowed in the aggregate amount of $43,944,957.49 (as of November 30, 2016).

3.3 Compromise of Senior Secured Creditor Action

Effective upon the Plan Implementation Date, the Senior Secured Creditors recourse to recover their Claim shall be limited to:

(a) their entitlement to the Poseidon Settlement Funds; and

(b) the Property, and, in this regard, the Senior Secured Creditors shall cause the Senior Secured Creditor Action to be dismissed with prejudice and without costs.

3.4 Unaffected Claims

Subject to Articles 3.3, 5.1 and 5.3 hereof, and notwithstanding anything else to the contrary herein, this Plan does not compromise, release, or otherwise affect the Unaffected Claims as against the Property. Unaffected Creditors shall not, in respect of an Unaffected Claim, be entitled to vote on the Plan or attend the Meeting.

3.5 Creditors Meeting

The Meeting will be held in accordance with this Plan, the Meeting and Hearing Order, and any further Order of the Court. Only the Affected Creditors, being the Senior Secured Creditors, shall be entitled to vote and for voting purposes, their claim shall be valued as approved by the Monitor,

3.6 Approval

To be approved, the Plan must be approved by the requisite majority of the Affected Creditors.

ARTICLE 4 DISTRIBUTIONS

4.1 Contributions to the Settlement Funds

(a) The Insurers shall pay the Initial Instalment of the Poseidon Settlement Funds pursuant to the Plan, and the Initial Instalment of the Class Settlement Funds pursuant to the Settlement Agreement, by wire transfer of immediately available funds to the Monitor, in trust, within thirty (30) days after the granting of the Approval and Settlement Order. It is acknowledged by the Parties hereto that CAD $29,000,000 has already been paid by the Insurers and that such moneys constitute a partial payment of the aggregate amount payable in respect of the Initial Instalment of the Poseidon Settlement Funds and the Initial Instalment of the Class Settlement Funds (i.e. CAD $29,000,000 of the CAD $30,000,000 payable has already been paid and only CAD $1,000,000 is owing). The Insurers shall pay the Final Instalment of the Poseidon Settlement Funds pursuant to the Plan (if and to the extent remaining as provided for and defined in Article 1.1 of the Plan) and the Final Instalment of the Class Settlement Funds pursuant to the Settlement Agreement (if and to the extent remaining as provided for and defined in Article 1.1 of the Plan), to the Monitor in accordance with such definition. The Settling Defendants shall have no personal liability for the payment of the Poseidon Settlement Funds and the Class Settlement Funds (excluding the Additional Proceeds, which are the sole responsibility of the contributors to same). Should this Plan be terminated in accordance with its terms, such monies shall be returned, with interest accrued, if any, and without deduction or holdback, forthwith to the Insurers. Any taxes payable on any interest that accrues in relation to the Poseidon Settlement Funds and the Class Settlement Funds shall be payable by the recipient(s) of any such interest earned.

(b) The Additional Proceeds shall be paid by KPMG, the Underwriters and Peyto under the Settlement Agreement in amounts agreed upon separately and confidentially as between them. Each such contributor shall only be responsible for their individual contribution to the aggregate amount payable. Payment shall be made by wire transfer of immediately available funds to the Monitor, in trust, within thirty (30) days after the granting of the Approval and Settlement Order and the Alberta Dismissal Order, whichever is later. Should this Plan be terminated in accordance with its terms, such monies shall be returned, with interest accrued, if any, and without deduction or holdback, forthwith to the contributing parties.

Any taxes payable on any interest that accrues in relation to the Additional Proceeds shall be payable by the recipient(s) of any such interest earned.

4.2 Distributions of Settlement Funds

The Poseidon Settlement Funds and the Class Settlement Funds shall be held by the Monitor in trust in one or more interest bearing accounts. The Poseidon Settlement Funds shall be distributed by the Monitor to Poseidon's estate, for distribution to the Priority Claims. The Class Settlement Funds shall be held by the Monitor and, on the Plan Implementation Date, distributed to Class Counsel, in trust, to be distributed in accordance with further order(s) of the CCAA Court.

Notwithstanding the above, the following persons and entities shall not be entitled to any allocation or distribution of the Class Settlement Funds:

(a) The following entities and their past and present directors, officers, senior employees, partners, subsidiaries, affiliates, legal representatives, heirs, predecessors, successors and assigns: Poseidon Concepts Corp; Poseidon Concepts Ltd.; Poseidon Concepts Limited Partnership; Poseidon Concepts Inc.; Open Range Energy Corp.; Peyto Exploration & Development Corp.; National Bank of Canada; National Bank Financial Inc.; The Toronto Dominion Bank; The Bank of Nova Scotia; HSBC Bank of Canada; KPMG LLP; BMO Nesbitt Burns Inc.; CIBC World Markets Inc.; Haywood Securities Inc.; Peters & Co. Limited; Canaccord Genuity Corp.; Cormark Securities Inc.; Dundee Securities Ltd.; and FirstEnergy Capital Corp.; and

(b) The following individuals and any individual who is a member of their immediate families: Matthew MacKenzie; Clifford Wiebe; Joseph Kostelecky; Lyle Michaluk; Scott Dawson; Dean Jensen; Jim McKee; Neil Richardson; David Belcher; Sonja Kuehnle; Harley Winger; Doug Robinson; Kenneth Faircloth; and Wazir (Mike) Seth.

4.3 [Intentionally deleted]

4.4 Timing of Distributions

The distributions contemplated by this Plan shall be made as soon as reasonably possible following the Plan Implementation Date.

4.5 Delivery of Distributions to Creditors

Distributions made in accordance with the terms of this Plan by the Monitor shall be deemed to be made to the Senior Secured Creditors by delivery of such funds to counsel for the Senior Secured Creditors.

4.6 Allocation of Distributions

All distributions made pursuant to this Plan, other than in respect of the Class Settlement Funds, shall be applied firstly in payment of all fees, costs, and expenses; secondly in payment of the outstanding principal amount of the Claim and, thirdly and only after the principal portion of any such Claim is satisfied in full, to any portion of such Claim comprising accrued and unpaid interest,

4.7 Transfer of Claims; Record Date for Distributions

Claims may be sold, transferred or assigned at any time by the holder thereof, whether prior or subsequent to the Plan Implementation Date, provided that:

(a) Neither Poseidon nor the Monitor shall be obligated to deal with or to recognize the purchaser, transferee or assignee of the Claim as the creditor in respect thereof unless and until written notice of the sale, transfer or assignment is provided to the Monitor, such notice to be in form and substance satisfactory to the Monitor, acting reasonably within five (5) Business Days prior to the Plan Implementation Date;

(b) only holders of record of Claims as at the date of the Meeting and Hearing Order shall be entitled to attend, vote or otherwise participate at such Meeting; provided, however, that: (A) for the purposes of determining whether this Plan has been approved by a majority in number of the creditors only the vote of the transferor or the transferee, whichever holds the highest dollar value of such Claims will be counted, and, if such value shall be equal, only the vote of the transferee will be counted; and (B) if a Claim has been transferred to more than one transferee, for purposes of determining whether this Plan has been approved by a majority in number of the creditors, only the vote of the transferee with the highest value of such Claim will be counted; and

(c) only holders of record of Claims as at five (5) Business Days prior to the Plan Implementation Date shall have the right to participate in the corresponding distribution provided for under Section 4.2 and 4.3 of this Plan.

4.8 No Further Contributions, Liability or Exposure

Notwithstanding any other provision of the Plan or the Settlement Agreement, and without in any way restricting, limiting or derogating from the releases provided herein and in the Settlement Agreement, or in any way restricting, limiting or derogating from any other protection provided in the Plan or the Settlement Agreement to the Released Parties, under no circumstances shall the Released Parties be required to or be called upon to make any further financial contribution or payment in respect of any Claim including the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, nor shall the Released Parties have any liability whatsoever for or have any exposure whatsoever to anything directly or indirectly, related to, arising out of, based on, or connected with the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, over and above the payment of the Poseidon Settlement Funds and the Class Settlement Funds (excluding the Additional Proceeds), which payment is solely the responsibility of the Insurers, and the Additional Proceeds, which payment is solely the responsibility of the parties contributing to same.

Costs associated with any notices required in connection with the Plan or the Settlement Agreement shall be paid for by Poseidon. Under no circumstances shall the cost of notice be payable by the Released Parties.

The Poseidon Settlement Funds and the Class Settlement Funds are the full monetary contribution or payment of any kind to be made by the Released Parties and is inclusive of all costs, interest, legal fees, taxes (inclusive of any GST, HST, or any other taxes that may be payable in respect of the Plan or the Settlement Agreement), costs associated with any distributions, further litigation, administration or otherwise.

ARTICLE 5 RELEASES AND INJUNCTIONS

5.1 Plan Release

Subject to Article 5.2 hereof, the Approval and Settlement Order and the U.S. Approval Order shall provide that the Released Parties are fully, finally, irrevocably, absolutely, and forever released, remised and discharged from any and all Claims as of the Effective Time on the Plan Implementation Date including the following Claims:

(a) all Claims of the Class against the Released Parties;

(b) all Claims of the Senior Secured Creditors against the Released Parties;

(c) all Claims of KPMG against the Released Parties;

(d) all Claims of the Underwriters against the Released Parties;

(e) all Claims of Poseidon against the Released Parties;

(f) all Claims of the Monitor against the Released Parties and the Senior Secured Creditors;

(g) all Claims of the Released Parties against Poseidon, the Class Representatives, the Class Members, the Senior Secured Creditors, and any other Released Parties; and

(h) [Intentionally deleted]

(i) all Claims of any other Person against the Released Parties.

5.2 Claims Not Released

Subject only to Article 5.8, Article 5.1 shall not waive, compromise, release, discharge, cancel, bar or otherwise affect any of the following:

(a) any Person of its obligations under the Plan, the Approval Orders, and the Settlement Agreement, including the obligation to pay the Additional Proceeds and the obligations of the Insurers to pay the Class Settlement Funds (excluding the Additional Proceeds) and the Poseidon Settlement Funds;

(b) Unaffected Claims;

(c) Claims that cannot be released by operation of s. 5.1(2) and 19(2) of the CCAA;

(d) [Intentionally deleted]

(e) [Intentionally deleted]

(f) [Intentionally deleted]

(g) [Intentionally deleted]

(h) [Intentionally deleted]

(i) the rights of the Insureds (excluding Poseidon, whose rights against the Insurers are fully released under Article 5.1 above) against the Insurers under the Insurance Policies except as affected by the declarations set out in Article 5.8 below; and

(j) the rights of any Person, including the Senior Secured Creditors, in respect of matters that are completely unrelated to any Claims, including rights in respect of matters that are completely unrelated to any Claims as against any Released Parties.

5.3 Bar Order / Injunctions

(a) Subject to Articles 5.4 and 5.8, all Persons (regardless of whether or not such Persons are creditors or Claimants), including the Class, Settling Defendants, Poseidon, the Released Parties, KPMG and the Underwriters, shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Time on the Plan Implementation Date, from:

(i) commencing, conducting, pursuing, instituting, intervening in, asserting, advancing, or continuing in any manner, directly or indirectly, any Claim or other related proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties;

(ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree, Damages, or order against the Released Parties or their property;

(iii) making, asserting, pursuing, instituting, intervening in, advancing, commencing, conducting or continuing in any manner, directly or indirectly, any Claim, including for contribution or indemnity or other relief, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative

or other forum) against any Person who makes or asserts, or might reasonably be expected to make or assert, such a Claim, in any manner or forum, against one or more of the Released Parties;

(iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or

(v) taking any actions to interfere with the implementation or consummation of this Plan.

(b) [Intentionally deleted]

5.4 Limitations on Injunctions

Subject only to Article 5.8, Article 5.3 shall not bar, estop, stay and enjoin or otherwise affect any of the following:

(a) any Person of its obligations under the Plan, the Approval Orders, and the Settlement Agreement;

(b) Unaffected Claims;

(c) [Intentionally deleted]

(d) [Intentionally deleted]

(e) [Intentionally deleted]

(f) the rights of the Insureds (excluding Poseidon, whose rights against the Insurers are fully barred, estopped, stayed and enjoined under Article 5.3 above) against the Insurers under the Insurance Policies except as affected by the declarations set out in Article 5.8 below; and

(g) [Intentionally deleted]

(h) the rights of any Person, including the Senior Secured Creditors, in respect of matters that are completely unrelated to the Claims, including rights in respect of matters that are completely unrelated to any Claims as against any Released Parties.

5.5 Timing of Releases and Injunctions

All releases and injunctions set forth in this Article 5 shall become effective at the Effective Time on the Plan Implementation Date.

5.6 [Intentionally deleted]

5.7 [Intentionally deleted]

5.8 Declarations re Insurance

The Approval Orders shall declare that:

(a) the Contribution:

(i) does not violate the rights or interests, in respect of the Insurance Policies, of the Class Representatives, the Class, the Monitor, the Senior Secured Creditors, KPMG, the Underwriters, or any other Person who might have a claim against any person or entity potentially covered under the Insurance Policies;

(ii) constitutes covered Loss (as defined in the Insurance Policies);

(iii) reduces the Limits of Liability (as defined in the Insurance Policies) under the Insurance Policies for all purposes, regardless of any subsequent finding by any court, tribunal, administrative body or arbitrator, in any proceeding or

action, that the Settling Defendants, or any of them, engaged in conduct that triggered or may have triggered any exclusion, term or condition of the Insurance Policies, or any of them, so as to disentitle them to coverage under the Insurance Policies, or any of them;

(iv) is without prejudice to any coverage positions or reservations of rights taken by the Insurers in relation to any other matter advised to the Insurers or any other Claim (as defined in the Insurance Policies) made or yet to be made against the Insureds, provided that neither coverage nor payment in respect of the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, nor the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, will be voided or impacted by any such coverage position or reservation of rights; and

(v) fully and finally releases the Insurers from any further obligation, and from any and all claims against them under or in relation to the Insurance Policies, in respect of the portion of the Limits of Liability that were expended to fund the Contribution;

(b) once the Contribution has been funded, there is no further coverage under the Insurance Policies for Poseidon. For clarity, this declaration is not intended to, and does not, extinguish any remaining coverage under the Insurance Policies for the individual Insureds,

(c) With the exception of payment in the aggregate amount of CAD $30,000 by the Insurers towards the settlement of regulatory proceedings by the Chartered Professional Accountants of Alberta against Lyle Michaluk, which shall be treated as Criminal /Regulatory Defence Costs, the determination of what constitutes reasonable Defence Costs paid or payable by any of the Insurers for Criminal/Regulatory Defence Costs and which reduce the amount of the Final Instalment of the Class Settlement Funds and the Final Instalment of the Poseidon Settlement Funds, all such terms as defined in Article 1.1 of this Plan, shall be within the sole purview and discretion of the Insurer paying them in accordance with the applicable litigation guidelines and, except for the individual Insured on whose behalf they are being paid, shall not be subject to review or challenge by any other Person, including but not limited to the Monitor, the Senior Secured Creditors, the Class Members or the Class Representatives.

(d) in addition to the reduction of the Limits of Liability under the Policies pursuant to Article 5.8(a)(iii), the Limits of Liability under the following Policies will be deemed to have been further reduced by the following amounts pursuant to an agreement between the Insurers and the Insureds under the Policies:

Policy Issued by:	***Policy***	***Limits of Liability to be Reduced by:***
Encon Group Inc.	[880# omitted]	$250,000
Chubb Insurance Company of Canada	[964# omitted]	$250,000
Travelers Insurance Company of Canada	[516# omitted]	$250,000
Royal & Sun Alliance Insurance Company of Canada	[854# omitted]	$250,000
Chartis Insurance Company of Canada, now known as AIG Insurance Company of Canada	[202# omitted]	$2,500,000
Lloyd's Underwriters	[150# omitted]	$0

5.9 Acknowledgements

(a) For greater certainty, the Settling Parties acknowledge that they may subsequently discover facts adding to those they now know, but nonetheless agree that at the Effective Time on the Plan Implementation Date, all of the protections provided for herein (including the protections in Article 5 of the Plan) for the Settling Parties and the Released Parties shall be definitive and permanent irrespective of whether any subsequently discovered facts were unknown, unsuspected, or not disclosed.

(b) By means of the Settlement, the Settling Parties waive any right they might have under the law, common law, civil law, in equity or otherwise, to disregard or avoid the protections provided for herein (including the protections in Article 5 of the Plan) and expressly relinquish any such right and each Class Member shall be deemed to have waived and relinquished such right. Furthermore, the Settling Parties agree to this waiver of their own volition, with full knowledge of its consequences and that this waiver was negotiated and constitutes a key element of the Settlement.

(c) It is understood and agreed by the D&Os (and Kuehnle and Robinson) that each individual D&O's (and Kuehnle and Robinson's) entitlement to Criminal / Regulatory Defence Costs shall be limited to CAD $2.5 million (such amount being a cap on, and not a guarantee of the availability of, funds), except for Joseph Kostelecky whose entitlement to Criminal / Regulatory Defence Costs shall be limited to USD $2.0 million (such amount being a cap on, and not a guarantee of the availability of, funds), and no D&O (nor Kuehnle and Robinson) shall be entitled to request or receive in excess of CAD $2.5 million in respect of Criminal / Regulatory Defence Costs from the Insurers, except for Joseph Kostelecky who shall not be entitled to request or receive in excess of USD $2.0 million in respect of Criminal / Regulatory Defence Costs from the Insurers. For the purposes of calculating the drawdown of the CAD $6.5 million available for the Final Instalment of Class Settlement Funds and Final Instalment of Poseidon Settlement Funds by payment of Criminal / Regulatory Defence Costs, payments of USD will be converted to CAD at the time an Insurer pays the Criminal / Regulatory Defence Costs.

5.10 Settlement Recognition Orders Required

Forthwith upon obtaining the Approval and Settlement Order and U.S. Approval Order, the Class Representatives and, where appropriate, the U.S. Class Representative, or their nominees, shall seek a Settlement Recognition Order in each of the Competent Courts in Ontario and Quebec and, in the United States, the United States Bankruptcy Court and/or the Competent Court, as the case may be, with respect to each Class Action commenced in Ontario, Quebec, and the United States. The Class Representatives and the U.S. Class Representative, or their nominees, shall make their commercially reasonable best efforts to obtain the Settlement Recognition Orders,

ARTICLE 6 CONDITIONS PRECEDENT AND IMPLEMENTATION

6.1 Conditions Precedent to Implementation of Plan

The implementation of this Plan shall be conditional upon the fulfillment of the following conditions on or before the Plan Implementation Date:

(a) Approval of this Plan

The Plan shall have been approved by the required majority of Affected Creditors.

(b) Granting of the Approval and Settlement Order

The Approval and Settlement Order shall have been granted, including the granting by the CCAA Court of its approval of the compromises, releases and injunctions contained in and effected by this Plan, as well as the approval of the CCAA Court of the Settlement Agreement.

(c) Granting of the U.S. Approval Order

The U.S. Approval Order shall have been granted by the United States Bankruptcy Court, recognizing and enforcing the Approval and Settlement Order.

(d) Granting of the Settlement Recognition Orders

The Settlement Recognition Orders shall have been granted by the Competent Courts in Ontario, Quebec, and in the United States.

(e) Granting of the Alberta Dismissal Orders

The Alberta Dismissal Orders shall have been granted by the Competent Court in Alberta.

(f) Expiry of Appeal Periods

The Approval Orders shall have become Final Orders.

(g) Contributions

The Poseidon Settlement Funds and the Class Settlement Funds shall have been paid to the Monitor in accordance with the terms of the Plan and the Settlement Agreement respectively. This condition may be waived expressly and in writing by the Monitor with respect to the payment of the Poseidon Settlement Funds and/or by the Class Representatives with respect to the payment of the Class Settlement Funds.

(h) Insurer Release

The Monitor receiving court approval to execute a release in favour of the insurers, in the form attached to the Plan as Schedule "E", and the amending agreement in respect of that release, attached to the Plan as Schedule "F".

6.2 Monitor's Certificate

Within thirty (30) days after the satisfaction of the conditions set out in Article 6.1 hereof, the Monitor shall file with the CCAA Court in the CCAA Proceeding and the United States Bankruptcy Court a certificate that states that all conditions precedent set out in Article 6.1 of this Plan have been satisfied and that the Plan Implementation Date has occurred.

ARTICLE 7 GENERAL

7.1 Binding Effect

At the Effective Time on the Plan Implementation Date:

(a) the Plan shall be final, binding and effective in accordance with its terms for all purposes on all Persons named in, referred to in, or subject to the Plan and their respective heirs, executors, administrators and other legal representatives, successors and assigns;

(b) each Person named or referred to in, or subject to, the Plan will be deemed to have consented and agreed to all of the provisions of the Plan, in its entirety, shall be deemed to have executed and delivered all consents, releases, assignments and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety, and shall be forever bound by the terms of the Plan; and

(c) the Monitor shall be entitled to make all distributions and conveyances in accordance with this Plan.

7.2 Deeming Provisions

In the Plan, the deeming provisions are not rebuttable and are conclusive and irrevocable.

7.3 No Admission of Liability

Neither the Plan, nor anything contained herein, shall be interpreted as a concession or admission of wrongdoing or liability by the Released Parties, or as a concession or admission by the Released Parties of the truthfulness or merit of any claim or allegation asserted in the Class Actions, the Monitor Action, the KPMG Claim, the Underwriter Claim, or the Senior Secured Creditor Action. Neither the Plan, nor anything contained herein, shall be used or construed as an admission by the Released Parties of any fault, omission, liability or wrongdoing whatsoever. Any and all liability or wrongdoing is expressly denied,

7.4 Agreement not Evidence

Except as required to defend against the assertion of a Released Claim and to enforce the terms of the Plan, neither the Plan, nor anything contained herein, nor any of the negotiations or proceedings connected with it, nor any related document, nor any other action taken to carry out the Plan shall be referred to, offered as evidence or received in evidence in any pending or future civil, criminal, quasi-criminal, regulatory or administrative action or proceeding.

7.5 Plan Amendment

Poseidon reserves the right, at any time prior to the Plan Implementation Date, to amend, modify and/or supplement this Plan, provided that:

(a) any such amendment, modification or supplement must be contained in a written document that is filed with the CCAA Court, and must be discussed in advance with, and not objected to by, the Released Parties, the Senior Secured Creditors and the Class Representatives and, if made following the Meeting, communicated to such of the creditors and in such manner, if any, as may be ordered by the CCAA Court;

(b) any amendment, modification or supplement may be made unilaterally by the Monitor, on behalf of Poseidon following the Approval Orders, provided that it concerns a matter which, in the opinion of the Monitor, acting reasonably, is of an administrative nature required to better give effect to the implementation of this Plan and to the Approval Orders and is not adverse in any way to the Senior Secured Creditors, the Released Parties or the Class Members; and

(c) any supplementary plan or plans of compromise or arrangement filed with the CCAA Court by Poseidon and, if required by this Article 7.6, approved by the CCAA Court shall, for all purposes, be and be deemed to be a part of and incorporated in this Plan.

7.6 Rights of Termination

The Plan shall terminate if:

(a) the Approval and Settlement Order, the Alberta Dismissal Orders or the U.S. Approval Order are not granted and no further rights of appeal exist;

(b) the Approval and Settlement Order, the Alberta Dismissal Orders and the U.S. Approval Order are granted, overturned on appeal, and no further rights of appeal exist;

(c) any of the Settlement Recognition Orders are not granted and no further rights of appeal exist;

(d) any of the Settlement Recognition Orders are granted, overturned on appeal, and no further rights of appeal exist; or

(e) the Plan is terminated by for any reason by Final Order of the CCAA Court.

If there are any disputes about the termination of the Plan, the dispute shall be determined by the CCAA Court on notice to the Settling Parties.

7.7 Impact of Non-Consummation, Non-Approval and/or Termination

If the conditions precedent set out in Article 6.1 are not met, or if the Settlement Agreement or the Plan terminates or is terminated in accordance with its terms, then:

(a) the Plan and the Settlement Agreement shall be null and void in all respects (subject to any survival provisions);

(b) any settlement or compromise embodied in the Plan, or the Settlement Agreement, and any document or agreement executed pursuant to the Plan or Settlement Agreement shall be deemed null and void;

(c) nothing contained in the Plan or the Settlement Agreement, and no act taken in preparation of the consummation of the Plan or the Settlement Agreement, shall:

(i) constitute or be deemed to constitute a waiver or release of any Claims or any defences thereto, by or against any of the Released Parties or any other Person;

(ii) prejudice in any manner the rights of any of the creditors, the Released Parties or any other Person; or

(iii) constitute an admission of any sort by any of the creditors, the Released Parties or any other Person; and

(d) the Settling Parties and any other Person affected by the Plan or the Settlement Agreement will be restored to their respective positions prior to the execution of the Agreement;

(e) [Intentionally deleted]

(f) [Intentionally deleted]

(g) subject to any survival provisions herein, the Agreement will have no further force and effect and no effect on the rights of the Settling Parties or any other Person affected by the Plan or the Settlement Agreement;

(h) [Intentionally deleted]

(i) the Poseidon Settlement Funds and the Class Settlement Funds will be returned to the payor(s) of such funds, with interest and without deduction or holdback, within 30 days after the date upon which the triggering event for repayment occurs. Any taxes payable on any interest that accrues in relation to the Poseidon Settlement Funds and Class Settlement Funds shall be payable by the recipient(s) of any such interest earned;

(j) neither the Settlement Agreement nor the Plan will be introduced into evidence or otherwise referred to in any litigation or proceeding against the Released Parties;

(k) the provisions of this Article, and Articles 1.1, 1.2, 7.3, 7.4, 7.8. 7.9, 7.10, 7.11, 7.13, 7.14, 7.15, 7.16 and 7.17, and the recitals and schedules applicable thereto shall survive termination and shall continue in full force and effect;

(l) Poseidon and/or the Monitor or Class Counsel, as applicable, shall, within 30 days after the date upon which the triggering event for repayment occurs, apply to the CCAA Court and the Competent Courts, as necessary, for orders:

(i) declaring the Plan and the Settlement Agreement null and void and of no force or effect except for the provisions of those Articles and sections that are expressly specified as continuing in force; and

(ii) setting aside, *nunc pro tunc*, all prior orders or judgments entered in accordance with the terms of the Plan and/or the Settlement Agreement;

but the obligation to apply to the CCAA Court and the Competent Courts for such orders will only be required if, for example, the Plan has been approved, the Settlement Agreement has been executed, an order or judgment has been entered into, or other prerequisite has occurred such that there is utility in applying for the above-noted orders.

7.8 Paramountcy

From and after the Plan Implementation Date, any conflict between: (a) this Plan; and (b) any information summary in respect of this Plan, or the covenants, warranties, representations; terms, conditions, provisions or obligations, express or implied, of

any contract, mortgage, security agreement, indenture, loan agreement, commitment letter, document or agreement, written or oral, and any and all amendments and supplements thereto existing between Poseidon and any creditor, Released Party or other Person as at the Plan Implementation Date, will be deemed to be governed by the terms, conditions and provisions of this Plan and the Approval Orders, which shall take precedence and priority.

7.9 Responsibilities of the Monitor

The Monitor is acting in its capacity as Monitor in the CCAA Proceeding, and the Monitor will not be personally responsible or liable for any obligations of Poseidon hereunder. The Monitor will have only those powers granted to it by this Plan, by the CCAA and by any Order of the CCAA Court in the CCAA Proceeding, including the Initial Order.

7.10 Notices

Any notice or other communication to be delivered hereunder must be in writing and reference the Plan and may, subject as hereinafter provided, be made or given by personal delivery, ordinary mail, facsimile or email addressed to the respective parties as follows:

(a) If to Poseidon:

Bennett Jones LLP

4500, 855 - 2nd Street S.W.

Calgary, Alberta T2P 4K7

Attention: Mr. Ken Lenz, Q.C.

Fax: 403-265-7219

Email: lenzk@bennettjones.com

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

(b) If to the Monitor:

PricewaterhouseCoopers Inc.

Suite 3100, 111 -5th Avenue S.W.

Calgary, Alberta T2P 5L3

Attention: Mr. Clinton Roberts

Fax: 403-781-1825

Email: clinton.l.roberts@ca.pwc.com

with a copy by email or fax (which shall not be deemed notice) to:

Attention: Mr. Ken Lenz, Q.C.

Fax: 403-265-7219

Email: lenzk@bennettjones.com

(c) If to the Class Representatives:

Paliare Roland Rosenberg Rothstein LLP

35th Floor, 155 Wellington Street W.

Toronto, Ontario M5V 3H1

Attention: Mr. Max Starnino

Fax: 416-646-4301

Email: max.starnino@paliareroland.com

(d) If to the Senior Secured Creditors:

Dentons Canada LLP

15th Floor, 850 2nd St SW

Calgary AB T2P 0R8

Attention: Mr. David Mann

Fax: 403-268-3100

Email: david.mann@dentons.com

and

Rose LLP

810-333 5 Avenue SW

Calgary AB T2P 3B6

Attention: Mr. Matthew Lindsay

Fax: 403-776-0601

Email: matt.lindsay@rosellp.com

(e) If to the U.S. Class Representative:

The Rosen Law Firm

275 Madison Avenue, 34th Floor

New York, NY 10016

Attention: Mr. Jonathan Horne

Fax: 212-202-3827

Email: jhorne@rosenlegal.com

(f) If to Matthew MacKenzie:

Burnet, Duckworth & Palmer LLP

525 - 8th Avenue S.W., Suite 2400

Calgary, AB T2P 1G1

Attention: Mr. Daniel J. McDonald, Q.C.

Fax: 403-260-0332

Email: djm@bdplaw.com

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

(g) If to Lyle Michaluk:

Peacock Linder Halt & Mack LLP

400 3rd Avenue S.W., Suite 4050

Calgary, AB T2P 4H2

Attention: Mr. J. Patrick Peacock, Q.C.

Fax: 403-296-2299

Email: jppeacock@plhlaw.ca

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

(h) If to Harley Winger:

Peacock Linder Halt & Mack LLP

400 3rd Avenue S.W., Suite 4050

Calgary, AB T2P 4H2

Attention: Mr. Perry R. Mack, Q.C.

Fax: 403-296-2299

Email: pmack@plhlaw.ca

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

(i) If to Scott Dawson:

Parlee McLaws LLP

3300 TD Canada Trust Tower

421-7 Avenue S.W.

Calgary, AB T2P 4K9

Attention: Mr. Gregory D.M. Stirling, Q.C.

Fax: 403-767-8874

Email: gstirling@parlee.com

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

(j) If to Clifford Wiebe:

Scott Venturo LLP

200 Barclay Parade S.W.

Calgary, AB T2P 4R5

Attention: Mr. Domenic Venturo

Fax: 403-265-4632

Email: d.venturo@scottventuro.com

(k) If to Joseph Kostelecky:

Code Hunter LLP

440 2nd Avenue S.W., Suite 850

Calgary, AB T2P 5E9

Attention: Messrs. Eric Groody and Robert Moyse

Fax: 403-261-2054

Email: eric.groody@codehunderllp.com and robert.moyse@codehunterllp.com

(l) If to David Belcher:

Brown lee LLP

2200 Commerce Place

10155-102 Street

Edmonton, AB T5J 4G8

Attention: Mr. Havelock B. Madill, Q.C.

Fax: 780-424-3254

Email: hmadill@brownleelaw.com

(m) If to Lyle D. Michaluk, Matt C. MacKenzie, A. Scott Dawson, Clifford L. Wiebe, Harley L. Winger, Dean Jensen, James McKee and Neil Richardson in their capacity as Defendants in the U.S. Action:

Kaufman Borgeest & Ryan LLP

200 Summit Lake Drive

Valhalla, New York 10595

Attention: Mr. Paul T. Curley

Fax: 914-449-1100

Email: pcurley@kbrlaw.com

(n) If to Sonja Kuehnle and Doug Robinson:

Fasken Martineau DuMoulin LLP

350 7th Avenue S.W., Suite 3400

Calgary, AB T2P 3N9

Attention: Mr. Robert D. Maxwell

Fax: 403-261-5351

Email: rmaxwell@fasken.com

(o) If to Peyto Exploration and Development Corp. or New Open Range

Goodmans LLP

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7

Attention: Mr. David Conklin

Fax: 416-979-1234

Email: dconklin@goodmans.ca

(p) If to Kenneth Faircloth and Wazir (Mike) Seth:

Ormston List Frawley LLP

6 Adelaide Street East, Suite 500

Toronto, ON M5C 1H6

Attention: John P. Ormston

Fax: 416-594-9690

Email: jormston@olflaw.com

(q) If to KPMG:

McLennan Ross LLP

1000 First Canadian Centre

350 - 7th Avenue, SW

Calgary, AB T2P 3N9

Attention: Graham McLennan, Q.C.

Fax: 403-543-9150

Email: gmclennan@mross.com

(r) If to the Underwriters:

Lenczner Slaght Royce Smith Griffin LLP

130 Adelaide St W., Suite 2600

Toronto, ON M5H 3P5

Attention: Shara Roy

Fax: 416-865-3973

Email: sroy@litigate.com

or to such other address as any party may from time to time notify the others in accordance with this Article. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or emailing, provided that such day in either event is a Business Day and the communication is so delivered, faxed or emailed before 5:00 p.m. (Calgary time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

7.11 Further Assurances

(a) The Settling Parties all covenant and agree to:

(i) pursue as promptly as practicable Court approval of the Plan and the granting of the Approval Orders in an expedited and commercially reasonable fashion; and

(ii) execute any and all documents and perform any and all acts required by the Plan and the Settlement Agreement, including any consent, approval or waiver requested by the Settling Parties, acting reasonably.

(b) The Settling Parties shall, with reasonable diligence, do all such things and provide all such reasonable assurances as may be required to consummate the settlement and transactions contemplated by this Plan and the Settlement Agreement, and each party shall provide such further documents or instruments required by any other party as may be reasonably necessary or desirable to effect the purpose of this Plan and the Settlement Agreement and carry out their provisions.

7.12 Currency

Unless otherwise specified, all references in this Plan are to Canadian dollars.

7.13 Successors and Assigns

The Plan shall be binding upon and shall ensure to the benefit of the heirs, administrators, executors, legal personal representatives/ successors and assigns of any Person named or referred to in the Plan.

7.14 Entire Agreement

The Settlement Agreement and this Plan together constitute the entire agreement between the Settling Parties with respect to the matter herein. The execution of the Plan has not been induced by, nor do any of the Settling Parties rely upon or regard as material, any representations, promises, agreements or statements whatsoever not incorporated herein and made a part hereof.

7.15 Governing Law

The Plan shall be governed by and construed in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein. All questions as to the interpretation of or application of the Plan and all proceedings taken in connection with the Plan and its provisions shall be subject to the jurisdiction of the CCAA Court.

7.16 Expenses

Each of the Settling Parties shall pay their respective legal, accounting, and other professional advisory fees, costs and expenses incurred in connection with the Plan and its implementation.

7.17 Counterparts

The Plan may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement. Delivery of an executed original counterpart of a signature page of the Plan by facsimile or electronic transmission shall be as effective as delivery of a manually executed original counterpart of the Plan.

7.18 Schedules

The following Schedules to the Plan are incorporated by reference into the Plan and form part of the Plan:

Schedule "A" List of Released Parties

Schedule "B" Settlement Agreement

Schedule "C" Draft Approval and Settlement Order

Schedule "D" [Intentionally deleted]

Schedule "E" Insurer Release

Schedule "F" Amending Agreement re Insurer Release

SCHEDULE "A" RELEASED PARTIES

1. All of the defendants and third (or subsequent) parties named in, and all other Persons who could have been or could in the future be named in, the Class Actions, the Monitor Action, the Senior Secured Creditor Action, the KPMG Claim, or the Underwriter Claim including, jointly and severally, individually and collectively:

New Open Range

Peyto Exploration and Development Corp.

the D&Os

the Employees

the Underwriters

KPMG

Poseidon

2. All of the past, present and future, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, insurers, predecessors, successors, assigns, purchasers, directors, officers, employees, agents, servants, consultants, representatives, attorneys, lawyers, in-house counsel, outside counsel, and administrators of:

New Open Range

Peyto Exploration and Development Corp.

the Underwriters

KPMG

Poseidon

3. All of the past, present and future insurers, Employees and D&Os (to the extent not otherwise included in #1 above), agents, servants, consultants, representatives, attorneys, lawyers, in-house counsel, outside counsel, and administrators of Poseidon.

4. All of the past, present and future, direct and indirect agents, trustees, servants, consultants, representatives, attorneys, lawyers, heirs, executors, administrators, guardians, estate trustees, relatives, insurers, assigns, as the case may be, of the Persons identified or referred to directly or indirectly in paragraphs 1, 2 and 3 above.

5. All Persons, partnerships, joint ventures, or corporations with whom any of the Released Parties in paragraph 1-4 above have been, or are now, affiliated.

6. The Insurers.

Schedule"B"

SETTLEMENT AGREEMENT

THIS AGREEMENT AMONG: MATTHEW MACKENZIE, CLIFFORD WIEBE, JOSEPH KOSTELECKY, LYLE MICHALUK, SCOTT DAWSON, DEAN JENSEN, JIM MCKEE, NEIL RICHARDSON, DAVID BELCHER, SONJA KUEHNLE, HARLEY WINGER, DOUG ROBINSON, KENNETH FAIRCLOTH, and WAZIR (MIKE) SETH -and- FRANZ AUER, MOHAMED RAMZY, THOMAS JAMES and MARIAN LEWIS personally and as representatives of Class Members (as defined in the Representation Order issued by the CCAA Court dated May 30, 2013 as amended *nunc pro tunc* on December 17, 2014 and on September 26, 2016) on behalf of such Class Members -and- GERALD KOLAR personally and as representative of all putative class members in the putative class proceedings in the U.S. District Court for the Southern District of New York (Case Nos. 13-CV-1213(DLC) and 13-cv-1412(DLC)) -and- THE TORONTO-DOMINION BANK, as agent for itself and HSBC BANK CANADA, THE BANK OF NOVA SCOTIA, and NATIONAL BANK OF CANADA -and- PEYTO EXPLORATION AND DEVELOPMENT CORP. -and- POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP and POSEIDON CONCEPTS INC., by their court appointed Monitor, PRICEWATERHOUSECOOPERS INC. -and- NATIONAL BANK FINANCIAL INC., BMO NESBITT BURNS INC., CIBC WORLD MARKETS INC., HAYWOOD SECURITIES INC., PETERS & CO. LIMITED, CANACCORD GENUITY CORP., CORMARK SECURITIES INC., DUNDEE SECURITIES LTD. and FIRST ENERGY CAPITAL CORP. -and- KPMG LLP

Dated: April 6, 2018

WHEREAS the Class, the Senior Secured Creditors and the Monitor are all stakeholders in the proceeding under *the Companies' Creditors Arrangement Act ("CCAA")* in the Alberta Court of Queen's Bench File No. 1301-04364 *("CCAA Proceeding*") and have asserted various claims in respect of Poseidon;

AND WHEREAS through a court sponsored mediation process and otherwise the Settling Parties have negotiated a settlement that will resolve a number of lawsuits and claims, and bring value to the estate of Poseidon;

AND WHEREAS the Settling Defendants deny liability in respect of the claims alleged in the Class Actions, the Monitor Action and the Senior Secured Creditor Action and believe that they have good and reasonable defences to the Class Actions, the Monitor Action and the Senior Secured Creditor Action;

AND WHEREAS the Settling Defendants assert that they would vigorously defend the Class Actions, the Monitor Action and the Senior Secured Creditor Action if the Class Actions, the Monitor Action and the Senior Secured Creditor Action are pursued against them;

AND WHEREAS the Settling Defendants do not admit any of the conduct alleged in the Class Actions, the Monitor Action and the Senior Secured Creditor Action and expressly deny any and all allegations of wrongdoing;

AND WHEREAS it is essential to the Released Parties that by virtue of this Plan and the Settlement Agreement, all Claims and possible Claims related in any way to Poseidon be fully and finally resolved so as to bring finality to their potential liability, and without such finality, the financial contributions under this Plan and the Settlement Agreement would not have been made, and the Parties agree that this Plan and the Settlement Agreement together provide finality to the Released Parties;

AND WHEREAS the settlement consists of the agreement set out in this Settlement Agreement and the agreement set out in the Plan in the CCAA Proceeding, and the settlement is contingent on both the Plan of Compromise and the Settlement Agreement being approved by the CCAA Court, and given full recognition and effect by the United States Bankruptcy Court and the Competent Courts;

AND WHEREAS by the Representation Order, the CCAA Court appointed the Class Representatives to formally represent, in the CCAA Proceeding, the interests of the persons comprising the proposed classes in the Class Actions, and authorized the Class Representatives to settle or compromise Claims on behalf of all Class Members, and to take all steps and to do all acts necessary or desirable to carry out the terms of that order;

NOW THEREFORE IN THE CONSIDERATION OF THE COVENANTS AND AGREEMENTS EXCHANGED AMONG THE SETTLING PARTIES AND THE SUM OF TEN DOLLARS (CAD$10.00), THE RECEIPT AND SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, THE SETTLING PARTIES HEREBY AGREE AS FOLLOWS:

1. Definitions and Interpretation

(a) Definitions

Capitalized terms used in this Settlement Agreement shall have the meaning ascribed to such terms in the Plan, unless otherwise defined in this Settlement Agreement, including the following:

> **"Administrator"** means the third-party firm appointed by Class Counsel, and approved by the Court, to administer the distribution of funds to or for the benefit of the Class, including any proceeds of the Settlement Agreement, and any employees of such firm;
>
> **"Administration Expenses"** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable relating to approval, implementation and administration of the settlement including the costs of translating, publishing and delivering notices and the fees, disbursements and taxes paid to the Administrator, the person appointed to receive and report on objections to the settlement to the CCAA Court, and any other expenses approved by the CCAA Court which shall all be paid from the Class Settlement Funds if, and only if, Plan Implementation Date has occurred. For greater certainty, (i) Administration Expenses do not include Class Counsel Fees; and (ii) if the Plan Implementation Date does not occur, then no fees, disbursements, expenses, costs, taxes or other amounts shall be paid from the Class Settlement Funds.

"Escrow Account" means an interest bearing trust account with one of the Canadian Schedule 1 banks or a liquid money market account or equivalent security with a rating equivalent to, or better than, that of an interest bearing account in a Canadian Schedule 1 bank in Ontario;

"Plan" means the Amended Plan of Compromise and Arrangement filed by Poseidon in the CCAA Proceeding, as may be amended, modified or supplemented from time to time in accordance with the terms thereof;

"Settlement Agreement" means this Agreement; and

"Shares" means the common shares of Poseidon.

(b) Interpretation

This Settlement Agreement shall be interpreted applying the following rules of interpretation:

(i) any reference in the Settlement Agreement to an order, agreement, contract, instrument, release, exhibit or other document means such order, agreement, contract, instrument, release, exhibit or other document as it may have been or may be validly amended, modified or supplemented;

(ii) the division of the Settlement Agreement into "sections" is for convenience of reference only and it does not affect the construction or interpretation of the Settlement Agreement, nor are the descriptive headings of the "sections" intended as complete or accurate descriptions of the content thereof;

(iii) unless the context otherwise requires, words importing the singular shall include the plural and vice versa, and words importing any gender shall include all genders;

(iv) the words "includes" and "including" and similar terms of inclusion shall not, unless expressly modified by the words "only" or "solely", be construed as terms of limitation, but rather shall mean "includes but is not limited to" and "including but not limited to", so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive;

(v) unless otherwise specified, all references to time herein and in any document issued pursuant hereto mean local time in Calgary, Alberta and any reference to an event occurring on a Business Day shall mean prior to 5:00 p.m. (Calgary time) on such Business Day;

(vi) unless otherwise specified, time periods within or following which any payment is to be made or act is to be done shall be calculated by excluding the day on which the period commences and including the day on which the period ends and by extending the period to the next succeeding Business Day if the last day of the period is not a Business Day;

(vii) unless otherwise provided, any reference to a statute or other enactment of parliament or a legislature includes all regulations made thereunder, all amendments to or re-enactments of such statute or regulations in force from time to time, and, if applicable, any statute or regulation that supplements or supersedes such statute or regulation; and

(viii) references to a specified "article" or "section" shall, unless something in the subject matter or context is inconsistent therewith, be construed as references to that specified article of the Plan or a section of the Settlement Agreement, whereas the terms "the Plan", "hereof, "herein", "hereto", "hereunder" and similar expressions shall be deemed to refer generally to the Settlement Agreement and not to any particular section or other portion of the Settlement Agreement and include any documents supplemental hereto.

2. MOTIONS FOR SETTLEMENT APPROVAL

(a) The Settling Parties shall use their best efforts to implement the Settlement Agreement and, among other things, to secure the prompt, complete and final dismissal, with prejudice and without costs, of the Class Actions, the Senior Secured

Creditor Action, the Monitor Action and any related Claims as against the Settling Defendants pursuant to the Approval Orders.

(b) The Settling Parties shall consent to all orders, including the Approval Orders, required to implement the Settlement Agreement provided that they are consistent with the terms of this Settlement Agreement.

3. PAYMENTS

(a) Payments

(i) The Insurers shall pay the Initial Instalment of the Poseidon Settlement Funds pursuant to the Plan, and the Initial Instalment of the Class Settlement Funds pursuant to this Settlement Agreement, by wire transfer of immediately available funds to the Monitor, in trust, within thirty (30) days after the granting of the Approval and Settlement Order. It is acknowledged by the Parties hereto that CAD $29,000,000 has already been paid by the Insurers and that such moneys constitute a partial payment of the aggregate amount payable in respect of the Initial Instalment of the Poseidon Settlement Funds and the Initial Instalment of the Class Settlement Funds. The Insurers shall pay the Final Instalment of the Poseidon Settlement Funds pursuant to the Plan (if and to the extent remaining as provided for and defined in Article 1.1 of the Plan) and the Final Instalment of the Class Settlement Funds pursuant to the Settlement Agreement (if and to the extent remaining as provided for and defined in Article 1.1 of the Plan), to the Monitor in accordance with such definition. The Settling Defendants shall have no personal liability for the payment of the Poseidon Settlement Funds and the Class Settlement Funds (except for the Additional Proceeds, which are the sole responsibility of the contributors to same). Should the Settlement Agreement be terminated in accordance with its terms, such monies shall be returned, with interest accrued, if any, and without deduction or holdback, forthwith to the Insurers. Any taxes payable on any interest that accrues in relation to the Poseidon Settlement Funds and the Class Settlement Funds shall be payable by the recipient(s) of any such interest earned.

(ii) The Additional Proceeds shall be paid by KPMG, the Underwriters and Peyto under the Settlement Agreement in amounts agreed upon separately and confidentially as between them. Each such contributor shall only be responsible for their individual contribution to the aggregate amount payable. Payment shall be made by wire transfer of immediately available funds to the Monitor, in trust, within thirty (30) days after the granting of the Approval and Settlement Order. If payment of the total Additional Proceeds is not made in accordance with this provision, the proportionate contribution of the defaulting party shall be disclosed to the Class Representatives, who will have thirty (30) days from such disclosure to elect whether to terminate this Settlement Agreement or pursue the defaulting party for such non-payment. Should this Settlement Agreement be terminated in accordance with its terms, such monies shall be returned, with interest accrued, if any, and without deduction or holdback, forthwith to the contributing parties. Any taxes payable on any interest that accrues in relation to the Additional Proceeds shall be payable by the recipient(s) of any such interest earned.

(b) Use of the Class Settlement Funds

The Class Settlement Funds shall be held in trust by the Monitor in an Escrow Account and, after the Plan Implementation Date, distributed to Class Counsel, in trust, to be distributed in accordance with further order of the CCAA Court, having regard to, among other things, the following priority claims:

(i) Class Counsel Fees and reimbursement of notice expenses;

(ii) any fees payable to Claims Funding Australia Pty Ltd., in its capacity as the litigation funder, pursuant to the Amended and Restated Litigation Funding Agreement made as of November 2015, approved by the Alberta Court Order dated August 8, 2016 and the Ontario Court Order dated November 30, 2016, the particulars of which shall be determined by further order of the CCAA Court;

(iii) Administration Expenses; and

(iv) taxes required by law to be paid to any governmental authority.

Notwithstanding the above, the following persons and entities shall not be entitled to any allocation or distribution of the Class Settlement Funds:

(i) The following entities and their past and present directors, officers, senior employees, partners, subsidiaries, affiliates, legal representatives, heirs, predecessors, successors and assigns:

Poseidon Concepts Corp; Poseidon Concepts Ltd.; Poseidon Concepts Limited Partnership; Poseidon Concepts Inc.; Open Range Energy Corp.; Peyto Exploration & Development Corp.; National Bank of Canada; National Bank Financial Inc.; The Toronto Dominion Bank; The Bank of Nova Scotia; HSBC Bank of Canada; KPMG LLP; BMO Nesbitt Burns Inc.; CIBC World Markets Inc.; Haywood Securities Inc.; Peters & Co. Limited; Canaccord Genuity Corp.; Cormark Securities Inc.; Dundee Securities Ltd.; and FirstEnergy Capital Corp.; and

(ii) The following individuals and any individual who is a member of their immediate families:

Matthew MacKenzie; Clifford Wiebe; Joseph Kostelecky; Lyle Michaluk; Scott Dawson; Dean Jensen; Jim McKee; Neil Richardson; David Belcher; Sonja Kuehnle; Harley Winger; Doug Robinson; Kenneth Faircloth; and Wazir (Mike) Seth.

(c) Use of the Poseidon Settlement Funds

The Poseidon Settlement Funds shall be held in trust by the Monitor and, forthwith after the Plan Implementation Date, distributed by the Monitor as follows:

(i) first in favour of the Monitor's charges, costs and expenses; and

(ii) second, in favour of the Priority Claims.

(d) No Further Contributions, Liability or Exposure

Notwithstanding any other provision of the Plan or the Settlement Agreement, and without in any way restricting, limiting or derogating from the releases provided herein and in the Plan, or in any way restricting, limiting or derogating from any other protection provided for herein and in the Plan to the Released Parties, under no circumstances shall the Released Parties be required to or be called upon to make any further financial contribution or payment in respect of any Claim including the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, nor shall the Released Parties have any liability whatsoever for or have any exposure whatsoever to anything directly or indirectly, related to, arising out of, based on, or connected with any Claim including the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, over and above the payment of the Poseidon Settlement Funds and the Class Settlement Funds (excluding the Additional Proceeds), which payment is solely the responsibility of the Insurers, and the Additional Proceeds, which payment is solely the responsibility of the parties contributing to same. Costs associated with any notice to Claimants required in connection with the Plan or the Settlement Agreement shall not be paid by the Released Parties. The Poseidon Settlement Funds and the Class Settlement Funds are the full monetary contribution and payment of any kind to be made by the Released Parties, and are inclusive of all costs, interest, legal fees, taxes (inclusive of any GST, HST, or any other taxes that may be payable in respect of the Plan or the Settlement Agreement), costs associated with any distributions, further litigation, administration or otherwise.

4. RELEASES AND BAR ORDER/INJUNCTIONS

(a) Release

Subject to section 4(b) of this Settlement Agreement, the Approval Orders shall provide that the Released Parties are fully, finally, irrevocably, absolutely, and forever released, remised and discharged from any and all Claims as of the Effective Time on the Plan Implementation Date including the following Claims:

(i) all Claims of the Class against the Released Parties;

(ii) all Claims of the Senior Secured Creditors against the Released Parties;

(iii) all Claims of KPMG against the Released Parties;

(iv) all Claims of the Underwriters against the Released Parties;

(v) all Claims of Poseidon against the Released Parties;

(vi) all Claims of the Monitor against the Released Parties and the Senior Secured Creditors;

(vii) all Claims of the Released Parties against Poseidon, the Class Representatives, the Class Members, the Senior Secured Creditors, and any other Released Parties; and

(viii) [Intentionally deleted]

(ix) all Claims of any other Person against the Released Parties.

The foregoing shall apply to Claims contemplated by s. 5.1(2) and 19(2) of the CCAA but shall not apply to the enforcement of any obligations under the Settlement Agreement.

(b) Claims Not Released

Nothing in section 4(a) of this Settlement Agreement shall waive, compromise, release, discharge, cancel, bar or otherwise affect any of the following:

(i) the obligations of any Person in respect of the Plan, the Approval Orders, and the Settlement Agreement, including the obligation to pay the Additional Proceeds and the obligations of the Insurers to pay the Class Settlement Funds (excluding the Additional Proceeds) and the Poseidon Settlement Funds;

(ii) Unaffected Claims;

(iii) [Intentionally deleted]

(iv) [Intentionally deleted]

(v) [Intentionally deleted]

(vi) [Intentionally deleted]

(vii) [Intentionally deleted]

(viii) [Intentionally deleted]

(ix) the rights of the Insureds (excluding Poseidon, whose rights against the Insurers are fully released under s. 4(a) above) against the Insurers under the Insurance Policies except as affected by the declarations set out in section 4(h) below; and

(x) the rights of any Person, including the Senior Secured Creditors, in respect of matters completely unrelated to the Claims, including any rights against the Released Parties that are in respect of matters completely unrelated to the Claims.

(c) Bar Order / Injunctions

Subject to section 4(d) of this Settlement Agreement, the Approval Orders shall provide that all Persons (regardless of whether or not such Persons are creditors or Claimants), including the Class, Settling Defendants, Poseidon, the Released Parties, KPMG and the Underwriters, shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Time on the Plan Implementation Date, from:

(i) commencing, conducting, pursuing, instituting, intervening in, asserting, advancing, or continuing in any manner, directly or indirectly, any Claim or other related proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Released Parties;

(ii) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree, Damages, or order against the Released Parties or their property;

(iii) making, asserting, pursuing, instituting, intervening in, advancing, commencing, conducting or continuing in any manner, directly or indirectly, any Claim, including for contribution or indemnity or other relief, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes or asserts, or might reasonably be expected to make or assert, such a Claim, in any manner or forum, against one or more of the Released Parties;

(iv) creating, perfecting, asserting or otherwise enforcing, directly or indirectly, any lien or encumbrance of any kind against the Released Parties or their property; or

(v) taking any actions to interfere with the implementation or consummation of the Settlement Agreement;

The foregoing shall apply to Claims contemplated by s. 5.1(2) and 19(2) of the CCAA but shall not apply to the enforcement of any obligations under the Settlement Agreement.

(d) Saving Provision re section 4(c)

The Approval Orders shall not bar, estop, stay and enjoin or otherwise affect any of the following:

(i) the obligations of any Person in respect of the Plan, the Approval Orders, and the Settlement Agreement;

(ii) Unaffected Claims;

(iii) [Intentionally deleted]

(iv) [Intentionally deleted]

(v) [Intentionally deleted]

(vi) the rights of the Insureds (excluding Poseidon, whose rights against the Insurers are fully barred, estopped, stayed and enjoined under section 4(c) above) against the Insurers under the Insurance Policies except as affected by the declarations set out in section 4(h) below; and

(vii) the rights of any Person, including the Senior Secured Creditors, in respect of matters completely unrelated to the Claims, including any rights against the Released Parties that are in respect of matters completely unrelated to the Claims.

(e) [Intentionally deleted]

(f) Acknowledgement that Knowledge not Complete

For greater certainty, the Settling Parties acknowledge that they may subsequently discover facts adding to those they now know, but nonetheless agree that on the Effective Date, all of the protections provided for herein (including the protections in section 4 of this Settlement Agreement) for the Settling Parties and the Released Parties shall be definitive and permanent irrespective of whether any subsequently discovered facts were unknown, unsuspected, or not disclosed.

By means of the Settlement, the Settling Parties waive any right they might have under the law, common law, civil law, in equity or otherwise, to disregard or avoid the protections provided for herein (including the protections in section 4 of this Settlement Agreement) and expressly relinquish any such right and each Class Member shall be deemed to have waived and relinquished such right. Furthermore, the Settling Parties agree to this waiver of their own volition, with full knowledge of its consequences and that this waiver was negotiated and constitutes a key element of the Settlement.

(g) [Intentionally deleted]

(h) Declarations Regarding Insurance

The Approval Orders shall declare that:

A. the Contribution:

I. does not violate the rights, in respect of the Insurance Policies, of the Class Representatives, the Class, the Monitor, the Senior Secured Creditors, KPMG, the Underwriters, or any other Person who might have a claim against any person or entity potentially covered under the Insurance Policies;

II. constitutes covered Loss (as defined in the Insurance Policies);

III. reduces the Limits of Liability (as defined in the Insurance Policies) under the Insurance Policies for all purposes, regardless of any subsequent finding by any court, tribunal, administrative body or arbitrator, in any proceeding or action, that the Settling Defendants, or any of them, engaged in conduct that triggered or may have triggered any exclusion, term or condition of the Insurance Policies, or any of them, so as to disentitle them to coverage under the Insurance Policies, or any of them;

IV. is without prejudice to any coverage positions or reservations of rights taken by the Insurers in relation to any other matter advised to the Insurers or any other Claim (as defined in the Insurance Policies) made or yet to be made against the Insureds (as defined in the Insurance Policies), provided that neither coverage nor payment in respect of the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, nor the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, will be voided or impacted by any such coverage position or reservation of rights; and

V. fully and finally releases the Insurers from any further obligation, and from any and all claims against them under or in relation to the Insurance Policies, in respect of the portion of the Limits of Liability that were expended to fund the Contribution;

B. once the Contribution has been funded, there is no further coverage under the Insurance Policies for Poseidon. For clarity, this declaration is not intended to, and does not, extinguish any remaining coverage under the Insurance Policies for the individual Insureds.

C. with the exception of payment in the aggregate amount of CAD $30,000 by the Insurers towards the settlement of regulatory proceedings by the Chartered Professional Accountants of Alberta against Lyle Michaluk, which shall be treated as Criminal /Regulatory Defence Costs, the determination of what constitutes reasonable Defence Costs paid or payable by any of the Insurers for Criminal/Regulatory Defence Costs and which reduce the amount of the Final Instalment of the Class Settlement Funds and the Final Instalment of the Poseidon Settlement Funds, all such terms as defined in Article 1.1 of the Plan, shall be within the sole purview and discretion of the Insurer paying them in accordance with the applicable

litigation guidelines and, except for the individual Insured on whose behalf they are being paid, shall not be subject to review or challenge by any other Person, including but not limited to the Monitor, the Senior Secured Creditors, Class Members or the Class Representatives.

D. in addition to the reduction of the Limits of Liability under the Policies pursuant to section 4(h)(A).III, the Limits of Liability under the following Policies will be deemed to have been further reduced by the following amounts pursuant to an agreement between the Insurers and the Insureds under the Policies:

Policy Issued by:	***Policy***	***Limits of Liability to be Reduced by:***
Encon Group Inc.	[#880 omitted]	$250,000
Chubb Insurance Company of Canada	[#964 omitted]	$250,000
Travelers Insurance Company of Canada	[#516 omitted]	$250,000
Royal & Sun Alliance Insurance Company of Canada	[#854 omitted]	$250,000
Chartis Insurance Company of Canada, now known as AIG Insurance Company of Canada	[#202 omitted]	$2,500,000
Lloyd's Underwriters	[#150 omitted]	$0

5. CONDITIONS PRECEDENT

The terms of this Settlement Agreement are conditional upon the fulfillment of the following conditions on or before the Plan Implementation Date:

(a) Approval of the Plan

The Plan in its entirety shall have been approved by the required majority of Affected Creditors.

(b) Granting of the Approval and Settlement Order

The Approval and Settlement Order shall have been granted by the CCAA Court, including the granting by the CCAA Court of its approval of all of the compromises, releases and injunctions contained in and effected by the Plan.

(c) Granting of the U.S. Approval Order

The U.S. Approval Order shall have been granted by the Bankruptcy Court, including the granting by the Bankruptcy Court of its approval of all of the compromises, releases and injunctions contained in and effected by the Plan.

(d) Granting of the Settlement Recognition Orders

The Settlement Recognition Orders shall have been granted by the Competent Courts in Ontario, Quebec, and in the United States.

(e) Granting of the Alberta Dismissal Orders

The Alberta Dismissal Orders shall have been granted by the Court of Queen's Bench of Alberta.

(f) Expiry of Appeal Periods

The Approval Orders shall have become Final Orders.

(g) Insurer Release

The Monitor receiving court approval to execute a release in favour of the insurers, in the form attached to the Plan as Schedule "E" and the amending agreement in respect of that release, attached to the Plan as Schedule "F".

6. EFFECT OF SETTLEMENT

(a) No Admission of Liability

Neither this Settlement Agreement, nor anything contained herein, shall be interpreted as a concession or admission of wrongdoing or liability by the Released Parties, or as a concession or admission by the Released Parties of the truthfulness or merit of any claim or allegation asserted in the Class Actions, the Monitor Action, the KPMG Claim, the Underwriters Claim, or the Senior Secured Creditor Action. Neither this Settlement Agreement, nor anything contained herein, shall be used or construed as an admission by the Released Parties of any fault, omission, liability or wrongdoing whatsoever. Any and all liability or wrongdoing is expressly denied.

(b) Agreement Not Evidence

Except as required to defend against the assertion of Released Claims and to enforce the terms of this Settlement Agreement, neither this Settlement Agreement, nor anything contained herein, nor any of the negotiations or proceedings connected with it, nor any related document, nor any other action taken to carry out the Settlement Agreement shall be referred to, offered as evidence or received in evidence in any pending or future civil, criminal, quasi-criminal, regulatory or administrative action or proceeding.

7. DISMISSAL OF ALL ACTIONS

(a) Except as otherwise provided in this Settlement Agreement, upon the granting of the Approval and Settlement Order or as soon as reasonably practicable thereafter, all Claims in Alberta including the Class Actions in Alberta, the Monitor Action, and the Senior Secured Creditor Action, and all claims, crossclaims, counterclaims, and third (or subsequent) party claims in, in connection with, or related to, such Claims shall be dismissed, without costs and with prejudice.

(b) Except as otherwise provided in this Settlement Agreement, upon the approval of the Settlement Recognition Orders or as soon as reasonably practicable thereafter, all Claims outside of Alberta, including the Class Actions in Quebec, the Class Actions in Ontario, the Class Actions in the United States District Court for the Southern District of New York, and all claims, crossclaims, counterclaims, and third (or subsequent) party claims in, in connection with, or related to, such Claims shall be dismissed, without costs and with prejudice.

(c) [intentionally deleted]

(d) [intentionally deleted]

(e) [intentionally deleted]

(f) [Intentionally deleted]

(g) [Intentionally deleted]

(h) [Intentionally deleted]

8. [Intentionally deleted]

9. ADMINISTRATION

(a) Appointment of the Administrator

(i) Class Counsel will, subject to the approval of the CCAA Court, appoint the Administrator to serve until further order of the CCAA Court, to implement the distribution of the Class Settlement Funds as directed by the CCAA Court.

(ii) The CCAA Court will fix the Administrator's compensation and payment schedule.

(b) Information and Assistance from the Monitor

Subject to the Plan Implementation Date having occurred:

(i) Upon request, the Monitor, Poseidon and/or any successor to Poseidon will authorize and direct TMX Equity Transfer Services or similar provider to deliver a computerized list of the names and addresses of persons who purchased Shares during the period of November 1, 2011 through February 14, 2013 or similar available information in its possession to Class Counsel and the Administrator, as applicable. Upon request, the Monitor will also authorize Broadridge Financial Solutions Inc. to obtain information about Class Members who hold or held beneficial interests in the Shares during the period of November 1, 2011 through February 14, 2013.

(ii) The Monitor will identify a person to whom Class Counsel and the Administrator may address any requests for information in respect of s. 9(b)(i) of this Settlement Agreement. The Monitor agrees to make reasonable efforts to answer any reasonable inquiry from the Administrator in order to facilitate the administration and implementation of the Settlement Agreement.

(iii) Class Counsel and/or the Administrator may use the information obtained pursuant to sections 9(b)(i) and (ii) only for the purposes of delivering the notices and administering and implementing the distribution of Class Settlement Funds and other proceeds of litigation, consequent to this Settlement Agreement or as otherwise ordered by the Court.

(iv) Any information obtained or created in the administration of this Settlement Agreement is confidential and, except as required by law, shall be used and disclosed only for the purpose of the administration of this Settlement Agreement or as otherwise ordered by the Court.

(v) If, and only if, the Plan Implementation Date has occurred, any professional fees or other costs associated with this paragraph shall be paid out of the Class Settlement Funds.

(c) Use of Class Settlement Funds

Subject to section 3 hereof, Class Counsel will distribute the Class Settlement Funds in accordance with one or more orders of the CCAA Court.

10. CLASS COUNSEL FEES

(a) Class Counsel shall seek the CCAA Court's approval of Class Counsel Fees to be paid as a first charge on the Class Settlement Funds. Class Counsel are not precluded from making additional applications to the CCAA Court for expenses incurred as a result of implementing the terms of the Settlement Agreement.

(b) The Settling Defendants acknowledge that they are not parties to the motion concerning the approval of Class Counsel Fees, they will have no involvement in the approval process to determine the amount of Class Counsel Fees and they will not make any submissions to the CCAA Court concerning Class Counsel Fees,

(c) Any order or proceeding relating to Class Counsel Fees, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to terminate or cancel the Settlement Agreement or affect or delay the finality of the settlement provided herein.

11. MISCELLANEOUS

(a) Entire Agreement

This Settlement Agreement and the Plan together constitute the entire agreement between the Settling Parties with respect to the matter herein. The execution of this Settlement Agreement has not been induced by, nor do any of the Settling Parties rely upon or regard as material, any representations, promises, agreements or statements whatsoever not incorporated herein and made a part hereof.

(b) Governing Law

This Settlement Agreement shall be governed by, and will be construed and interpreted in accordance with, the laws of the Province of Alberta and the laws of Canada applicable in the Province of Alberta. The Settling Parties hereby attorn to the jurisdiction of the Court of Queen's Bench in the Province of Alberta, in the CCAA Proceeding, in respect of any dispute arising from this Settlement Agreement except with respect to disputes concerning solely the U.S. Class Members, in which case the Settling Parties hereby attorn to the jurisdiction of the United States District Court for the Southern District of New York.

(c) Amendment

No amendment, supplement, modification or waiver or termination of this Settlement Agreement and, unless otherwise specified, no consent or approval by any Party, is binding unless executed in writing by the party to be bound thereby.

(d) Expenses

Each of the Settling Parties shall pay their respective legal, accounting, and other professional advisory fees, costs and expenses incurred in connection with this Settlement Agreement and its implementation.

(e) Monitor's Capacity

The Settling Parties acknowledge and agree that the Monitor, acting in its capacity as the Monitor of Poseidon in the CCAA Proceeding, will have no liability in connection with this Settlement Agreement (including in relation to any information or data provided by the Monitor in connection with this Settlement Agreement) whatsoever in its capacity as Monitor, in its personal capacity or otherwise; provided however that the Monitor shall exercise the powers granted to the Monitor under any order of the CCAA Court to perform the Monitor's obligations in respect of this Settlement Agreement and the Monitor shall be bound by the releases provided for in this Agreement and in the Plan at the Effective Time on the Plan Implementation Date.

(f) Counterparts

This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same agreement. Delivery of an executed original counterpart of a signature page of this Settlement Agreement by facsimile or electronic transmission shall be as effective as delivery of a manually executed original counterpart of this Settlement Agreement.

(g) Motions for Directions

Any one or more of the Settling Parties, Class Counsel or the Administrator may apply to the CCAA Court for directions in respect of any matter in relation to this Settlement Agreement. All motions contemplated by the Settlement Agreement shall be on notice to the Settling Parties.

(h) Released Parties Have No Responsibility or Liability for Administration

The Released Parties shall not have any responsibility for, or any liability whatsoever with respect to, the administration or implementation of this Settlement Agreement, including, without limitation, the allocation, processing and payment of claims by the Administrator.

(i) Negotiated Agreement

The Settlement Agreement has been the subject of negotiations and many discussions among the Settling Parties. Each of the Settling Parties has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafters of the Settlement Agreement shall have no force and effect. The Settling Parties further agree that the language contained in or not contained in previous drafts of the Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of the Settlement Agreement.

(j) Acknowledgements

Each of the Settling Parties hereby represents and warrants that:

(i) he/she has all requisite corporate power and authority to execute, deliver and perform the Settlement Agreement and has been duly authorized to do so;

(ii) the Settlement Agreement has been duly and validly executed and delivered by him/her and constitutes legal, valid, and binding obligations;

(iii) the terms of the Settlement Agreement and the effects thereof have been fully explained to him, her or its representative by his, her or its counsel;

(iv) he, she or its representative fully understands each term of the Settlement Agreement and its effect; and

(v) he, she or its representative have required and consented that this Settlement Agreement and all related documents be prepared only in English; les parties reconnaissent avoir exigé que la présente convention et tous les documents connexes soient rédigés seulement en Anglais.

The representations and warranties contained in the Settlement Agreement shall survive its execution and implementation.

(k) Notices

Any notice, instruction, motion for court approval or motion for directions or court orders sought in connection with the Settlement Agreement or any other report or document to be given by any of the Settling Parties to any of the other Settling Parties shall be in writing and delivered personally, by facsimile or e-mail during normal business hours, or sent by registered or certified mail, or courier postage paid as follows:

A. If to Poseidon:

Bennett Jones LLP

4500, 855 -2nd Street S.W.

Calgary, Alberta T2P 4K7

Attention: Mr. Ken Lenz, Q.C.

Fax: 403-265-7219

Email: lenzk@bennettjones.com

with a copy by email to:

Gowling WLG (Canada) LLP

1600,421 7 th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

B. If to the Monitor:

PricewaterhouseCoopers Inc.

Suite 3100, 111-5th Avenue S.W.

Calgary, Alberta T2P 5L3

Attention: Mr. Clinton Roberts

Fax: 403-781-1825

Email: clinton.l.roberts@ca.pwc.com

with a copy by email or fax (which shall not be deemed notice) to:

Attention: Mr. Ken Lenz, Q.C.

Fax: 403-265-7219

Email: lenzk@bennettjones.com

C. If to the Class Representatives:

Paliare Roland Rosenberg Rothstein LLP

35th Floor, 155 Wellington Street W.

Toronto, Ontario M5V 3H1

Attention: Mr. Max Starnino

Fax: 416-646-4301

Email: max.starnino@paliareroland.com

D. If to the Senior Secured Creditors:

Dentons Canada LLP

15th Floor, 850 2nd St SW

Calgary AB T2P 0R8

Attention: Mr. David Mann

Fax: 403-268-3100

Email: david.mann@dentons.com

and

Rose LLP

810-333 5 Avenue SW

Calgary AB T2P 3B6

Attention: Mr. Matthew Lindsay

Fax: 403-776-0601

Email: matt.lindsay@rosellp.com

E. If to the Class Members in the U.S. Action:

The Rosen Law Firm

275 Madison Avenue, 34th Floor

New York, NY 10016

Attention: Mr. Jonathan Home

Fax: 212-202-3827

Email: jhorne@rosenlegal.com

F. If to Matthew MacKenzie:

Burnet, Duckworth & Palmer LLP

525 - 8th Avenue S.W., Suite 2400

Calgary, AB T2P 1G1

Attention: Mr. Daniel J. McDonald, Q.C.

Fax: 403-260-0332

Email: dim@bdplaw.com

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

G. If to Lyle Michaluk:

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Attention: Mr. J. Patrick Peacock, Q.C.

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Email: jppeacock@plhlaw.ca

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

H. If to Harley Winger:

Peacock Linder Halt & Mack LLP

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Calgary, AB T2P 4H2

Attention: Mr. Perry R. Mack, Q.C.

Fax: 403-296-2299

Email: pmack@plhlaw.ca

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

I. If to Scott Dawson:

Parlee McLaws LLP

3300 TD Canada Trust Tower

421-7 Avenue S.W.

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Email: gstirling@parlee.com

with a copy by email to:

Gowling WLG (Canada) LLP

1600, 421 7th Avenue SW

Calgary, Alberta T2P 4K9

Attention: Mr. David Bishop and Mr. Scott Kugler

Email: david.bishop@gowlingwlg.com and scott.kugler@gowlingwlg.com

J. If to Clifford Wiebe:

Scott Venturo LLP

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Calgary, AB T2P 4R5

Attention: Mr. Domenic Venturo

Fax: 403-265-4632

Email: d.venturo@scottventuro.com

K. If to Joseph Kostelecky:

Code Hunter LLP

440 2nd Avenue S.W., Suite 850

Calgary, AB T2P 5E9

Attention: Messrs. Eric Groody and Robert Moyse

Fax: 403-261-2054

Email: eric.groody@codehunterllp.com and robert.moyse@codehunterllp.com

L. If to David Belcher:

Brownlee LLP

2200 Commerce Place

10155-102 Street

Edmonton, AB T5J 4G8

Attention: Mr. Havelock B. Madill, Q.C.

Fax: 780-424-3254

Email: hmadill@brownleelaw.com

M. If to Lyle D. Michaluk, Matt C. MacKenzie, A. Scott Dawson, Clifford L. Wiebe, Harley L, Winger, Dean Jensen, James McKee and Neil Richardson in their capacity as Defendants in the U.S. Action:

Kaufman Borgeest & Ryan LLP

200 Summit Lake Drive

Valhalla, New York 10595

Attention: Mr. Paul T. Curley

Fax: 914-449-1100

Email: pcurley@kbrlaw.com

N. If to Sonja Kuehnle and Doug Robinson:

Fasken Martineau DuMoulin LLP

350 7th Avenue S.W., Suite 3400

Calgary, AB T2P 3N9

Attention: Mr. Robert D. Maxwell

Fax: 403-261-5351

Email: rmaxwell@fasken.com

O. If to Peyto Exploration and Development Corp.

Goodmans LLP

333 Bay Street, Suite 3400

Toronto, ON M5H 2S7

Attention: Mr. David Conklin

Fax: 416-979-1234

Email: dconklin@goodmans.ca

P. If to Kenneth Faircloth and Wazir (Mike) Seth:

Ormston List Frawley LLP

6 Adelaide Street East, Suite 500

Toronto, ON M5C 1H6

Attention: John P. Ormston

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Email: jormston@olflaw.com

Q. If to KPMG:

McLennan Ross LLP

1000 First Canadian Centre

350 - 7th Avenue, SW

Calgary, AB T2P 3N9

Attention: Graham McLennan, Q.C.

Fax: 403-543-9150

Email: gmclennan@mross.com

R. If to the Underwriters:

Lenczner Slaght Royce Smith Griffin LLP

130 Adelaide St W., Suite 2600

Toronto, ON M5H 3P5

Attention: Shara Roy

Fax: 416-865-3973

Email: sroy@litigate.com

or to such other address as any party may from time to time notify the others in accordance with this section. Any such communication so given or made shall be deemed to have been given or made and to have been received on the day of delivery if delivered, or on the day of faxing or emailing, provided that such day in either event is a Business Day and the communication is so delivered, faxed or emailed before 5:00 p.m. (Calgary time) on such day. Otherwise, such communication shall be deemed to have been given and made and to have been received on the next following Business Day.

(l) Further Assurances

The Settling Parties all covenant and agree to:

(i) pursue as promptly as practicable and in coordination with the Plan, Court approval of the Settlement Agreement and the granting of the Class Action Settlement Orders in an expedited and commercially reasonable fashion; and

(ii) execute any and all documents and perform any and all acts required by the Plan and the Settlement Agreement, including any consent, approval or waiver requested by the Settling Parties, acting reasonably.

(m) Successors and Assigns

This Settlement Agreement shall be binding upon and shall ensure to the benefit of the heirs, administrators, executors, legal personal representatives, successors and assigns of any Person named or referred to in this Settlement Agreement.

(n) Fonds d'aide aux actions collectives Levy

The Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives will apply to the portion of any remaining balance (or "reliquat") attributable to Quebec residents who are Class Members after all the Class Actions have been resolved.

12. TERMINATION

(a) Rights of Termination

This Settlement Agreement shall terminate if:

(i) the Approval and Settlement Order, the Alberta Dismissal Orders or the U.S. Approval Order are not granted and no further rights of appeal exist;

(ii) the Approval and Settlement Order, the Alberta Dismissal Orders and the U.S. Approval Order are granted, overturned on appeal, and no further rights of appeal exist;

(iii) any of the Settlement Recognition Orders are not granted and no further rights of appeal exist;

(iv) any of the Settlement Recognition Orders are granted, overturned on appeal, and no further rights of appeal exist; or

(v) the Plan is terminated for any reason by Final Order of the CCAA Court.

If there are any disputes about the termination of the Settlement Agreement, the dispute shall be determined by the CCAA Court on notice to the Settling Parties.

(b) No Termination Rights Regarding Class Counsel Fees

The refusal of the Competent Courts to approve, or uphold in the case of an appeal, any request by Class counsel for fees shall not be grounds to terminate this Settlement Agreement.

(c) Impact of Non-Approval and/or Termination

If the conditions precedent set out in section 5 of this Settlement Agreement are not met, or if the Settlement Agreement or the Plan terminates or is terminated in accordance with its terms, then:

(i) the Plan and the Settlement Agreement shall be null and void in all respects (subject to any survival provisions);

(ii) any settlement or compromise embodied in the Plan, or the Settlement Agreement, and any document or agreement executed pursuant to the Plan or Settlement Agreement shall be deemed null and void;

(iii) nothing contained in the Plan or the Settlement Agreement, and no act taken in preparation of the consummation of the Plan or the Settlement Agreement, shall:

A. constitute or be deemed to constitute a waiver or release of any Claims or any defences thereto, by or against any of the Released Parties or any other Person;

B. prejudice in any manner the rights of any of the creditors, the Released Parties or any other Person; or

C. constitute an admission of any sort by any of the creditors, the Released Parties or any other Person; and

(iv) the Settling Parties and any other Person affected by the Plan or the Settlement Agreement will be restored to their respective positions prior to the execution of the Settlement Agreement;

(v) [Intentionally deleted]

(vi) [Intentionally deleted]

(vii) subject to any survival provisions herein, the Settlement Agreement will have no further force and effect and no effect on the rights of the Settling Parties and any other Person affected by the Plan or the Settlement Agreement;

(viii) [Intentionally deleted]

(ix) the Poseidon Settlement Funds and the Class Settlement Funds will be returned to the payor(s) of such funds, with interest and without deduction or holdback, within 30 days after the date upon which the triggering event for repayment occurs. Any taxes payable on any interest that accrues in relation to the Class Settlement Funds shall be payable by the recipient(s) of any such interest earned;

(x) neither the Settlement Agreement nor the Plan will be introduced into evidence or otherwise referred to in any litigation or proceeding against the Released Parties;

(xi) the provisions of this section, and sections 1(a), 1(b), 6(a), 6(b), 11(a)-(k), 11(l)(ii) and the recitals and schedules applicable thereto shall survive termination and shall continue in full force and effect;

(xii) Poseidon and/or the Monitor, or Class Counsel, as applicable, shall, within 30 days after the date upon which the triggering event for repayment occurs, apply to the CCAA Court and the Competent Courts, as necessary, for orders:

A. declaring the Plan and the Settlement Agreement null and void and of no force or effect except for the provisions of those Articles and sections that are expressly specified as continuing in force; and

B. setting aside, *nunc pro tunc*, all prior orders or judgments entered in accordance with the terms of the Plan and/or the Settlement Agreement;

but the obligation to apply to the CCAA Court and the Competent Courts for such orders will only be required if, for example, the Plan has been approved, the Settlement Agreement has been executed, an order or judgment has been entered into, or other prerequisite has occurred such that there is utility in applying for the above-noted orders,

IN WITNESS OF WHICH the Settling Parties have executed this Settlement Agreement.

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP, as Legal Counsel for and on behalf of FRANZ AUER and MOHAMED RAMZY Per: _____ GAVIN PRICE	SISKINDS LLP, as Legal Counsel for and on behalf of THOMAS JAMES and MARIAN LEWIS Per: _____
THE TORONTO-DOMINION BANK, as Agent for itself and HSBC BANK CANADA, THE BANK OF NOVA SCOTIA and NATIONAL BANK OF CANADA Per: _____ Title: _____	POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP and POSEIDON CONCEPTS INC. by its Court Appointed Monitor, PRICEWATERHOUSECOOPERS INC. Per: _____ Title: _____

Graphic 1

24

B. setting aside, *nunc pro tunc*, all prior orders or judgments entered in accordance with the terms of the Plan and/or the Settlement Agreement;

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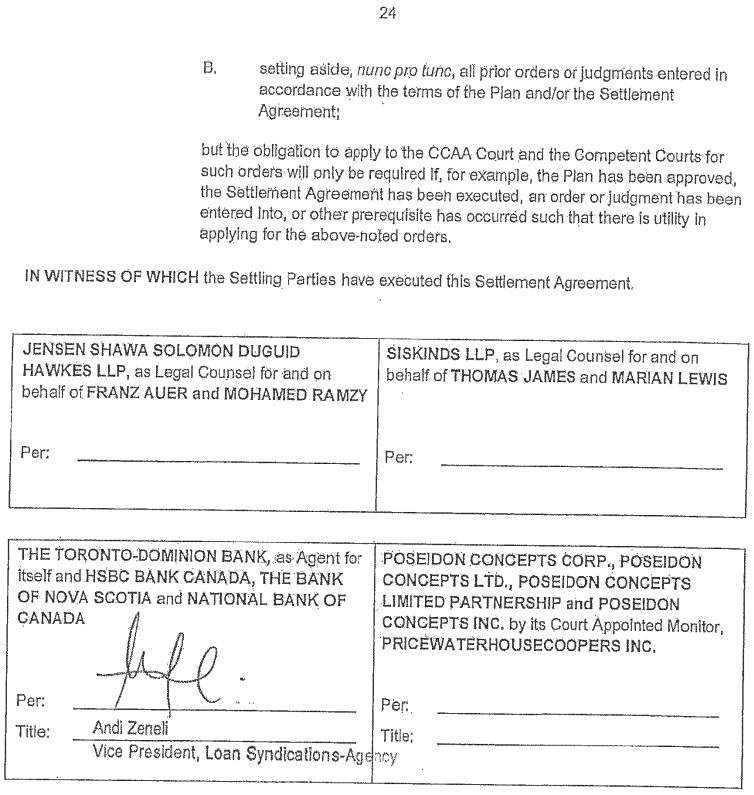
JENSEN SHAWA SOLOMON DUGUID HAWKES LLP, as Legal Counsel for and on behalf of FRANZ AUER and MOHAMED RAMZY Per: _____	SISKINDS LLP, as Legal Counsel for and on behalf of THOMAS JAMES and MARIAN LEWIS Per: _____ Sajjad Nematollahi
THE TORONTO-DOMINION BANK, as Agent for itself and HSBC BANK CANADA, THE BANK OF NOVA SCOTIA and NATIONAL BANK OF CANADA Per: _____ Title: _____	POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP and POSEIDON CONCEPTS INC. by its Court Appointed Monitor, PRICEWATERHOUSECOOPERS INC. Per: _____ Title: _____

Graphic 2



24

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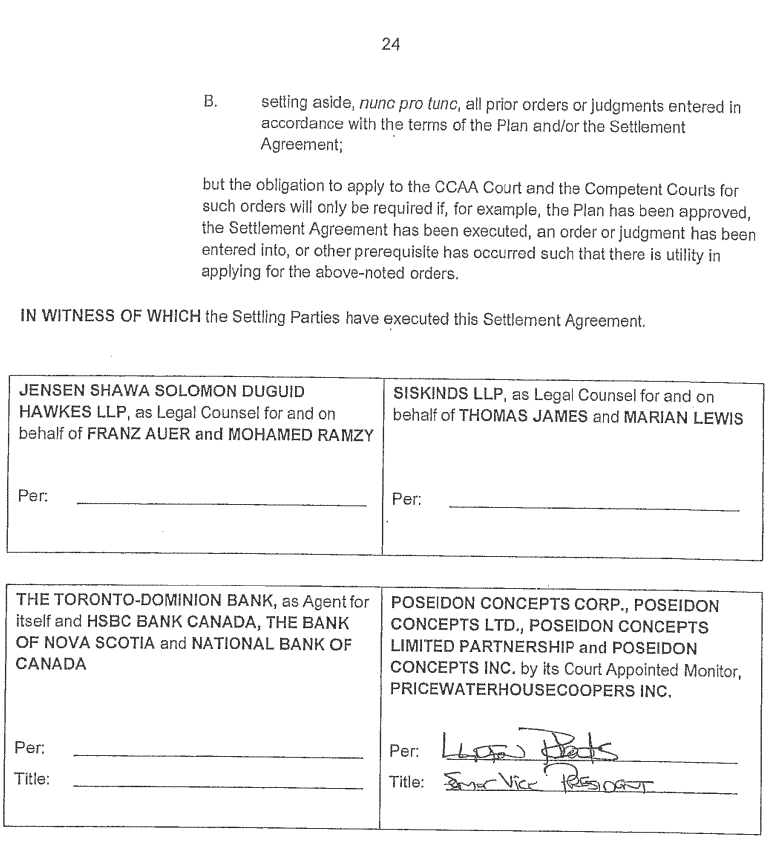
THE TORONTO-DOMINION BANK, as Agent for itself and HSBC BANK CANADA, THE BANK OF NOVA SCOTIA and NATIONAL BANK OF CANADA Per: _____ Title: Andi Zeneli Vice President, Loan Syndications-Agency	POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP and POSEIDON CONCEPTS INC. by its Court Appointed Monitor, PRICEWATERHOUSECOOPERS INC. Per: _____ Title: _____

Graphic 3



24

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JENSEN SHAWA SOLOMON DUGUID HAWKES LLP, as Legal Counsel for and on behalf of FRANZ AUER and MOHAMED RAMZY Per: _____	SISKINDS LLP, as Legal Counsel for and on behalf of THOMAS JAMES and MARIAN LEWIS Per: _____
THE TORONTO-DOMINION BANK, as Agent for itself and HSBC BANK CANADA, THE BANK OF NOVA SCOTIA and NATIONAL BANK OF CANADA Per: _____ Title: _____	POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP and POSEIDON CONCEPTS INC. by its Court Appointed Monitor, PRICEWATERHOUSECOOPERS INC. Per: _____ Title: _____

Graphic 4

25

	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	**PEACOCK LINDER HALT & MACK LLP**, as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	**PARLEE McLAWS LLP**, as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	**CODE HUNTER LLP**, as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 5

25

	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	**PEACOCK LINDER HALT & MACK LLP**, as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	**PARLEE McLAWS LLP**, as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	**CODE HUNTER LLP**, as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 6

25

	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	PARLEE McLAWS LLP, as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	CODE HUNTER LLP, as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 7

25

	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	PARLEE McLAWS LLP, as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	CODE HUNTER LLP, as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 8

25

	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	PARLEE McLAWS LLP, as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	CODE HUNTER LLP, as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 9

25

	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	PARLEE McLAWS LLP, as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	CODE HUNTER LLP, as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 10

25

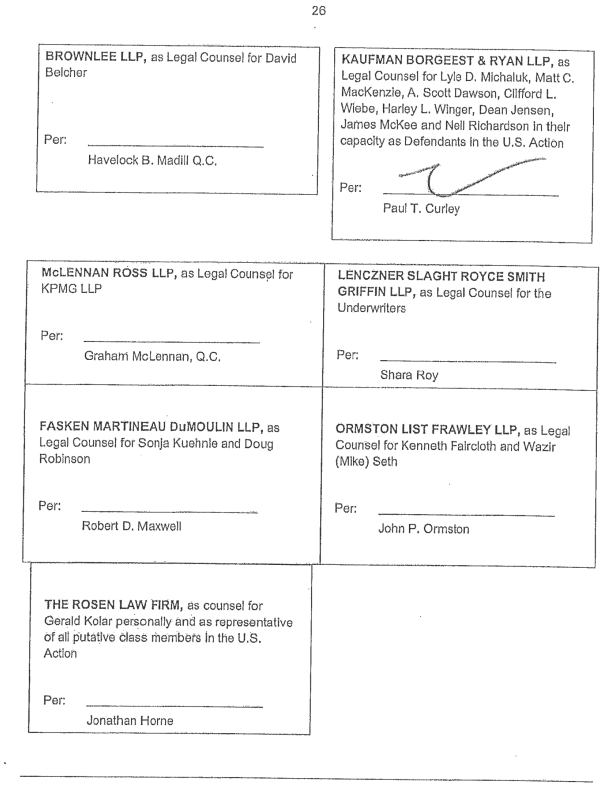
	GOODMANS LLP, as Legal Counsel for Peyto Exploration and Development Corp. Per: _____ David Conklin
BURNET, DUCKWORTH & PALMER LLP, as Legal Counsel for Matthew MacKenzie Per: _____ Daniel J. McDonald, Q.C.	**PEACOCK LINDER HALT & MACK LLP,** as Legal Counsel for Harley Winger Per: _____ Perry R. Mack, Q.C.
PEACOCK LINDER HALT & MACK LLP, as Legal Counsel for Lyle Michaluk Per: _____ J. Patrick Peacock, Q.C.	**PARLEE McLAWS LLP,** as Legal Counsel for Scott Dawson Per: _____ Gregory D.M. Stirling, Q.C.
SCOTT VENTURO LLP, as Legal Counsel for Clifford Wiebe Per: _____ Domenic Venturo, Q.C.	**CODE HUNTER LLP,** as Legal Counsel for Joseph Kostelecky Per: _____ Robert Moyse

Graphic 11

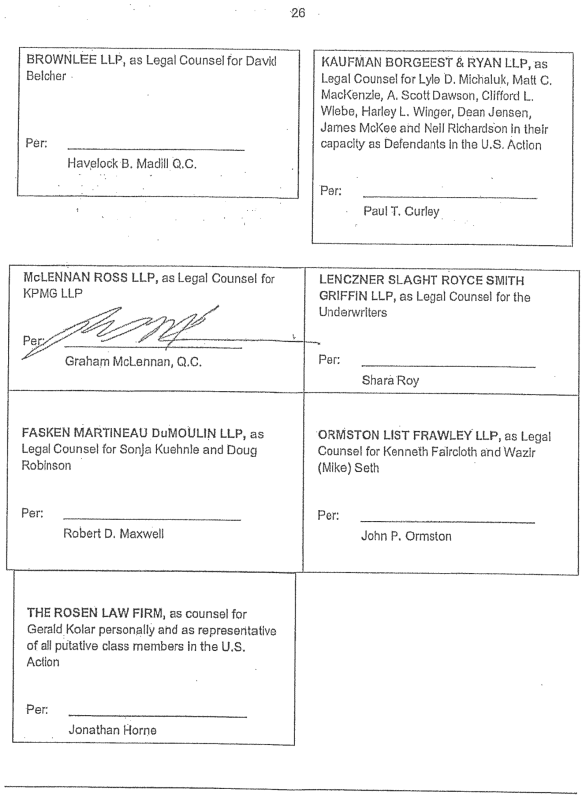
26

BROWNLEE LLP, as Legal Counsel for David Belcher Per: _____ Havelock B. Madill Q.C.	**KAUFMAN BORGEEST & RYAN LLP,** as Legal Counsel for Lyle D. Michaluk, Matt C. MacKenzie, A. Scott Dawson, Clifford L. Wiebe, Harley L. Winger, Dean Jensen, James McKee and Neil Richardson in their capacity as Defendants in the U.S. Action Per: _____ Paul T. Curley
McLENNAN ROSS LLP, as Legal Counsel for KPMG LLP Per: _____ Graham McLennan, Q.C.	**LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP,** as Legal Counsel for the Underwriters Per: _____ Shara Roy
FASKEN MARTINEAU DuMOULIN LLP, as Legal Counsel for Sonja Kuehnle and Doug Robinson Per: _____ Robert D. Maxwell	**ORMSTON LIST FRAWLEY LLP,** as Legal Counsel for Kenneth Faircloth and Wazir (Mike) Seth Per: _____ John P. Ormston
THE ROSEN LAW FIRM, as counsel for Gerald Kolar personally and as representative of all putative class members in the U.S. Action Per: _____ Jonathan Horne	

Graphic 12



Graphic 13



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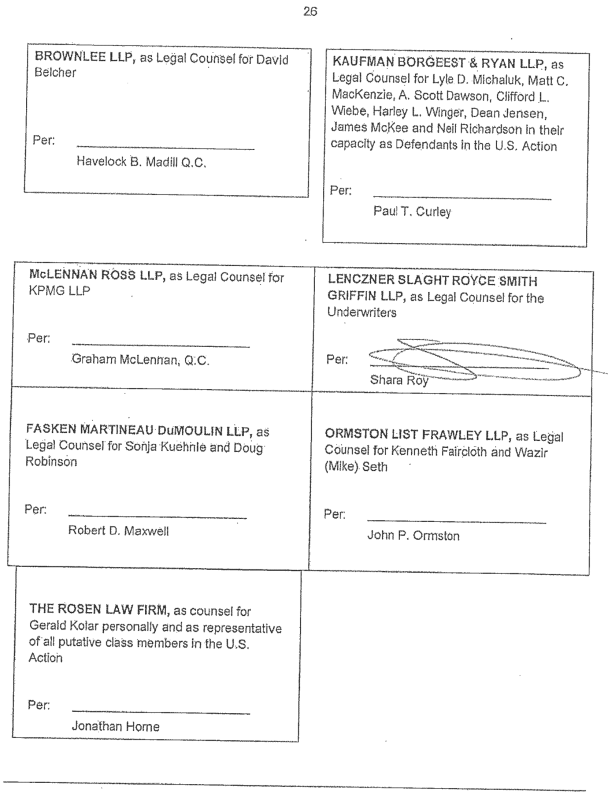
26

BROWNLEE LLP, as Legal Counsel for David Belcher

Per: _____
Havelock B. Madill Q.C.

KAUFMAN BORGEEST & RYAN LLP, as Legal Counsel for Lyle D. Michaluk, Matt C. MacKenzie, A. Scott Dawson, Clifford L. Wiebe, Harley L. Winger, Dean Jensen, James McKee and Neil Richardson in their capacity as Defendants in the U.S. Action

Per: _____
Paul T. Curley

McLENNAN ROSS LLP, as Legal Counsel for KPMG LLP

Per: _____
Graham McLennan, Q.C.

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Per: _____
Shara Roy

FASKEN MARTINEAU DuMOULIN LLP, as Legal Counsel for Sonja Kuehnle and Doug Robinson

Per: _____
Robert D. Maxwell

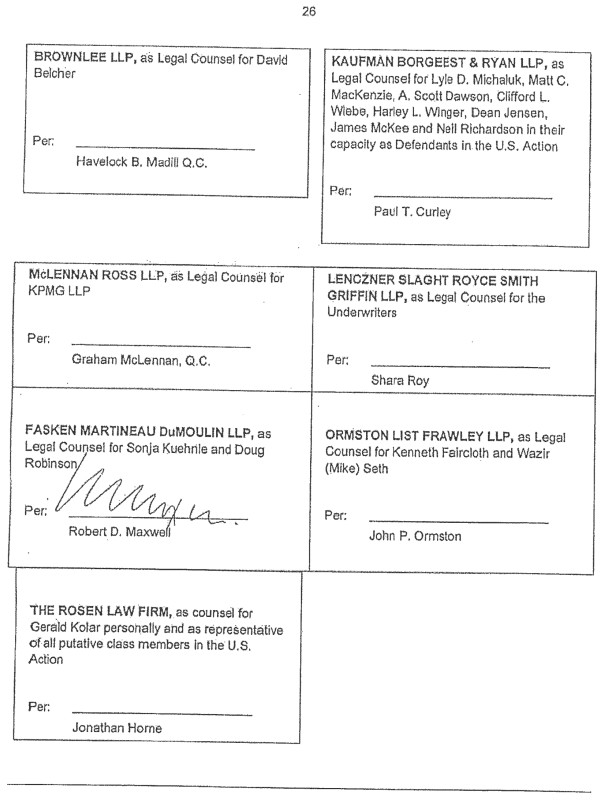
ORMSTON LIST FRAWLEY LLP, as Legal Counsel for Kenneth Faircloth and Wazir (Mike) Seth

Per: _____
John P. Ormston

THE ROSEN LAW FIRM, as counsel for Gerald Kolar personally and as representative of all putative class members in the U.S. Action

Per: _____
Jonathan Horne

Graphic 15


26

BROWNLEE LLP, as Legal Counsel for David Belcher

Per: _____
Havelock B. Madill Q.C.

KAUFMAN BORGEEST & RYAN LLP, as Legal Counsel for Lyle D. Michaluk, Matt C. MacKenzie, A. Scott Dawson, Clifford L. Wiebe, Harley L. Winger, Dean Jensen, James McKee and Neil Richardson in their capacity as Defendants in the U.S. Action

Per: _____
Paul T. Curley

McLENNAN ROSS LLP, as Legal Counsel for KPMG LLP

Per: _____
Graham McLennan, Q.C.

LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP, as Legal Counsel for the Underwriters

Per: _____
Shara Roy

FASKEN MARTINEAU DuMOULIN LLP, as Legal Counsel for Sonja Kuehnle and Doug Robinson

Per: _____
Robert D. Maxwell

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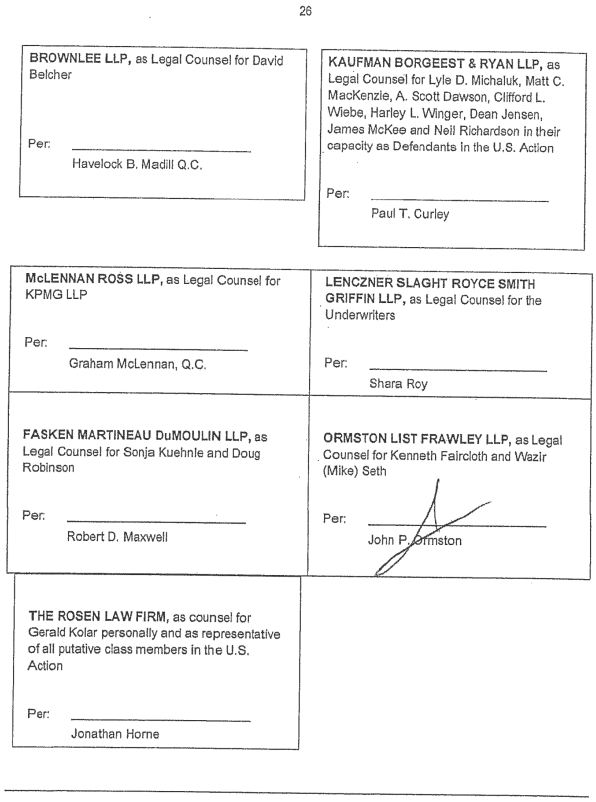
Per: _____
John P. Ormston

THE ROSEN LAW FIRM, as counsel for Gerald Kolar personally and as representative of all putative class members in the U.S. Action

Per: _____
Jonathan Horne

Graphic 16



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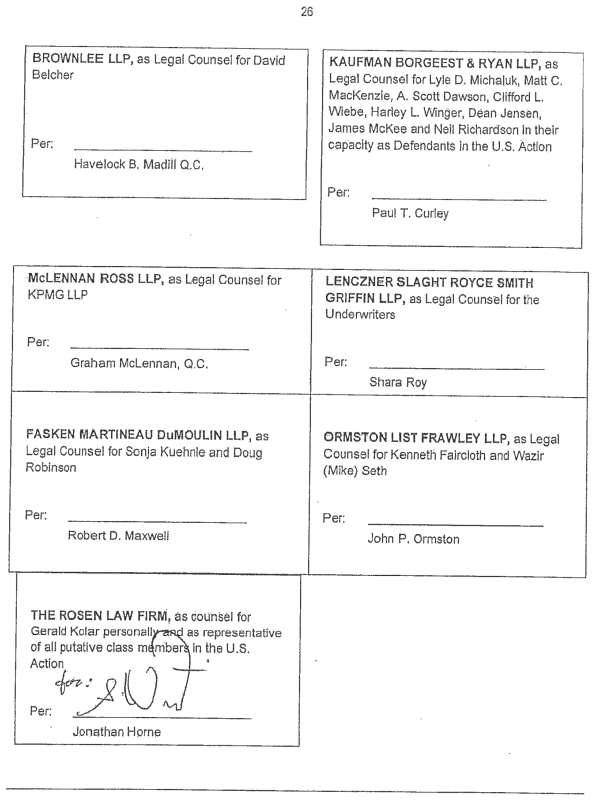

Graphic 18

Schedule"C"

SCHEDULE "C"

COURT FILE NUMBERS	1301-04364
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED AND IN THE MATTER OF POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP AND POSEIDON CONCEPTS INC.
APPLICANTS	POSEIDON CONCEPTS CORP., POSEIDON CONCEPTS LTD., POSEIDON CONCEPTS LIMITED PARTNERSHIP, AND POSEIDON CONCEPTS INC.
DOCUMENT	*ORDER*
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bennett Jones LLP 4500, 855 - 2{nd} Street S.W. Calgary, AB T2P 4K7 Ken Lenz, Q.C. Phone: (403) 298-3317 Fax: (403) 265-7219 *lenzk@bennettjones.com* File No.: 11866-66

DATE ON WHICH ORDER WAS PRONOUNCED: May 4, 2018

LOCATION OF HEARING OR TRIAL: Calgary, Alberta

NAME OF JUDGE WHO MADE THIS ORDER: Justice Horner

THE APPLICATION OF Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Limited Partnership, and Poseidon Concepts Inc. (collectively, the "Applicants") and by the Class Representatives, in their own and in a representative capacity, and by the Senior Secured Creditors, in the proceeding in the Court of Queen's Bench of Alberta bearing Court File No. 1301-04364 (the *"CCAA Proceedings")* for an Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the *"CCAA")* approving and giving effect to: (i) the Amended Plan of Compromise and Arrangement dated April 6, 2018 attached as Schedule "A" hereto, as amended, varied or supplemented from time to time in accordance with its terms (the *"Plan");* and, (ii) the Settlement Agreement, dated April 6, 2018 attached as Schedule "B" hereto (the *"Settlement Agreement")*, was considered this day, at the Court of Queen's Bench of Alberta at the Calgary Court Centre, 601-5th Street SW, City of Calgary, in the Province of Alberta;

UPON READING the Notice of Application; the Forty-• Report of PricewaterhouseCoopers Inc., in its capacity as monitor of the Applicants (the *"Monitor")*, dated April •, 2018 (the *"Monitor's Report");* as well as the other materials filed by the parties;

AND UPON HEARING the submissions of counsel for the Applicants, counsel for the Monitor, Class Counsel, and such other counsel as were present;

AND UPON BEING ADVISED that all of the Settling Parties support the Plan and the Settlement Agreement;

IT IS HEREBY ORDERED AND DECLARED THAT:

DEFINED TERMS

1. Any capitalized terms not otherwise defined in this Order shall have the meanings ascribed to such terms in the Plan and the Settlement Agreement.

SERVICE, NOTICE, AND MEETING

2. The time for service of the Notice of Application and the Monitor's Report is hereby abridged and validated so that this Application is properly returnable today, and the Court hereby dispenses with further service.

3. There has been good and sufficient notice, service, and delivery of the Meeting and Hearing Order, Plan, and Settlement Agreement to all Persons upon which notice, service, and delivery was required. All applicable parties adhered to, and acted in accordance with, the Meeting and Hearing Order and the Global Settlement Notice Order. All Persons shall be forever barred from raising any further objection to the Plan or the Settlement Agreement.

4. The Meeting was duly convened and held, all in conformity with the CCAA and the orders of this Court, including, without limitation, the Meeting and Hearing Order.

APPROVAL OF THE PLAN AND THE SETTLEMENT AGREEMENT

5. The Plan, the Settlement Agreement, and all the terms and conditions thereof, and matters and transactions contemplated thereby, are fair and reasonable.

6. The Plan is hereby sanctioned and approved pursuant to Section 6 of the CCAA.

7. The Settlement Agreement is hereby approved pursuant to Section 11 of the CCAA.

8. The terms of the Plan and the Settlement Agreement are incorporated by reference into this Order and are hereby approved.

PLAN AND SETTLEMENT AGREEMENT IMPLEMENTATION

9. At the Effective Time on the Plan Implementation Date, the Plan shall be final, binding, and effective in accordance with its terms against, and enure to the benefit of, as the case may be, the Applicants, the Released Parties, the Affected Creditors, the Class Representatives, the Class Members, and all other Persons and parties named or referred to in, affected by, or subject to the Plan, including, without limitation, respective heirs, executors, administrators, legal representatives, successors, and assigns of all of them without any ability to "opt-out" or otherwise not be bound by the Plan.

10. At the Effective Time on the Plan Implementation Date, the Settlement Agreement shall be final, binding, and effective against the Class Representatives and Class Members, as well as any Person who is a plaintiff/applicant, defendant/respondent, third, fourth, or subsequent party or mis-en-cause in any Claim, including the Class Actions, without any ability to "opt-out" or otherwise not be bound by the Settlement Agreement.

11. Each Person named or referred to in, or subject to, the Plan is hereby deemed to have consented and agreed to all of the provisions of the Plan, in its entirety, and is hereby deemed to have executed and delivered all consents, releases, assignments, and waivers, statutory or otherwise, required to implement and carry out the Plan in its entirety.

12. Each of the Applicants is authorized and directed, and the Monitor, Senior Secured Creditors, Released Parties, and the Class Representatives are authorized and empowered, to take all steps and actions, and to do all things, necessary or appropriate to implement the Plan and the Settlement Agreement in accordance with their terms, and to enter into, execute, deliver, complete, implement, and consummate all of the steps, transactions, distributions, deliveries, allocations, instruments, and agreements contemplated pursuant to the Plan including but not limited to the Monitor executing the release at Schedule "E" to the Plan, the amending agreement at Schedule "F" to the Plan, and such steps and actions are hereby authorized, ratified and approved.

13. On or after the Plan Implementation Date, the Class Settlement Funds shall be held, allocated, and distributed by Class Counsel in accordance with the further order of this Court.

14. Upon being provided with confirmation satisfactory to it that the conditions precedent set out in article 6.1 of the Plan have been satisfied or waived, as applicable, in accordance with the terms of the Plan, the Monitor is hereby authorized and directed

to deliver to the Applicants, the Class Representatives, the Senior Secured Creditors, the Settling Defendants and the other parties to the service list in the CCAA Proceeding, a certificate signed by the Monitor (the *"Monitor's Certificate")* certifying that the Plan Implementation Date has occurred and that the Plan and this Sanction Order are effective in accordance with their respective terms, and, following delivery of the Monitor's Certificate as contemplated above, the Monitor shall file the Monitor's Certificate with this Court and with the United States Bankruptcy Court.

15. Section 36.1 of the CCAA, sections 95 to 101 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and any other federal or provincial law relating to preferences, fraudulent conveyances, transfers at undervalue or oppressive misconduct, shall not apply to the Plan or to any transactions, distributions, transfers, allocations, transactions, or payments implemented pursuant to the Plan, the Settlement Agreement, or this Order.

16. The steps, compromises, releases, injunctions, discharges, cancellations, transactions, arrangements, and reorganizations to be effected on the Plan Implementation Date are deemed to occur and be effected in the sequential order contemplated in the Plan, without any further act or formality, beginning at the Effective Time.

17. On the Plan Implementation Date, (a) Poseidon shall establish an Administration Charge Reserve in the approximate amount of $200,000, or such other amount as agreed to by the Monitor and the Senior Secured Creditors, which cash reserve: (i) shall be maintained and administered by the Monitor, in trust, for the purpose of paying any amounts secured by the Administration Charge; and (ii) upon the termination of the Administration Charge pursuant to the Plan, shall be paid to the Senior Secured Creditors in addition to any other amounts payable pursuant to the Plan; and (b) the Directors' Charge and the previously existing Administration Charge shall be vacated and discharged in all respects.

COMPROMISE OF CLAIMS, RELEASE AND DISCHARGE OF CLAIMS

18. On the Plan Implementation Date, any and all Affected Claims shall be fully, finally, irrevocably and forever compromised, released, discharged, cancelled, and barred, subject only to the right of the applicable Persons to receive the distributions and interests to which they are entitled pursuant to the Plan.

19. Pursuant to Article 5.1 of the Plan, and subject to Article 5.2 of the Plan, the Released Parties are fully, finally, irrevocably, absolutely, and forever released, remised and discharged from all Claims, including those identified in Article 5.1 of the Plan, as of the Effective Time on the Plan Implementation Date pursuant to the Plan and this Order.

20. Pursuant to Articles 5.1 and 5.3 of the Plan, and subject to Articles 5.2, 5.4 and 5.8 of the Plan, as of the Plan Implementation Date, the ability of any Person to proceed against the Released Parties in respect of any Released Claim shall be forever discharged, barred and restrained, and all proceedings with respect to, in connection with or relating to any such matter shall be permanently barred, estopped, stayed and enjoined.

21. Pursuant to Article 5.3 of the Plan and subject to Articles 5.4 and 5.8 of the Plan, all Persons (regardless of whether or not such Persons are creditors or Claimants), including the Settling Defendants, Class Representatives, Class Members, Poseidon, and the Released Parties shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Time on the Plan Implementation Date, from taking any step, or doing any activity or other thing, identified in Article 5.3 of the Plan.

22. Pursuant to section 4(a) of the Settlement Agreement, and subject to section 4(b) of the Settlement Agreement, the Released Parties are fully, finally, irrevocably, absolutely, and forever released, remised and discharged from all Claims, including those identified in section 4(a) of the Settlement Agreement, as of the Effective Time on the Plan Implementation Date pursuant to the Settlement Agreement and this Order.

23. Pursuant to section 4(c) of the Settlement Agreement and subject to section 4(d) of the Settlement Agreement, all Persons (regardless of whether or not such Persons are creditors or Claimants), including the Settling Defendants, Class Representatives, Class Members, Poseidon, and the Released Parties shall be permanently and forever barred, estopped, stayed and enjoined, as of the Effective Time on the Plan Implementation Date, from taking any step, or doing any activity or other thing, identified in

section 4(c) of the Settlement Agreement. Nothing in the Settlement Agreement or in this Order shall bar, estop, stay or enjoin any of the steps or activities or other things identified in section 4(d) of the Settlement Agreement.

24. The Class Actions, the Monitor Action, the Senior Secured Creditor Action and any and all claims, counterclaims, crossclaims, and third (or subsequent) party claims related thereto, including the KPMG Claim, are to be dismissed, with prejudice and without costs, pursuant to the Plan and the Settlement Agreement.

25. No further Claims by or against the Released Parties may be commenced.

26. In accordance with Article 4.7 of the Plan and section 3(d) of the Settlement Agreement:

(a) under no circumstances shall the Released Parties be liable to make any further financial contribution or payment in respect of any Claim including the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, nor shall the Released Parties have any liability whatsoever for or have any exposure whatsoever to anything directly or indirectly, related to, arising out of, based on, or connected with the Class Actions, Monitor Action, KPMG Claim, Underwriter Claim, or Senior Secured Creditor Action, over and above the payment of the Poseidon Settlement Funds and the Class Settlement Funds;

(b) costs associated with any notices required in connection with the Plan and the Settlement Agreement shall not be paid for by the Released Parties; and

(c) the Poseidon Settlement Funds and the Class Settlement Funds are:

(i) the full monetary contribution or payment of any kind to be made by the Released Parties, and is inclusive of all costs, interest, legal fees, taxes (inclusive of any GST, HST, or any other taxes that may be payable in respect of the Plan or the Settlement Agreement), costs associated with any distributions, further litigation, administration or otherwise; and

(ii) a tangible and meaningful contribution on behalf of the Released Parties to the resolution of issues on the terms set out in the Plan and the Settlement Agreement.

POWERS OF THE MONITOR

27. In connection with its role holding funds and making or facilitating payments and distributions contemplated by the Plan:

(a) the Monitor is solely doing so as administrative payment agent for the Applicants and neither the Monitor nor PricewaterhouseCoopers Inc. has agreed to become, and neither is assuming any responsibility as a receiver, assignee, curator, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Applicants within the meaning of any relevant tax legislation;

(b) the Monitor shall be provided with and is entitled to have access to all of the non-privileged books and records of the Applicants and to all non-privileged documents and other information required by it from time to time, whether in the possession of the Applicants or a third party, in connection with its role hereunder; and

(c) the Monitor shall not exercise discretion over the funds to be paid or distributed hereunder and shall only make payments as contemplated by the Plan, this Order and any future Order of this Court.

28. Any payments and deliveries made by, or with the consent of, the Monitor in accordance with the Plan or this Order (including without limitation payments made to or for the benefit of the Affected Creditors) shall not constitute a "distribution" for the purposes of any federal, provincial or territorial tax legislation (collectively, the "Tax Statutes"), and the Monitor, in making any such payments is merely a disbursing agent under the Plan and is not exercising any discretion in making payments under the Plan and is not "distributing" such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of payments or deliveries made by it, or with its consent, and the Monitor is hereby forever

released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of or as a result of payments made by, or with the consent of the Monitor in accordance with the Plan and this Order and any claims of this nature are hereby forever barred.

29. From and after the Plan Implementation Date, in addition to its prescribed rights and obligations under the CCAA and the powers provided to the Monitor herein and in the Plan, the Monitor shall be empowered and authorized, but not obligated, to:

(a) take such actions and execute such documents, in the name of and on behalf of the Applicants, as the Monitor considers necessary or desirable in order to:

(i) effect the liquidation, bankruptcy, winding-up or dissolution of the Applicants;

(ii) facilitate the completion and administration of the estates of the Applicants in the CCAA Proceeding and any other proceedings commenced in respect of the Applicants or any of them; and,

(iii) act, if required, as trustee in bankruptcy, liquidator, receiver or a similar official of such entities;

(b) exercise any powers which may be properly exercised by any officer, any member of the board of directors or of the board of directors of any of the Applicants except for the waiver of privilege belonging to the Applicants;

(c) cause the Applicants to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Applicants in dealing with their operations, restructuring, wind-down, liquidation or other activities except for the waiver of privilege belonging to the Applicants;

(d) engage assistants or advisors or cause the Applicants to engage assistants or advisors as the Monitor deems necessary or desirable to carry out the terms of the Orders in the CCAA Proceeding or for purposes of the Plan; and

(e) apply to this Court for any orders necessary or advisable to carry out its powers and obligations under any other Order granted by this Court including for advice and directions with respect to any matter,

and in each case where the Monitor takes any such actions or steps it shall not be deemed to be a director or officer of the Applicants, and it shall be exclusively authorized and empowered to take any such actions or steps, to the exclusion of all other Persons, and without interference from any other Person, provided that the Monitor shall comply with all applicable law.

30. Without limiting the provisions of the Initial Order or the provisions of any other Order granted in the CCAA Proceeding, including this Order, the Applicants shall remain in possession and control of the Property (as defined in the Plan) and Business (as defined in the Initial Order) and the Monitor shall not take possession or be deemed to be in possession and/or control of the Property or Business.

31. Nothing herein shall constitute or be deemed to constitute the Monitor as a receiver, assignee, liquidator, administrator, receiver-manager, agent of the creditors or legal representative of any of the Applicants within the meaning of any relevant legislation.

32. The Monitor's Report, and the Monitor's activities and conduct in relation to the Applicants up to the date hereof, including the activities described in the foregoing Report, are hereby approved.

33. That: (i) in carrying out the terms of this Order and the Plan, the Monitor shall have all the protections given to it by the CCAA, the Initial Order, and as an officer of the Court, including the stay of proceedings in its favour; (ii) the Monitor shall incur no liability or obligation as a result of carrying out the provisions of and exercising the powers given to it under this Order and the Plan, save and except for any gross negligence or wilful misconduct on its part; (iii) the Monitor shall be entitled to rely on the books and records of the Applicants and any information provided by the Applicants without independent investigation; and (iv) the Monitor shall not be liable for any claims or damages resulting from any errors or omissions in such books, records or information.

DECLARATIONS RE INSURANCE

34. The Contribution:

(a) does not violate the interests of the Class Representatives, the Class, the Monitor, the Senior Secured Creditors, KPMG, the Underwriters, or any other Person who might have a claim against any person or entity potentially covered under the Insurance Policies;

(b) constitutes covered Loss (as defined in the Insurance Policies);

(c) reduces the Limits of Liability (as defined in the Insurance Policies) under the Insurance Policies for all purposes, regardless of any subsequent finding by any court, tribunal, administrative body or arbitrator, in any proceeding or action, that the Settling Defendants, or any of them, engaged in conduct that triggered or may have triggered any exclusion, term or condition of the Insurance Policies, or any of them, so as to disentitle them to coverage under the Insurance Policies, or any of them;

(d) is without prejudice to any coverage positions or reservations of rights taken by the Insurers in relation to any other matter advised to the Insurers or any other Claim (as defined in the Insurance Policies) made or yet to be made against the Insureds, provided that neither coverage nor payment in respect of the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, nor the settlement of the Class Actions, the Monitor Action or the Senior Secured Creditor Action, will be voided or impacted by any such coverage position or reservation of rights; and

(e) fully and finally releases the Insurers from any further obligation, and from any and all claims against them under or in relation to the Insurance Policies, in respect of the portion of the Limits of Liability that were expended to fund the Contribution.

35. Once the Contribution has been funded, there is no further coverage under the Insurance Policies for Poseidon. For clarity, this declaration is not intended to, and does not, extinguish any remaining coverage under the Insurance Policies for the individual Insureds.

36. With the exception of payment in the aggregate amount of CAD $30,000 by the Insurers towards the settlement of regulatory proceedings by the Chartered Professional Accountants of Alberta against Lyle Michaluk, which shall be treated as Criminal / Regulatory Defence Costs, the determination of what constitutes reasonable Defence Costs paid or payable by any of the Insurers for Criminal/Regulatory Defence Costs and which reduce the amount of the Final Instalment of the Poseidon Settlement Funds and the Final instalment of the Class Settlement Funds, all such terms as defined in Article 1.1 of the Plan, shall be within the sole purview and discretion of the Insurer paying them in accordance with the applicable litigation guidelines and, except for the individual Insured on whose behalf they are being paid, shall not be subject to review or challenge by any other Person, including but not limited to the Monitor, the Senior Secured Creditors, Class Members or the Class Representatives.

37. In addition to the reduction of the Limits of Liability under the Policies pursuant to Article 5.8(a)(iii) of the Plan and section 4(h)A.III. of the Settlement Agreement, the Limits of Liability under the following Policies will be deemed to have been further reduced by the following amounts pursuant to an agreement between the Insurers and the Insureds under the Policies:

Policy Issued by:	***Policy***	***Limits of Liability to be Reduced by:***
Encon Group Inc.	[880# omitted]	$250,000
Chubb Insurance Company of Canada	[964# omitted]	$250,000
Travelers Insurance Company of Canada	[516# omitted]	$250,000
Royal & Sun Alliance Insurance Company of Canada	[854# omitted]	$250,000
Chartis Insurance Company of Canada, now known as AIG Insurance Company of Canada	[202# omitted]	$2,500,000

Lloyd's Underwriters	[150# omitted]	$0

STAY EXTENSION

38. The Stay Period in the Initial Order be and is hereby extended until and including 1, or such later date as this Court may order.

EFFECT, RECOGNITION AND ASSISTANCE

39. This Court shall retain an ongoing supervisory role for the purposes of implementing, administering and enforcing the Plan and the Settlement Agreement and matters related to the Class Settlement Funds. Any disputes arising with respect to the performance or effect of, or any other aspect of, the Settlement Agreement shall be determined by this Court, and, except with leave of this Court first obtained, no person or party shall commence or continue any proceeding or enforcement process in any other court or tribunal, with respect to the performance or effect of, or any other aspect of the Plan or Settlement Agreement.

40. This Order shall have full force and effect in all provinces and territories of Canada and abroad as against all persons and parties against whom it may otherwise be enforced.

41. The Applicants, the Released Parties, Class Representatives, the Senior Secured Creditors, and the Monitor shall be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order, or any further order as may be contemplated by the Plan or the Settlement Agreement or be otherwise required, and for assistance in carrying out the terms of this Orders, the Plan and the Settlement Agreement.

42. The aid and recognition of any court or any judicial, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Released Parties, the Monitor, the Class Representatives, the Senior Secured Creditors and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, the Monitor, the Class Representatives, and the Senior Secured Creditors, as may be necessary or desirable to give effect to this Order or to assist them in carrying out the terms of this Order, including, without limitation, by granting representative status to the Monitor in any foreign proceeding.

43. Any conflict or inconsistency between the Plan and this Order shall be governed by the terms, conditions and provision of the Plan, which shall take precedence and priority.

44. Any conflict or inconsistency between the Settlement Agreement and this Order shall be governed by the terms, conditions and provision of the Settlement Agreement, which shall take precedence and priority.

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J.C.Q.B.A.

Schedule"D" — INTENTIONALLY OMMITED

Schedule"E"

CONFIDENTIAL FULL AND FINAL RELEASE

THIS CONFIDENTIAL FULL AND FINAL RELEASE (the "AGREEMENT") is made by and between Encon Group, Inc., as managing general agent for Continental Casualty Company, Temple Insurance Company, Aviva Insurance Company of Canada and XL Reinsurance America Inc. (hereinafter "ENCON"), Chubb insurance Company of Canada ("CHUBB"), Travelers Insurance Company of Canada ("TRAVELERS"), Royal & SunAlliance Insurance Company of Canada ("RSA") and AIG Insurance Company of Canada (formerly known as Chartis Insurance Company of Canada) ("AIG"; and collectively with ENCON, CHUBB, TRAVELERS and RSA, the "INSURERS"), on the one hand, and Poseidon Concepts Corp.,

Poseidon Concepts Ltd., Poseidon Concepts Ltd. Partnership and Poseidon Concepts Inc., by and though their Monitor PricewaterhouseCoopers Inc. (all hereinafter collectively, the "POSEIDON ENTITIES"), Matthew MacKenzie, Lyle Michaluk, Scott Dawson, Harley Winger, Clifford Wiebe, Joseph Kostelecky, Dean Jensen, David Belcher, Neil Richardson, Kenneth Faircloth, Wazir (Mike) Seth and James McKee (all, hereinafter collectively, the "INSURED PERSONS") and Sonja Kuehnle (Sanborn) and Douglas Robinson (hereinafter collectively, the "POSEIDON EMPLOYEES"), on the other hand (the INSURERS, the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES are collectively referred to herein as the "PARTIES").

RECITALS

I. WHEREAS, the INSURERS respectively issued the following insurance policies to Poseidon Concepts Corp. for the period November 1, 2012 to November 1, 2013 (collectively, the "POLICIES"):

(i) Encon policy no. [880# omitted] (the "ENCON POLICY"), with a Limit of Liability of $10,000,000 [1] inclusive of the $50,000 deductible, and a separate $1,000,000 Side A Excess Extension in excess of the $10,000,000 limit contained in the AIG POLICY described below;

(ii) Chubb Policy No. [694# omitted] (the "CHUBB POLICY") with a Limit of Liability of $10,000,000 in excess of $10,000,000 in underlying insurance, along with a separate $1,000,000 Side A Excess Extension in excess of the $1,000,000 Side A Excess Extension contained in the ENCON POLICY;

(iii) Travelers Policy No. [516# omitted] (the "TRAVELERS POLICY") with a $10,000,000 Limit of Liability in excess of $20,000,000 in underlying insurance, along with a separate $1,000,000 Side A Excess Extension in excess of the $1,000,000 Side A Excess Extensions contained in the ENCON POLICY and the CHUBB POLICY;

(iv) RSA Policy No. [854# omitted] (the "RSA POLICY") with a $10,000,000 Limit of Liability in excess of $30,000,000 in underlying insurance, along with a separate $1,000,000 Side A Excess Extension in excess of the $1,000,000 Side A Excess Extensions contained in the ENCON POLICY, the CHUBB POLICY and the TRAVELERS POLICY; and

(v) AIG Policy No. [202# omitted] (the "AIG POLICY"), with a $10,000,000 Limit of Liability in excess of $40,000,000 in underlying insurance.

II. WHEREAS, the POSEIDON ENTITIES, the INSURED PERSONS and/or the POSEIDON EMPLOYEES have provided notice under the POLICIES of the actions and proceedings identified on Schedule "A" hereto (the "SCHEDULE "A" ACTIONS/PROCEEDINGS");

III. WHEREAS, the INSURERS have asserted certain defences to coverage for the SCHEDULE "A" ACTIONS/PROCEEDINGS;

IV. WHEREAS, the $10,000,000 Limit of Liability of the ENCON POLICY has been exhausted through payment of defence expenses for certain of the SCHEDULE "A" ACTIONS/PROCEEDINGS;

V. WHEREAS, a portion of the $10,000,000 Limit of Liability of the CHUBB POLICY has been eroded through payment of defence expenses for certain of the SCHEDULE "A" ACTIONS/PROCEEDINGS;

VI. WHEREAS, the parties to the SCHEDULE "A" ACTIONS/PROCEEDINGS identified with an asterisk are negotiating a Plan of Compromise and Arrangement (the "PLAN") and a separate Settlement Agreement (the "SETTLEMENT AGREEMENT; and collectively, with the PLAN, the "POSEIDON SETTLEMENTS") to resolve such actions/proceedings against the INSURED PERSONS and the POSEIDON EMPLOYEES in exchange for an aggregate payment of up to $36,500,000, consisting of:

(i) an initial payment of $29,000,000 (the "Initial Instalment"); and

(ii) $7,500,000, less defence costs incurred by the INSURED PERSONS and the POSEIDON EMPLOYEES during the Relevant Period (defined below) that have been paid by, or that are payable by, the INSURERS for the defence of any criminal or regulatory (including enforcement) proceedings actually commenced, on or before April 10, 2019, against one or more of them ("CRIMINAL/REGULATORY DEFENCE COSTS"), For the purposes of this definition, the term "Relevant Period" means April 10, 2017 until the later of (i) the date upon which all such criminal /regulatory proceedings are completed (i.e. any appeals that could be brought have been completed or the time for bringing such appeals has expired) and (ii) April 10, 2019. This residual amount is the "FINAL INSTALMENT"; and collectively with the INITIAL INSTALMENT, the "POSEIDON SETTLEMENT FUNDS". VII. WHEREAS, the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES have requested that the INSURERS fund $25,250,000 of the INITIAL INSTALMENT and fund the entire FINAL INSTALMENT (if any) (the "INSURER CONTRIBUTION");

VIII. WHEREAS, the INSURERS have been advised that the $3,750,000 of the INITIAL INSTALMENT not paid by the INSURERS will be funded by Lloyd's Underwriters ("LLOYD'S"), pursuant to its policy no. [150# omitted] issued to Burstall Winger LLP (the "LLOYD'S CONTRIBUTION");

IX. WHEREAS, the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES represent and warrant that they will not execute the SETTLEMENT AGREEMENT without obtaining consent from the INSURERS;

X. WHEREAS, in conjunction with the CRIMINAL/REGULATORY DEFENCE COSTS, the INSURED PERSONS and the POSEIDON EMPLOYEES have requested that the INSURERS make available from their POLICIES up to $7,500,000 to be used, if needed, by defence counsel to the INSURED PERSONS and the POSEIDON EMPLOYEES within the sole purview and discretion of the INSURER paying them in accordance with the applicable litigation guidelines in accordance with Article 5.8(c) of the PLAN (the "$7,500,000 DEFENCE COST RESERVE");

XI. WHEREAS, the INSURED PERSONS' and the POSEIDON EMPLOYEES' arrangement for allocating proceeds from the $7,500,000 DEFENCE COST RESERVE are set forth in Article 5.9(c) of the PLAN;

XII. WHEREAS, the INSURED PERSONS and the POSEIDON EMPLOYEES represent, warrant and acknowledge that, as described in the PLAN, they each have agreed to a maximum cap representing their maximum potential allocable share of the insurance proceeds from the $7,500,000 DEFENCE COSTS RESERVE and that, under no circumstances, will any INSURED PERSON or any POSEIDON EMPLOYEE seek payment from the $7,500,000 DEFENCE COSTS RESERVE from the INSURERS for any amount that exceeds such INSURED PERSON'S or POSEIDON EMPLOYEE'S respective potential allocable share of proceeds therefrom;

XIII. WHEREAS, the POSEIDON ENTITIES' agreement herein is conditional upon the Monitor receiving court approval to execute this AGREEMENT;

XIV. WHEREAS, the PARTIES desire to compromise, resolve and fully settle all demands for insurance proceeds from the POLICIES on the terms set out herein.

AGREEMENT

IN CONSIDERATION OF:

1. The payment by ENCON and CHUBB under the ENCON POLICY and the CHUBB POLICY of all covered DEFENCE COSTS (as such term is defined in the POLICIES) incurred to date by the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES in defence of the SCHEDULE "A" ACTIONS/PROCEEDINGS (the "PAID DEFENCE COSTS");

2. the INSURERS' (with the exception of AIG, whose agreement to pay is on behalf of the INSURED PERSONS and the POSEIDON EMPLOYEES only) agreement to pay under the POLICIES, on behalf of the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES and in accordance with the payment provisions of the

POSEIDON SETTLEMENTS and the limits of their respective POLICIES as eroded, the aggregate sum of THIRTY-TWO MILLION AND SEVEN HUNDRED AND FIFTY THOUSAND DOLLARS ($32,750,000.00) (consisting of the funds made available to fund the $7,500,000 DEFENSE COST RESERVE and the INSURER CONTRIBUTION) to be funded as follows:

i. the remaining limits from the $10,000,000 Limit of Liability of the CHUBB POLICY to be funded toward the INITIAL INSTALMENT;

ii. $10,000,000 from the Limit of Liability of the TRAVELERS POLICY to be funded toward the INITIAL INSTALMENT;

iii. up to $10,000,000 from the Limit of Liability of the RSA POLICY to be funded toward the INITIAL INSTALMENT;

iv. after the LLOYD'S CONTRIBUTION has been made toward the INITIAL INSTALMENT, up to a maximum amount of $7,500,000 from the AIG Policy to be funded toward the INITIAL INSTALMENT and/or to be available toward the $7,500,000 DEFENCE COST RESERVE and, if necessary, the FINAL INSTALMENT (it being understood and agreed that the remaining $2,500,000 limit from the AIG POLICY is being completely released by the INSURED PERSONS and the POSEIDON EMPLOYEES, as further described below); and

v. a sufficient amount from the Side A Extension of the ENCON POLICY to be made available to fund that portion of the $7,500,000 DEFENCE COST RESERVE and/or the FINAL INSTALMENT which is not funded by AIG (it being understood and agreed that $250,000 of the Side A Extension of the ENCON POLICY is being completely released by the INSURED PERSONS and the POSEIDON EMPLOYEES, as further described below, leaving a Side A Extension limit of $750,000.00).

3. the INSURERS' agreement to pay (in addition to their obligations with respect to the $7,500,000 DEFENCE COST RESERVE) on behalf of the INSURED PERSONS and/or the POSEIDON EMPLOYEES under the POLICIES, subject to the POLICY LIMITS REDUCTION (as defined below), the wording of the POLICIES, the reduced Side A limits of their respective POLICIES as eroded and the INSURERS' reservations of rights as previously advised:

a. Defence Costs (as such term is defined in the Policies) incurred by the INSURED PERSONS in complying with their obligations under the POSEIDON SETTLEMENTS to provide certain co-operation to the Plaintiffs in the SCHEDULE "A" ACTIONS/PROCEEDINGS identified with an asterisk,

b. Defence Costs (as defined in the POLICIES) incurred in the future in connection with the defence of those SCHEDULE "A" ACTIONS/PROCEEDINGS which are not resolved by the POSEIDON SETTLEMENTS,

c. Defence Costs (as defined in the POLICIES) incurred in the future in connection with the SCHEDULE "A" ACTIONS/PROCEEDINGS and, in particular, the approval and enforcement of the POSEIDON SETTLEMENTS;

d. Defence Costs (as such term is defined in the POLICIES) incurred in the future with respect to any future Claims (as defined in the POLICIES) which might be made against the INSURED PERSONS and/or the POSEIDON EMPLOYEES which arise out of any of the SCHEDULE "A" ACTIONS/PROCEEDINGS or the facts or allegations set out therein and for which coverage is or may be afforded by the POLICIES ("FUTURE COVERED CLAIMS and DEFENCE COSTS");

(the INSURERS' agreement as set out in paragraphs 2 and 3 above, to pay the INSURER CONTRIBUTION, fund the $7,500,000 DEFENCE COST RESERVE and to pay FUTURE COVERED CLAIMS and DEFENCE COSTS is hereinafter collectively referred to as the "INSURERS' OBLIGATIONS").

4. *AND FOR OTHER GOOD AND VALUABLE CONSIDERATION*, the receipt and sufficiency of which is hereby acknowledged, subject to section 5 hereof, the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON

EMPLOYEES do hereby release and forever discharge the INSURERS, their present and former parents, subsidiaries, affiliates, related companies and reinsurers, and each of their respective present and former directors, officers, shareholders, partners, associates, employees, servants, agents, professional advisors and administrators, and each of their heirs, executors, administrators, trustees, successors and assigns (all collectively the "INSURER RELEASEES") from, with the exception of the INSURERS' OBLIGATIONS, any and all actions, causes of action, claims and demands, for damages, loss or injury, howsoever arising, which heretofore may have been or may hereafter be sustained by them in connection with:

a) the SCHEDULE "A" ACTIONS/PROCEEDINGS;

b) any other claims, regulatory investigations or proceedings and/or criminal charges whatsoever (which have been brought or which may be brought in the future) against any of the POSEIDON ENTITIES, the INSURED PERSONS and/or the POSEIDON EMPLOYEES in respect of the POLICIES; and

c) that portion of the Limits of Liability (as such term is defined in the POLICIES) of each of the POLICIES which the INSURED PERSONS and the POSEIDON EMPLOYEES have agreed, by reason of certain coverage issues raised by the INSURERS, will not be paid and is expressly released and/or waived by the INSURED PERSONS and the POSEIDON EMPLOYEES:

POLICY	***LIMITS OF LIABILITY REDUCTION ($CDN.)***
ENCON POLICY	$250,000.00
CHUBB POLICY	$250,000.00
TRAVELERS POLICY	$250,000.00
RSA POLICY	$250,000.00
AIG POLICY	$2,500,000.00

such amounts hereinafter collectively the "POLICY LIMITS REDUCTION");[2] including any claim for coverage under the POLICIES for all such amounts (collectively the "RELEASED MATTERS"). The RELEASED MATTERS further include, but are not limited to, a complete release and discharge of:

i. any claims against the INSURERS which do not allege, arise out of, and/or which are not based upon or attributable to the Wrongful Acts alleged in any of the SCHEDULE "A" ACTIONS/PROCEEDINGS;

ii. claims against the INSURERS for "bad faith," unfair claims handling practices and/or breach of implied covenant of good faith and fair dealing in connection with any of the INSURERS' handling of any of the SCHEDULE "A". ACTIONS/PROCEEDINGS; and

iii. all rights and claims, if any, which the POSEIDON ENTITIES, the INSURED PERSONS and/or the POSEIDON EMPLOYEES now have, claim to have or may have in the future, against the INSURERS related to any of the SCHEDULE "A" ACTIONS/PROCEEDINGS, other than the INSURERS' OBLIGATIONS.

5. *IT IS FURTHER UNDERSTOOD AND AGREED* that this AGREEMENT, including but not limited to the releases pertaining to the RELEASED MATTERS, shall become effective upon the execution of this AGREEMENT. However, if FINAL ORDERS are not obtained, and upon return of the POSEIDON SETTLEMENT FUNDS to the INSURERS and to LLOYDS, this AGREEMENT shall be deemed null and void, and the releases and other obligations of the PARTIES hereunder shall not be enforceable. For purposes of this AGREEMENT, the term "FINAL ORDERS" means the issuance by the Courts of the final, non-appealable requisite order(s) approving the POSEIDON SETTLEMENTS.

6. *WITHOUT LIMITING THE GENERALITY OF THE FORGOING*, the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES declare that the intent of this AGREEMENT is to conclude all issues between them and the INSURERS in connection with the RELEASED MATTERS on the terms set out herein.

7. *AND FOR THE SAID CONSIDERATION* the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES further agree not to make any claim or take any proceeding against any other person, corporation, partnership, business or entity of any nature whatsoever, who or which might assert a claim for contribution, damages, indemnity, other relief over, or on any other basis in law against or from the INSURERS in relation to the RELEASED MATTERS.

8. *IT IS UNDERSTOOD AND AGREED* that if any of the POSEIDON ENTITIES, the INSURED PERSONS or POSEIDON EMPLOYEES institutes or maintains any action or proceeding, or takes any steps to advance any claim in connection with any of the RELEASED MATTERS against any other person, corporation, partnership, business or entity of any nature whatsoever, who or which might assert a claim for contribution, damages, indemnity or other relief from any of the INSURER RELEASEES, whether justified in law or not, it, he or she will immediately discontinue such action, claim or proceeding and fully indemnify the INSURER RELEASEES for all costs, legal fees, and liabilities incurred by any or all of them in responding to or in connection with any such claim, action or proceeding.

9. *AND FOR THE SAID CONSIDERATION* the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES hereby represent and warrant that they have not assigned to any person, firm, corporation or any other entity, any cause of action, claim, suit or demand of any nature or kind which, by their execution of this AGREEMENT, is hereby being released or with respect to which they have agreed not to make any claim or take any proceeding.

10. *IT IS UNDERSTOOD AND AGREED* that:

a. payment of the PAID DEFENCE COSTS, the INSURER CONTRIBUTION, any defence costs in connection with the $7,500,000 DEFENCE COST RESERVE, and the FUTURE COVERED CLAIMS AND DEFENCE COSTS by the INSURERS shall be deemed no admission whatsoever of any liability or obligation owed by them under the POLICIES to or on behalf of the POSEIDON ENTITIES, the INSURED PERSONS or the POSEIDON EMPLOYEES in respect of any of the SCHEDULE "A" ACTIONS/PROCEEDINGS, or in respect of any other civil, regulatory or criminal proceeding whatsoever, and any such liability or obligation is specifically denied; and

b. funds made available toward the $7,500,000 DEFENCE COST RESERVE could, in certain circumstances, not be paid by INSURERS before other INSURERS may be required to contribute toward the FUTURE COVERED CLAIMS AND DEFENCE COSTS. In no circumstance will any of the PARTIES hereto assert that any obligation to fund Defence Costs in connection with any FUTURE COVERED CLAIMS AND DEFENCE COSTS has not been triggered due to lack of exhaustion due to any amount that has not yet been paid from the $7,500,000 DEFENCE COST RESERVE.

11. *IT IS FURTHER UNDERSTOOD AND AGREED* by each of the PARTIES that AIG will not deny coverage to Mr. Kostelecky under the AIG POLICY for defence costs payable from the DEFENCE COST RESERVE, other than in accordance with Article 5.9(c) of the PLAN, for the lawsuit styled *United States v. Kostelecky*, pending in the United States District Court for the District of North Dakota.

12. *THIS AGREEMENT SHALL BE BINDING* upon the POSEIDON ENTITIES, their present and former parents, subsidiaries, affiliates, related companies, shareholders, their respective present and former directors, officers, shareholders, partners, associates, employees, servants, agents, professional advisors and administrators, and each of their heirs, executors, administrators, trustees, successors and assigns, court-appointed Monitors, as well as upon any party who claims a right or interest through any of them, and upon the INSURED PERSONS and the POSEIDON EMPLOYEES, and each of their heirs, executors, administrators, trustees, successors and assigns, as well as upon any party who claims a right or interest through any of them.

13. *NOTWITHSTANDING* any other provision of this AGREEMENT, nothing in this AGREEMENT in any way impacts any Claims (as defined in the Plan) by the Class (as defined in the Plan), the POSEIDON ENTITIES or the Senior Secured

Creditors (as defined in the Plan) against the Non-Settling Defendants (as defined in the Plan) in the Class Actions, the Monitor Action and the Senior Secured Creditor Action (all as defined in the Plan).

14. *THIS AGREEMENT* may be executed in separate counterparts, each of which shall be deemed to be an original and such separate counterparts shall constitute one and the same instrument, and facsimile or digitally transmitted copies of the signatures are deemed to be and count as originals in all respects.

15. *THIS AGREEMENT* shall be governed by and construed in accordance with the laws of the Province of Ontario.

16. *IN WITNESS WHEREOF* the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES have hereunto set their hands (in the case of the POSEIDON ENTITIES, by PricewaterhouseCoopers Inc., Court-appointed Monitor of the POSEIDON ENTITIES) on the dates below indicated.

POSEIDON CONCEPTS CORP.

_____ Per:_____c/s
Date I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

POSEIDON CONCEPTS LTD.

_____ Per:_____c/s
Date I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

POSEIDON CONCEPTS LIMITED PARTNERSHIP

_____ Per:_____c/s
Date I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

POSEIDON CONCEPTS INC.

_____ Per:_____c/s
Date I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

Graphic 19

14

Witness

MATTHEW MACKENZIE

Print Name

Date

Witness

LYLE MICHALUK

Print Name

Date

Witness

SCOTT DAWSON

Print Name

Date

Witness

HARLEY WINGER

Print Name

Date

Witness

CLIFFORD WIEBE

ADALLAS 2480909.1

Graphic 20

Witness

Print Name

Date

MATTHEW MACKENZIE

Witness

KARA MICHALUK
Print Name

JUN 13/17
Date

LYLE MICHALUK

Witness

Print Name

Date

SCOTT DAWSON

Witness

Print Name

Date

HARLEY WINGER

ADALLAS 2480909.1

Graphic 21

14

Witness

MATTHEW MACKENZIE

Print Name

Date

Witness

LYLE MICHALUK

Print Name

Date

Witness

SCOTT DAWSON

Print Name

June 15, 2017

Date

Witness

HARLEY WINGER

Print Name

Date

ADALLAS 2480909.1

Graphic 22

Witness

Print Name

Date

MATTHEW MACKENZIE

Witness

Print Name

Date

LYLE MICHALUK

Witness

Print Name

Date

SCOTT DAWSON

Witness

Heather Simonds

Print Name

June 12, 2017

Date

HARLEY WINGER

Graphic 23

Print Name

Date

Witness

LYLE MICHALUK

Print Name

Date

Witness

SCOTT DAWSON

Print Name

Date

Witness

HARLEY WINGER

Print Name

Date

Witness

CLIFFORD WIEBE

ADALLAS 2480909.1

Graphic 24

Witness

Print Name

Date

CLIFFORD WIEBE

Witness

Print Name

Date

JOSEPH KOSTELECKY

CHELSEA D. ANDERSON
NOTARY PUBLIC for the
State of Montana
Residing at Billings, Montana
My Commission Expires
April 29, 2019

Witness

Print Name

Date

DEAN JENSEN

Witness

Print Name

Date

DAVID BELCHER

ADALLAS 2480909.1

Graphic 25

15

Witness

Print Name

Date

CLIFFORD WIEBE

Witness

Print Name

Date

JOSEPH KOSTELECKY

Witness

Robyn Jensen
Print Name

June 14, 2017
Date

DEAN JENSEN

Witness

Print Name

Date

DAVID BELCHER

ADALLAS 2480909.1

Graphic 26

15

Witness

Print Name

Date

CLIFFORD WIEBE

Witness

Print Name

Date

JOSEPH KOSTELECKY

Witness

Print Name

Date

DEAN JENSEN

Witness

Print Name

Date

DAVID BELCHER

Graphic 27

Witness

Alicia Richardson

Print Name

6/14/17

Date

NEIL RICHARDSON

Witness

Print Name

Date

KENNETH FAIRCLOTH

Witness

Print Name

Date

WAZIR (MIKE) SETH

Witness

Print Name

Date

JAMES MCKEE

Graphic 28

Witness

Print Name

Date

NEIL RICHARDSON

Witness

Print Name

June 13, 2017
Date

KENNETH FAIRCLOTH

Witness

Print Name

Date

WAZIR (MIKE) SETH

Witness

Print Name

Date

JAMES MCKEE

ADALLAS 2480909.1

Graphic 29

Witness

Print Name

Date

NEIL RICHARDSON

Witness

Print Name

Date

KENNETH FAIRCLOTH

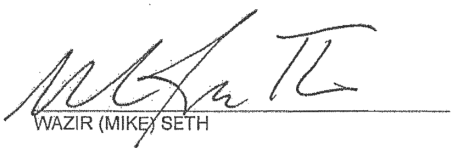
Witness

Ashley Bettcher

Print Name

June 13, 2017

Date



WAZIR (MIKE) SETH

Witness

Print Name

Date

JAMES MCKEE

ADALLAS 2480909.1

Graphic 30

16

Witness

Print Name

Date

NEIL RICHARDSON

Witness

Print Name

Date

KENNETH FAIRCLOTH

Witness

Print Name

Date

WAZIR (MIKE) SETH

Witness

TINA McKEE
Print Name

June 13/17
Date

JAMES MCKEE

ADALLAS 2480909.1

Graphic 31

Witness

Jody Benteau

Print Name

6/12/2017

Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

Date

DOUGLAS ROBINSON

ENCON GROUP INC.

Per: c/s
I have the power to bind the corporation.

CHUBB INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation.

ADALLAS 2480909.1

Graphic 32

Witness

Print Name

Date

SONJA KUEHNLE (SANBORN)

Witness

Lata Parmar
Print Name

June 12/2017
Date

DOUGLAS ROBINSON

ENCON GROUP INC.

Per: _____ c/s
I have the power to bind the corporation.

CHUBB INSURANCE COMPANY OF CANADA

Per: _____ c/s
I have the power to bind the corporation.

ADALLAS 2480909.1

Graphic 33

17

Witness

Print Name

Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

Date

DOUGLAS ROBINSON

ENCON GROUP INC.

22 June 2017

Per: _____ c/s
I have the power to bind the corporation.

CHUBB INSURANCE COMPANY OF CANADA

Per: _____ c/s
I have the power to bind the corporation.

ADALLAS 2480909.1

Graphic 34

17

Witness

Print Name

Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

Date

DOUGLAS ROBINSON

ENCON GROUP INC.

Per: c/s
I have the power to bind the corporation.

CHUBB INSURANCE COMPANY OF CANADA

Per: PAULA KARGAS, Vice President c/s
I have the power to bind the corporation.

ADALLAS 2480909.1

Graphic 35

18

TRAVELERS INSURANCE COMPANY OF CANADA

Per: DAVID CLARK c/s
I have the power to bind the corporation

ROYAL & SUNALLIANCE INSURANCE COMPANY

Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

Per: c/s
We together have the power to bind the corporation.

Per: c/s
We together have the power to bind the corporation.

Graphic 36

18

TRAVELERS INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation

ROYAL & SUNALLIANCE INSURANCE COMPANY
Digitally signed by Philippe Senecal
DN: dc=ca, dc=royalsunalliance, ou=HEAD OFFICE, ou=Users, cn=Philippe Senecal
Date: 2017.06.20 18:11:12 -04'00'

Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

Per: c/s
We together have the power to bind the corporation.

Per: c/s
We together have the power to bind the corporation.

Graphic 37

18

TRAVELERS INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation

ROYAL & SUNALLIANCE INSURANCE COMPANY

Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

Per: c/s
We together have the power to bind the corporation.

Per: c/s
We together have the power to bind the corporation.

Graphic 38

SCHEDULE "A"

1. Class Actions, as defined in the Plan *

2. Monitor Action, as defined in the Plan *

3. Senior Secured Creditor Action, as defined in the Plan *

4. Underwriter Claim, as defined in the Plan*

5. KPMG Claim, as defined in the Plan*

6. ASC Investigation and Proceeding and related judicial review proceeding by KPMG

7. SEC Investigation and Proceeding

8. DOJ Investigation

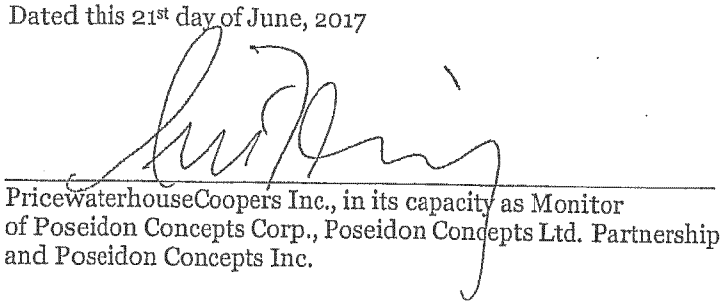
9. Manitoba Securities Commission Investigation

10. *United States of America v. Joseph A. Kostelecky* (USDC N.D., 17-CR-15)

11. Chartered Professional Accountants of Alberta Investigation and Proceeding (File 2017027)

PricewaterhouseCoopers Inc., in its capacity as Monitor of Poseidon Concepts Corp., Poseidon Concepts Ltd. Partnership and Poseidon Concepts Inc. (the "Poseidon Entities") hereby undertakes on behalf of the Poseidon Entities to sign the attached release (the "Release") and deliver a copy to the other parties thereto upon Court approval of the Poseidon Entities' Plan of Arrangement and the Release.

Dated this 21st day of June, 2017



PricewaterhouseCoopers Inc., in its capacity as Monitor
of Poseidon Concepts Corp., Poseidon Concepts Ltd. Partnership
and Poseidon Concepts Inc.

Graphic 39

Schedule"F"

AMENDED CONFIDENTIAL FULL AND FINAL RELEASE

THIS AMENDED CONFIDENTIAL FULL AND FINAL RELEASE (the *"AMENDING AGREEMENT")* is made by and between Encon Group, Inc., as managing general agent for Continental Casualty Company, Temple Insurance Company, Aviva Insurance Company of Canada and XL Reinsurance America Inc. (hereinafter *"ENCON")*, Chubb Insurance Company of Canada *("CHUBB")*, Travelers Insurance Company of Canada *("TRAVELERS")*, Royal & SunAlliance Insurance Company of Canada ("RSA") and AIG Insurance Company of Canada (formerly known as Chartis Insurance Company of Canada) ("AIG"; and collectively with ENCON, CHUBB, TRAVELERS and RSA, the *"INSURERS")*, on the one hand, and Poseidon Concepts Corp., Poseidon Concepts Ltd., Poseidon Concepts Ltd. Partnership and Poseidon Concepts Inc., by and though their Monitor PricewaterhouseCoopers Inc. (all hereinafter collectively, the *"POSEIDON ENTITIES")*, Matthew MacKenzie, Lyle Michaluk, Scott Dawson, Harley Winger, Clifford Wiebe, Joseph Kostelecky, Dean Jensen, David Belcher, Neil Richardson, Kenneth Faircloth, Wazir (Mike) Seth and James McKee (all, hereinafter collectively, the "INSURED PERSONS") and Sonja Kuehnle (Sanborn) and Douglas Robinson (hereinafter collectively, the *"POSEIDON EMPLOYEES")*, on the other hand (the INSURERS, the POSEIDON ENTITIES, the INSURED PERSONS and the POSEIDON EMPLOYEES are collectively referred to herein as the *"PARTIES").*

RECITALS

I. WHEREAS the PARTIES entered into a Confidential Full and Final Release in June 2017, a copy of which is found at Schedule "A" to this AGREEMENT (the *"INSURER RELEASE");*

II. AND WHEREAS the PARTIES, other than the INSURERS, and others entered into a Plan of Compromise and Arrangement and Settlement Agreement in June 2017 that did not include KPMG or the Underwriters in the settlement contemplated therein (the *"INITIAL PLAN AND SETTLEMENT");*

III. AND WHEREAS a global settlement was subsequently reached that involves KPMG and the Underwriters, which is set out in an Amended Plan of Compromise and Arrangement (the *"PLAN")* and an Amended Settlement Agreement (the *"SETTLEMENT AGREEMENT")*, which, when executed, will supersede and replace the INITIAL PLAN AND SETTLEMENT;

IV. AND WHEREAS under the PLAN and the SETTLEMENT AGREEMENT, the INITIAL INSTALMENT will increase from $29,000,000 to $30,000,000, and the FINAL INSTALMENT will decrease from a maximum of $7,500,000 to a maximum of $6,500,000;

V. AND WHEREAS the PARTIES desire to enter into this AMENDING AGREEMENT to amend the INSURER RELEASE to reflect the changes that have been made to the INITIAL PLAN AND SETTLEMENT;

VI. AND WHEREAS any capitalized terms used herein that are not defined herein have the same meaning ascribed to such terms in the INSURER RELEASE;

VII. AND WHEREAS the POSEIDON ENTITIES' agreement herein is conditional upon the Monitor receiving court approval to execute this AGREEMENT;

VIII. AND WHEREAS PricewaterhouseCoopers Inc., in its capacity as Monitor of the POSEIDON ENTITIES has undertaken on behalf of the POSEIDON ENTITIES to sign the INSURER RELEASE and this AMENDING AGREEMENT and deliver copies of both documents to the PARTIES upon Court approval of the Plan of Arrangement, the Settlement Agreement, the INSURER RELEASE and this AMENDING AGREEMENT.

NOW THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged, the PARTIES agree as follows:

AGREEMENT

1. All references in the INSURER RELEASE to the INITIAL PLAN AND SETTLEMENT shall now be read as references to the PLAN and SETTLEMENT AGREEMENT.

2. The aggregate amount payable by the INSURERS under section 2 of the INSURER RELEASE shall remain unchanged at $32,750,000.

3. The INSURERS' contribution to the INITIAL INSTALMENT shall be $26,250,000 instead of $25,250,000.

4. The INSURERS' commitment to fund the FINAL INSTALMENT shall be limited to $6,500,000 instead of $7,500,000.

5. All references to "$7,500,000 DEFENCE COST RESERVE" shall be replaced with references to "$6,500,000 DEFENCE COST RESERVE".

6. The $6,500,000 DEFENCE COST RESERVE shall be $6,500,000 instead of $7,500,000.

7. The aggregate monetary limit for CRIMINAL/REGULATORY DEFENCE COSTS shall be $6,500,000 instead of $7,500,000.

8. The increase of $1,000,000 to the INITIAL INSTALMENT shall be funded from the AIG Policy (it is understood and agreed that in no event shall the $1,000,000 contribution to the Initial Instalment from the AIG Policy affect or reduce the $2,500,000 that is being released from the AIG Policy as part of the POLICY LIMITS REDUCTION).

9. Payment in the aggregate amount of $30,000 by the INSURERS towards the settlement of regulatory proceedings by the Chartered Professional Accountants of Alberta against Lyle Michaluk shall be treated as CRIMINAL/REGULATORY DEFENCE COSTS.

10. All others terms and conditions of the INSURER RELEASE remain unchanged.

11. This AMENDING AGREEMENT shall be governed by and construed in accordance with the laws of the Province of Ontario.

IN WITNESS WHEREOF the PARTIES have hereunto set their hands (in the case of the POSEIDON ENTITIES, by PricewaterhouseCoopers Inc., Court-appointed Monitor of the POSEIDON ENTITIES) on the dates below indicated.

POSEIDON CONCEPTS CORP.

_____
Date

Per:_____c/s
I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

POSEIDON CONCEPTS LTD.

_____
Date

Per:_____c/s
I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

POSEIDON CONCEPTS LIMITED PARTNERSHIP

_____
Date

Per:_____c/s
I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

ADALLAS 2480909.1

Graphic 40

5

POSEIDON CONCEPTS INC.

Date

Per:_____c/s
I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

Witness

MATTHEW MACKENZIE

Print Name

Date

Witness

LYLE MICHALUK

Print Name

Date

Witness

SCOTT DAWSON

Print Name

Date

ADALLAS 2480909.1

Graphic 41

5

POSEIDON CONCEPTS INC.

Date

Per:_____c/s
I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

Witness

MATTHEW MACKENZIE

Print Name

Date

Witness

LYLE MICHALUK

KARA MICHALUK
Print Name

APRIL 11, 2013
Date

Witness

SCOTT DAWSON

Print Name

Date

ADALLAS 2480909.1

Graphic 42

POSEIDON CONCEPTS INC.

_____
Date

Per:_____c/s
I have authority to bind the corporation.
PricewaterhouseCoopers Inc.

_____
Witness

_____
MATTHEW MACKENZIE

_____
Print Name

_____
Date

_____
Witness

_____
LYLE MICHALUK

_____
Print Name

_____
Date

Renée Larose
Witness

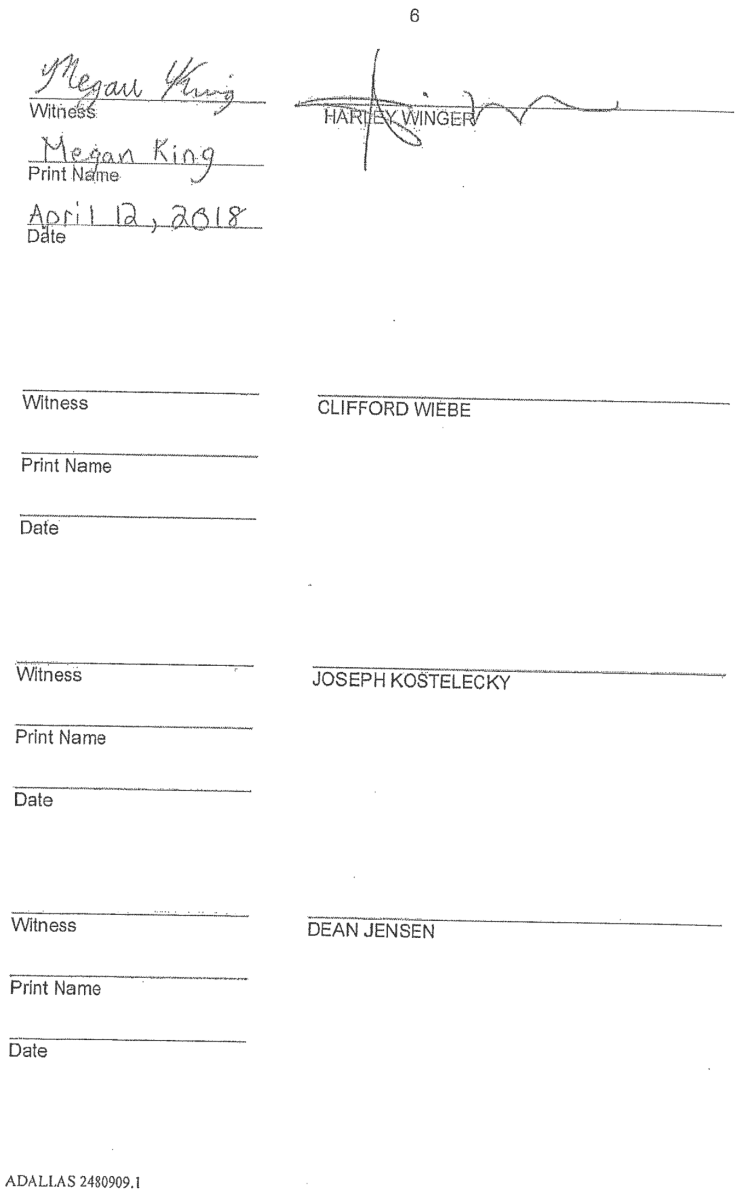
SCOTT DAWSON

Renée Larose
Print Name

4/12/18
Date

ADALLAS 2480909.1

Graphic 43



Graphic 44

Witness

Print Name

Date

HARLEY WINGER

Witness

Print Name

April 6, 2018
Date

CLIFFORD WIEBE

Witness

Print Name

Date

JOSEPH KOSTELECKY

Witness

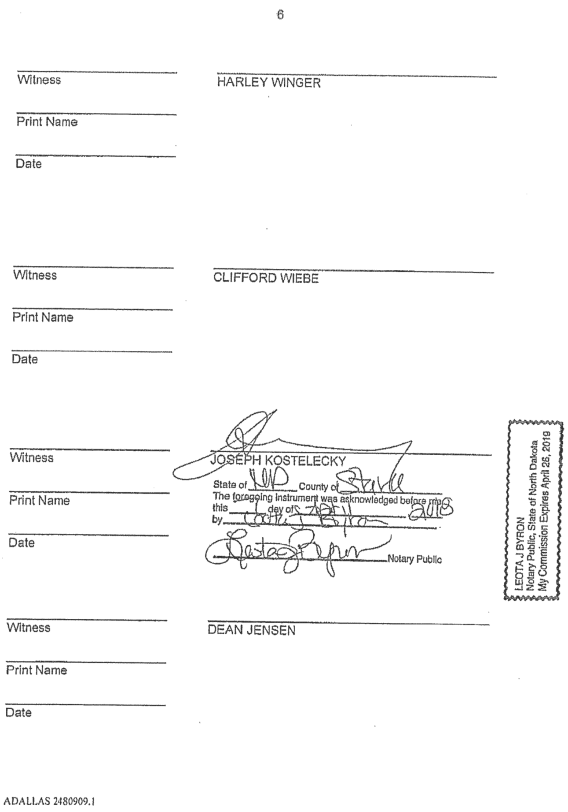
Print Name

Date

DEAN JENSEN

ADALLAS 2480909.1

Graphic 45


6

Witness

Print Name

Date

HARLEY WINGER

Witness

Print Name

Date

CLIFFORD WIEBE

Witness

Print Name

Date

JOSEPH KOSTELECKY

State of ___ County of ___

The foregoing instrument was acknowledged before me this ___ day of ___ 2018 by ___

Notary Public

LEOTA J. BYRON
Notary Public, State of North Dakota
My Commission Expires April 25, 2019

Witness

Print Name

Date

DEAN JENSEN

ADALLAS 2480909.1

Graphic 46

6

Witness

Print Name

Date

HARLEY WINGER

Witness

Print Name

Date

CLIFFORD WIEBE

Witness

Print Name

Date

JOSEPH KOSTELECKY

Witness

Robyn G. JENSEN
Print Name

April 12, 2018
Date

DEAN JENSEN

ADALLAS 2480909.1

Graphic 47

7

Witness

MARCER BASTIAN

Print Name

APR 6, 2018

Date

DAVID BELCHER

Witness

Print Name

Date

NEIL RICHARDSON

Witness

Print Name

Date

KENNETH FAIRCLOTH

Witness

Print Name

Date

WAZIR (MIKE) SETH

ADALLAS 2480909.1

Graphic 48

7

Witness

Print Name

Date

DAVID BELCHER

Witness

Alicia Richardson

Print Name

4/15/18

Date

NEIL RICHARDSON

Witness

Print Name

Date

KENNETH FAIRCLOTH

Witness

Print Name

Date

WAZIR (MIKE) SETH

ADALLAS 2480909.1

Graphic 49

Witness

Print Name

Date

DAVID BELCHER

Witness

Print Name

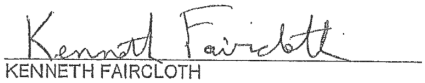
Date

NEIL RICHARDSON

Witness

Print Name

Date



KENNETH FAIRCLOTH

Witness

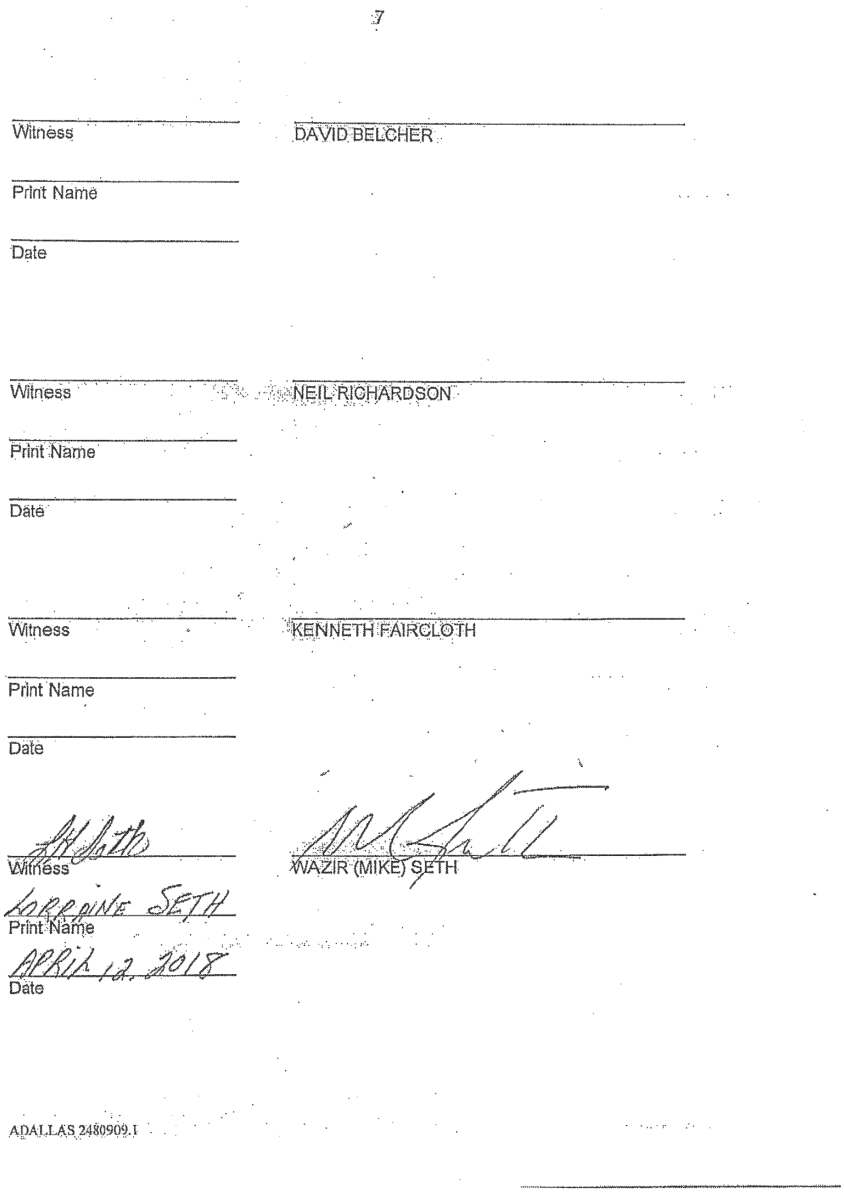
Print Name

Date

WAZIR (MIKE) SETH

ADALLAS 2480909.1

Graphic 50



Graphic 51

8

Witness

TINA McKEE
Print Name

APRIL 12, 2018
Date

JAMES MCKEE

Witness

Print Name

Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

Date

DOUGLAS ROBINSON

ENCON GROUP INC.

Per:
I have the power to bind the corporation.

ADALLAS 2480909.1

Graphic 52

8

Witness

Print Name

Date

JAMES MCKEE

Witness

Alison Portas
Print Name

4/9/2018
Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

Date

DOUGLAS ROBINSON

ENCON GROUP INC.

Per: c/s
I have the power to bind the corporation.

ADALLAS 2480909.1

Graphic 53

8

Witness

Print Name

Date

JAMES MCKEE

Witness

Print Name

Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

04/10/2018
Date

DOUGLAS ROBINSON

ENCON GROUP INC.

Per: c/s
I have the power to bind the corporation.

Graphic 54

Witness

Print Name

Date

JAMES MCKEE

Witness

Print Name

Date

SONJA KUEHNLE (SANBORN)

Witness

Print Name

Date

DOUGLAS ROBINSON

ENCON GROUP INC.

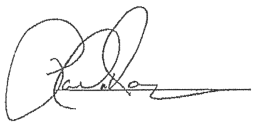
April 16/18

Per: c/s

I have the power to bind the corporation.

Graphic 55

9



CHUBB INSURANCE COMPANY OF CANADA

Per: PAULA KARGAS c/s
I have the power to bind the corporation.

TRAVELERS INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation

ROYAL & SUNALLIANCE INSURANCE COMPANY

Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

Per: c/s
We together have the power to bind the corporation.

Per: c/s
We together have the power to bind the corporation.

Graphic 56

9

CHUBB INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation.

TRAVELERS INSURANCE COMPANY OF CANADA

April 10, 2018

Per: c/s
I have the power to bind the corporation
PAUL CLARK

ROYAL & SUNALLIANCE INSURANCE COMPANY

Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

Per: c/s
We together have the power to bind the corporation.

Per: c/s
We together have the power to bind the corporation.

Graphic 57

9

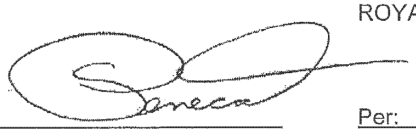
CHUBB INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation.

TRAVELERS INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation

ROYAL & SUNALLIANCE INSURANCE COMPANY



Digitally signed by Philippe Senecal
DN: dc=ca, dc=royalsunalliance, ou=HEAD OFFICE, ou=Users, cn=Philippe Senecal
Date: 2018.04.10 16:55:32 -04'00'

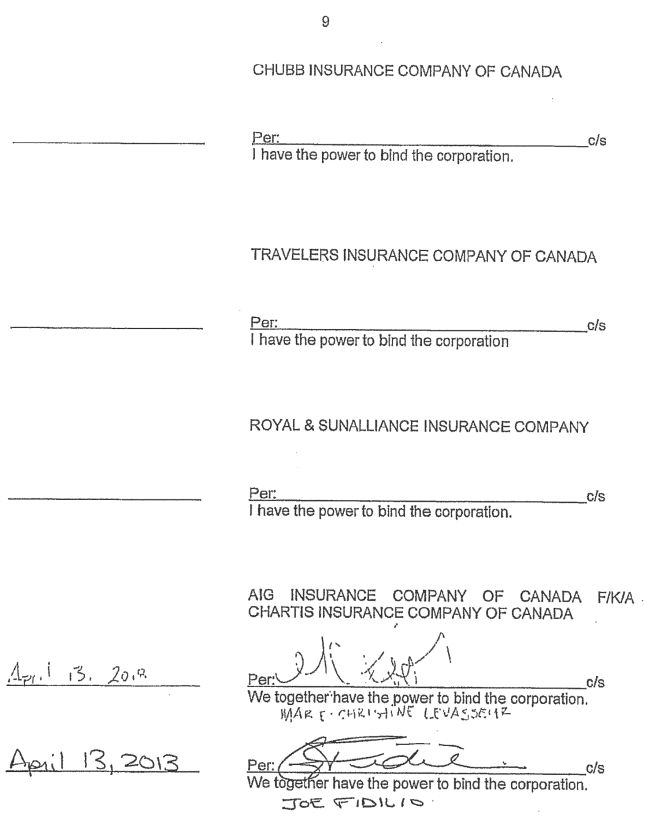
Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

Per: c/s
We together have the power to bind the corporation.

Per: c/s
We together have the power to bind the corporation.

Graphic 58


9

CHUBB INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation.

TRAVELERS INSURANCE COMPANY OF CANADA

Per: c/s
I have the power to bind the corporation

ROYAL & SUNALLIANCE INSURANCE COMPANY

Per: c/s
I have the power to bind the corporation.

AIG INSURANCE COMPANY OF CANADA F/K/A CHARTIS INSURANCE COMPANY OF CANADA

April 13, 2013 Per: c/s
We together have the power to bind the corporation.
MARIE-CHRISTINE LEVASSEUR

April 13, 2013 Per: c/s
We together have the power to bind the corporation.
JOE FIDLIS

Graphic 59

Footnotes

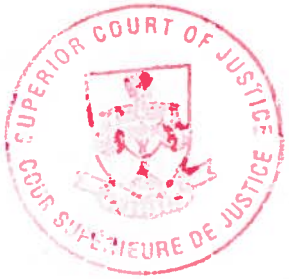
1 All sums of money referenced in this AGREEMENT are in Canadian currency.

2 For the avoidance of any doubt, and notwithstanding anything in this AGREEMENT that might be construed to the contrary, it is understood and agreed by each of the INSURED PERSONS and the POSEIDON EMPLOYEES that the POLICY LIMITS REDUCTION is a material term of this AGREEMENT and under no circumstances will any amounts being released pursuant to the POLICY LIMITS REDUCTION be available as LOSS or otherwise to or for the benefit of any of the INSURED PERSONS or POSEIDON EMPLOYEES upon the execution of this AGREEMENT.

End of Document

Tab 20

See paras. 39-44



Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 25th
	)	
MR. JUSTICE MCEWEN	)	DAY OF APRIL, 2019

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 OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

Applicant

ORDER

THIS MOTION, made by Rothmans, Benson & Hedges Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicant dated March 28, 2019, the affidavit of Peter Luongo sworn March 22, 2019 (the "**Initial Order Affidavit**"), the affidavit of Peter Luongo sworn March 28, 2019 and the exhibits thereto (the "**Luongo Affidavit**"), the Pre-Filing Report of Ernst & Young Inc. in its capacity as the proposed Monitor of the Applicant (the "**Monitor**"), the First Report of the Monitor, and on hearing the submissions of counsel for the Applicant, the Monitor, and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service of Sonia Antonellis dated March 29, 2019 and the affidavit of service of Emilia Moon-de Kemp dated April 3, 2019.

1. **THIS COURT ORDERS** that the time for service and filing of this motion is hereby abridged and validated such that the motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF SECOND AMENDED AND RESTATED INITIAL ORDER

2. **THIS COURT ORDERS AND DECLARES** that the order of Pattillo J. dated March 22, 2019 (the "**Initial Order**") as amended and restated on April 5, 2019, is hereby amended and restated in the form attached hereto as Schedule "**A**".

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

APR 26 2019

PER / PAR:

Schedule "A"

See attached.

Court File No. CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	FRIDAY, THE 22ND
	)	
JUSTICE PATTILLO	)	DAY OF MARCH, 2019

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 OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

Applicant

SECOND AMENDED AND RESTATED INITIAL ORDER

THIS APPLICATION, made by Rothmans, Benson & Hedges Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING (i) the affidavit of Peter Luongo sworn March 22, 2019 and the exhibits thereto (the "**Luongo Affidavit**") and (ii) the pre-filing report dated March 22, 2019 of Ernst & Young Inc. ("**EYI**") in its capacity as the proposed Monitor of the Applicant, and on hearing the submissions of counsel for the Applicant and EYI, and on reading the consent of EYI to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. **THIS COURT ORDERS AND DECLARES** that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. **THIS COURT ORDERS** that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "**Plan**").

DEFINITIONS

4. **THIS COURT ORDERS** that for purposes of this Order:

(a) "**Deposit Posting Order**" means the order of the Court of Appeal of Quebec granted October 27, 2015 and any other Order requiring the posting of security or the payment of a deposit in respect of the Quebec Class Actions;

(b) "**Pending Litigation**" means any and all actions, applications and other lawsuits existing at the time of this Order in which the Applicant is a named defendant or respondent (either individually or with other Persons (as defined below)) relating in any way whatsoever to a Tobacco Claim, including, without limitation, the Quebec Class Actions, the Class Actions, the Health Care Actions, the Tobacco Growers' Action and the Individual Actions (as each of those terms is defined in the Luongo Affidavit);

(c) "**PMI Group**" means Philip Morris International Inc. and all entities related to or affiliated with it, other than the Applicant;

(d) **"Quebec Class Actions"** means the proceedings in the Quebec Superior Court and the Court of Appeal of Quebec in (i) *Cécilia Létourneau et al. v. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc.* and (ii) *Conseil Québécois sur le Tabac et la Santé and Jean-Yves Blais v. JTI-Macdonald Corp., Imperial Tobacco Canada Limited and Rothmans, Benson & Hedges Inc.* and all decisions and orders in such proceedings, including, without limitation, the Deposit Posting Order;

(e) "**Sales & Excise Taxes**" means all goods and services, harmonized sales or other applicable federal, provincial or territorial sales taxes, and all federal excise taxes and customs and import duties and all federal, provincial and territorial tobacco taxes;

(f) "**Tobacco Claim**" means any right or claim (including, without limitation, a claim for contribution or indemnity) of any Person against or in respect of the Applicant or any member of the PMI Group that has been advanced (including, without limitation, in the Pending Litigation), that could have been advanced or that could be advanced, and whether such right or claim is on such Person's own account, on behalf of another Person, as a dependent of another Person or on behalf of a certified or proposed class or made or advanced as a government body or agency, insurer, employer or otherwise, under or in connection with:

(i) applicable law, to recover damages in respect of the development, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, the use of or exposure to Tobacco Products or any representation in respect of Tobacco Products, in Canada or, in the case of the Applicant, anywhere else in the world; or

(ii) the HCCR Legislation (as defined in the Luongo Affidavit),

excluding any right or claim of a supplier relating to goods or services supplied to, or the use of leased or licensed property by, the Applicant or any member of the PMI Group; and

(g) "**Tobacco Products**" means tobacco or any product made or derived from tobacco or containing nicotine that is intended for human consumption, including any component, part, or accessory of or used in connection with a tobacco product, including cigarettes, cigarette tobacco, roll your own tobacco, smokeless tobacco, electronic cigarettes, vaping liquids and devices, heat-not-burn tobacco, and any other tobacco or nicotine delivery systems and shall include materials, products and by-products derived from or resulting from the use of any tobacco products.

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Applicant is authorized and empowered to continue to retain and employ the employees, independent contractors, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business, to preserve the value of the Property or the Business, or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicant shall be entitled to continue to utilize the bank accounts currently used by it as described in the Luongo Affidavit and to use or replace them with other accounts from time to time for similar purposes (the "**Bank Accounts**") and that any present or future bank providing the Bank Accounts and related services ("**Banking Services**") shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken to, from or with the Bank Accounts, or as to the use or application by the Applicant of funds transferred, paid, collected or

otherwise dealt with in or to the Bank Accounts, shall be entitled to provide Banking Services without any liability in respect thereof to any Person other than the Applicant, pursuant to the terms of the documentation applicable to the Bank Accounts and Banking Services, and shall be, in its capacity as provider of the Bank Accounts and Banking Services, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Bank Accounts and Banking Services.

7. **THIS COURT ORDERS** that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to, on or after the date of this Order:

(a) all outstanding and future wages, salaries, commissions, compensation, vacation pay, bonuses, incentive plan payments, employee and retiree pension and other benefits and related contributions and payments (including, without limitation, expenses related to employee and retiree medical, dental, disability, life insurance and similar benefit plans or arrangements, employee assistance programs and contributions to or any payments in respect of the Registered Pension Plans, the Non-Registered Pension Plans and the RRSP (each as defined in the Luongo Affidavit)), reimbursement expenses (including, without limitation, amounts charged to corporate credit cards), termination pay, salary continuance and severance pay, all of which is payable to or in respect of employees, independent contractors and other personnel, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements or with Monitor approval;

(b) the fees and disbursements of any Assistants retained or employed by the Applicant at their standard rates and charges;

(c) any payment under or in respect of any Trade Program (as defined in the Luongo Affidavit) operated by the Applicant; and

(d) any expense that was incurred during or that pertains to the period prior to the date of this Order if, in the opinion of the Applicant and with the consent of the Monitor, the applicable payee or the payment of such expense is necessary or desirable for the

preservation of the Business or the Property or the ongoing operations of the Applicant.

8. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) capital expenditures other than as permitted in clause (a) above to replace or supplement the Property or that are otherwise of benefit to the Business, provided that Monitor approval is obtained for any single such expenditure in excess of $1,000,000 or an aggregate of such expenditures in a calendar year in excess of $10,000,000; and

(c) payment for goods or services supplied or to be supplied to the Applicant on or after the date of this Order (including the payment of any royalties or shared services).

9. **THIS COURT ORDERS** that the Applicant is authorized to complete outstanding transactions and engage in new transactions with the members of the PMI Group and to continue, on and after the date hereof, to buy and sell goods and services and to allocate, collect and pay costs, expenses and other amounts from and to the members of the PMI Group, including without limitation in relation to finished, unfinished and semi-finished materials, personnel, administrative, technical and professional services, and royalties and fees in respect of trademark licences (collectively, all transactions and all inter-company policies and procedures between the Applicant and any member of the PMI Group, the "**Intercompany Transactions**") in the ordinary course of business or as otherwise approved by the Monitor. All Intercompany Transactions in the ordinary course of business between the Applicant and any member of the PMI Group, including the provision of goods and services from any member of the PMI Group

to the Applicant, shall continue on terms consistent with existing arrangements or past practice or as otherwise approved by the Monitor.

10. **THIS COURT ORDERS** that the Applicant shall remit, in accordance with legal requirements, or pay (whether levied, accrued or collected before, on or after the date of this Order):

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all Sales & Excise Taxes required to be remitted by the Applicant in connection with the Business; and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

11. **THIS COURT ORDERS** that the Applicant is authorized to post and to continue to have posted cash collateral, letters of credit, performance bonds, payment bonds, guarantees and other forms of security from time to time, in an aggregate amount not exceeding $31,100,000 (the "**Bonding Collateral**"), to satisfy regulatory or administrative requirements to provide security that have been imposed on it in the ordinary course and consistent with past practice in relation to the collection and remittance of federal excise taxes and customs and import duties and federal, provincial and territorial tobacco taxes, whether the Bonding Collateral is provided directly or indirectly by the Applicant as such security and the Applicant is authorized to post

and to continue to have posted cash collateral with Citibank Canada and any other issuers of Bonding Collateral as security therefor.

12. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes are hereby stayed during the Stay Period from requiring that any additional bonding or other security be posted by or on behalf of the Applicant in connection with Sales & Excise Taxes or any other matters for which such bonding or security may otherwise be required.

13. **THIS COURT ORDERS** that until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, at such intervals as such Rent is usually paid in the ordinary course of business. On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

14. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant or claims to which it is subject to any of its creditors as of this date and to post no security in respect of any such amounts or claims, including pursuant to any order or judgment; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

15. **THIS COURT ORDERS** that the Applicant shall, subject to such requirements as are imposed by the CCAA, have the right to:

(a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding $5,000,000 in any one transaction or $10,000,000 in any calendar year in the aggregate;

(b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate;

(c) pursue all avenues of refinancing of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing; and

(d) pursue all avenues to resolve any of the Tobacco Claims, in whole or in part,

all of the foregoing to permit the Applicant to proceed with an orderly restructuring of the Business (the "**Restructuring**").

16. **THIS COURT ORDERS** that the Applicant shall provide each of the relevant landlords with notice of the Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Applicant's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicant disclaims or resiliates the lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer or resiliation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

17. **THIS COURT ORDERS** that if a notice of disclaimer or resiliation is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

STAY OF PROCEEDINGS

18. **THIS COURT ORDERS** that until and including June 28, 2019, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), including but not limited to an application for leave to appeal to the Supreme Court of Canada in the Quebec Class Actions (a "**QCA Leave Application**"), the Pending Litigation and any other Proceeding in relation to a Tobacco Claim, shall be commenced, continued or take place by, against or in respect of the Applicant, the Monitor or the Court-Appointed Mediator (defined below), or affecting the Business or the Property or the funds deposited pursuant to the Deposit Posting Order, except with leave of this Court, and any and all Proceedings currently under way or directed to take place by, against or in respect of the Applicant or affecting the Business or the Property or the funds deposited pursuant to the Deposit Posting Order are hereby stayed and suspended pending further Order of this Court. All counterclaims, cross-claims and third party claims of the Applicant in the Pending Litigation are likewise subject to this stay of Proceedings during the Stay Period. by the Applicant

19. **THIS COURT ORDERS** that during the Stay Period, (i) none of the Pending Litigation or any Proceeding in relation thereto shall be commenced, continued or take place against or in respect of any Person named as a defendant or respondent (other than Imperial Tobacco Canada Limited, Imperial Tobacco Company Limited or JTI-Macdonald Corp.) in any of the Pending Litigation (such Persons, the "**Other Defendants**"); and (ii) no Proceeding in Canada that relates

in any way to a Tobacco Claim or to the Applicant, the Business or the Property shall be commenced, continued or take place against or in respect of any member of the PMI Group; except with leave of this Court, and any and all such Proceedings currently underway or directed to take place against or in respect of any of the Other Defendants or any member of the PMI Group, or affecting the Business or the Property or the funds deposited pursuant to the Deposit Posting Order are hereby stayed and suspended pending further Order of this Court.

20. **THIS COURT ORDERS** that, to the extent any prescription, time or limitation period relating to any Proceeding by, against or in respect of the Applicant, any of the Other Defendants or any member of the PMI Group that is stayed pursuant to this Order may expire, including but not limited to any prescription of time whereby the Applicant would be required to commence the QCA Leave Application, the term of such prescription, time or limitation period shall hereby be deemed to be extended by a period equal to the Stay Period.

NO EXERCISE OF RIGHTS OR REMEDIES

21. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), against or in respect of the Applicant or the Monitor, or affecting the Business or the Property or to obtain the funds deposited pursuant to the Deposit Posting Order (including, for greater certainty, any enforcement process or steps or other rights and remedies under or relating to the Quebec Class Actions against the Applicant or the Property), are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

22. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

23. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services including, without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility, customs clearing, warehouse or logistical services, or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

24. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

SALES AND EXCISE TAX CHARGE

25. **THIS COURT ORDERS** that the Canadian federal, provincial and territorial authorities that are entitled to receive payments or collect monies from the Applicant in respect of Sales & Excise Taxes shall be entitled to the benefit of and are hereby granted a charge (the "**Sales and Excise Tax Charge**") on the Property, which charge shall not exceed an aggregate amount of $270,000,000, as security for all amounts owing by the Applicant in respect of Sales & Excise Taxes, after taking into consideration any Bonding Collateral posted in respect thereof. The Sales and Excise Tax Charge shall have the priority set out in paragraphs 45 and 47 herein.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

26. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

27. **THIS COURT ORDERS** that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

28. **THIS COURT ORDERS** that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $7,000,000, as security for the indemnity

provided in paragraph 27 of this Order. The Directors' Charge shall have the priority set out in paragraphs 45 and 47 herein.

29. **THIS COURT ORDERS** that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 27 of this Order.

APPOINTMENT OF MONITOR

30. **THIS COURT ORDERS** that EYI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

31. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicant's receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) advise the Applicant in its preparation of the Applicant's cash flow statements, which information shall be reviewed with the Monitor;

(d) advise the Applicant in its development of the Plan and any amendments to the Plan;

(e) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) assist the Applicant, to the extent required by the Applicant, in its efforts to explore the potential for a resolution of any of the Tobacco Claims;

(i) consult with the Court-Appointed Mediator in connection with the Court-Appointed Mediator's mandate, including in relation to any negotiations to settle any Tobacco Claims and the development of the Plan; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

32. **THIS COURT ORDERS** that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

33. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release

or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, the Ontario *Occupational Health and Safety Act*, the Quebec *Environment Quality Act*, the Quebec *Act Respecting Occupational Health and Safety* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

34. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicant and the Court-Appointed Mediator with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

35. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

36. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is

hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicant on a bi-weekly basis and, in addition, the Applicant is hereby authorized to pay the Monitor and counsel to the Monitor, retainers in the amount of $250,000 and $50,000 respectively to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

37. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

38. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $3,000,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 45 and 47 hereof.

COURT-APPOINTED MEDIATOR

39. **THIS COURT ORDERS** that the Hon. Warren K. Winkler, Q.C. is hereby appointed, as an officer of the Court and shall act as a neutral third party (the "**Court-Appointed Mediator**") to mediate a global settlement of the Tobacco Claims.

40. **THIS COURT ORDERS** that in carrying out his mandate, the Court-Appointed Mediator may, among other things:

(a) Adopt processes which, in his discretion, he considers appropriate to facilitate negotiation of a global settlement;

(b) Retain independent legal counsel and such other advisors and persons as the Court-Appointed Mediator considers necessary or desirable to assist him in carrying out his mandate;

(c) Consult with all Persons with Tobacco Claims ("**Tobacco Claimants**"), the Monitor, the Applicant, the Co-Defendants (as defined in the Luongo Affidavit), other creditors and stakeholders of the Applicant and/or the Co-Defendants and any other persons the Court-Appointed Mediator considers appropriate;

(d) Accept a court appointment of similar nature in any proceedings under the CCAA commenced by a company that is a co-defendant or respondent with the Applicant or the Co-Defendants in any action brought by one or more Tobacco Claimants, including the Pending Litigation; and,

(e) Apply to this Court for advice and directions as, in his discretion, the Court-Appointed Mediator deems necessary.

41. **THIS COURT ORDERS** that, subject to an agreement between the Applicant and the Court-Appointed Mediator, all reasonable fees and disbursements of the Court-Appointed Mediator and his legal counsel and financial and other advisors as may have been incurred by them prior to the date of this Order or which shall be incurred by them in relation to carrying out his mandate shall be paid by the Applicant and the Co-Defendants on a monthly basis, forthwith upon the rendering of accounts to the Applicant and the Co-Defendants.

42. **THIS COURT ORDERS** that the Court-Appointed Mediator shall be entitled to the benefit of and is hereby granted a charge (the "**Court-Appointed Mediator Charge**") on the Property, which charge shall not exceed an aggregate amount of $1 million, as security for his fees and disbursements and for the fees and disbursements of his legal counsel and financial and other advisors, in each case incurred at their standard rates and charges, both before and after the making of this Order in respect of these proceedings. The Court-Appointed Mediator Charge shall have the priority set out in paragraphs 45 and 47 hereof.

43. **THIS COURT ORDERS** that the Court-Appointed Mediator is authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court, regulatory body or other government ministry, department or agency, and to take all such steps as are necessary or incidental thereto.

44. **THIS COURT ORDERS** that, in addition to the rights and protections afforded as an officer of this Court, the Court-Appointed Mediator shall incur no liability or obligation as a result of his appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on his part. Nothing in this Order shall derogate from the protections afforded a person pursuant to Section 142 of the *Courts of Justice Act* (Ontario).

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

45. **THIS COURT ORDERS** that the priorities of the Administration Charge, the Court-Appointed Mediator Charge, the Directors' Charge and the Sales and Excise Tax Charge (collectively, the "**Charges**"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $3,000,000) and the Court-Appointed Mediator Charge (to the maximum amount of $1,000,000), *pari passu*;

Second – Directors' Charge (to the maximum amount of $7,000,000); and

Third – Sales and Excise Tax Charge (to the maximum amount of $270,000,000).

46. **THIS COURT ORDERS** that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

47. **THIS COURT ORDERS** that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, encumbrances and claims of secured creditors, statutory or otherwise (collectively, the "**Encumbrances**") in favour of any Person in respect of such Property, save and except for:

(a) purchase-money security interests or the equivalent security interests under various provincial legislation and financing leases (that, for greater certainty, shall not include trade payables);

(b) statutory super-priority deemed trusts and liens for unpaid employee source deductions;

(c) deemed trusts and liens for any unpaid pension contribution or deficit with respect to the Registered Pension Plans, but only to the extent that any such deemed trusts and liens are statutory super-priority deemed trusts and liens afforded priority by statute over all pre-existing Encumbrances granted or created by contract;

(d) liens for unpaid municipal property taxes or utilities that are given first priority over other liens by statute; and

(e) cash collateral deposited with a financial institution as security for letters of credit or bank guarantees issued by the financial institution at the request of the Applicant.

48. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor and the beneficiaries of the Charges affected thereby (collectively, the "**Chargees**"), or further Order of this Court.

49. **THIS COURT ORDERS** that the Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the *Bankruptcy and Insolvency Act* of Canada (the "**BIA**"), or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

(a) the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(c) the payments made by the Applicant pursuant to this Order and the granting of the Charges do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

50. **THIS COURT ORDERS** that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

51. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in The Globe and Mail (National Edition) and La Presse a notice containing the information prescribed under the CCAA as well as the date of the Comeback Motion (as defined below), (ii) within five days after the date of this Order or as soon as reasonably practicable thereafter, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice (which shall include the date of the Comeback Motion) to every known creditor who has a claim (contingent, disputed or otherwise) against the Applicant of more than $1,000, except with respect to (I) plaintiffs in the Pending Litigation, in which cases the Monitor shall only send a notice to counsel of record, as applicable, (II) beneficiaries of the Registered Pension Plans (as that term is defined in the Luongo Affidavit), in which case the Monitor shall only send a notice to the trustees of each of the Registered Pension Plans and the Financial Services Commission of Ontario and the Régie Des Rentes Du Québec, as applicable, and (III) current and former employees of the Applicant; and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations

made thereunder. The list referenced at subparagraph (C) above shall not include the names, addresses, or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual.

52. **THIS COURT ORDERS** that the E-Service Guide of the Commercial List (the "**Guide**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Guide (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05, this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 13 of the Guide, service of documents in accordance with the Guide will be effective on transmission. This Court further orders that a Case Website shall be established by the Monitor in accordance with the Guide with the following URL: www.ey.com/ca/rbh (the **"Case Website"**).

53. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Guide is not practicable, the Applicant and the Monitor are at liberty to serve or distribute this Order, any other materials and orders in these proceedings and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or other electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery, facsimile or other electronic transmission shall be deemed to be received on the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

54. **THIS COURT ORDERS** that the Applicant is authorized to rely upon the notice provided in paragraph 51 to provide notice of the comeback motion to be heard on a date to be set by this Court upon the granting of this Order (the "**Comeback Motion**") and shall only be required to serve motion materials relating to the Comeback Motion, in accordance with the Guide, upon those parties who serve a Notice of Appearance in this proceeding prior to the date of the Comeback Motion.

55. **THIS COURT ORDERS** that the Monitor shall create, maintain and update as necessary a list of all Persons appearing in person or by counsel in this proceeding (the "**Service List**"). The Monitor shall post the Service List, as may be updated from time to time, on the Case Website as part of the public materials to be recorded thereon in relation to this proceeding. Notwithstanding the foregoing, the Monitor shall have no liability in respect of the accuracy of or the timeliness of making any changes to the Service List.

56. **THIS COURT ORDERS** that the Applicant and the Monitor and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Applicant's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the Electronic Commerce Protection Regulations, Reg. 8100 2-175 (SOR/DORS).

57. **THIS COURT ORDERS** that, subject to paragraph 58, all motions in this proceeding are to be brought on not less than seven (7) calendar days' notice to all persons on the Service List. Each Notice of Motion shall specify a date (the "**Return Date**") and time for the hearing.

58. **THIS COURT ORDERS** that motions for relief on an urgent basis need not comply with the notice protocol described herein.

59. **THIS COURT ORDERS** that any interested Person wishing to object to the relief sought in a motion must serve responding motion material or, if they do not intend to file material, a notice in all cases stating the objection to the motion and the grounds for such objection in writing (the "**Responding Material**") to the moving party, the Applicant and the Monitor, with a copy to all Persons on the Service List, no later than 5 p.m. on the date that is four (4) calendar days prior to the Return Date (the "**Objection Deadline**").

60. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the judge having carriage of the motion (the "**Presiding Judge**") may determine:

(a) whether a hearing is necessary;

(b) whether such hearing will be in person, by telephone or by written submissions only; and

(c) the parties from whom submissions are required

(collectively, the "**Hearing Details**"). In the absence of any such determination, a hearing will be held in the ordinary course.

61. **THIS COURT ORDERS** that, if no Responding Materials are served by the Objection Deadline, the Monitor shall communicate with the Presiding Judge regarding whether a determination has been made by the Presiding Judge concerning the Hearing Details. The Monitor shall thereafter advise the Service List of the Hearing Details and the Monitor shall report upon its dissemination of the Hearing Details to the Court in a timely manner, which may be contained in the Monitor's next report in the proceeding.

62. **THIS COURT ORDERS** that if any party objects to the motion proceeding on the Return Date or believes that the Objection Deadline does not provide sufficient time to respond to the motion, such objecting party shall, promptly upon receipt of the Notice of Motion and in any event prior to the Objection Deadline, contact the moving party and the Monitor (together with the objecting party and any other party who has served Responding Materials, the "**Interested Parties**") to advise of such objection and the reasons therefor. If the Interested Parties are unable to resolve the objection to the timing and schedule for the motion following good faith consultations, the Interested Parties may seek a scheduling appointment before the Presiding Judge to be held prior to the Return Date or on such other date as may be mutually agreed by the Interested Parties or as directed by the Presiding Judge to establish a schedule for the motion. At the scheduling appointment, the Presiding Judge may provide directions including a schedule for the delivery of any further materials and the hearing of the contested motion, and may address such other matters, including interim relief, as the Court may see fit. Notwithstanding the foregoing, the Presiding Judge may require the Interested Parties to proceed with the contested motion on the Return Date or on any other date as may be directed by the

Presiding Judge or as may be mutually agreed by the Interested Parties, if otherwise satisfactory to the Presiding Judge.

GENERAL

63. **THIS COURT ORDERS** that the Applicant or the Monitor may from time to time apply to this Court to amend, vary, supplement or replace this Order or for advice and directions concerning the discharge of their respective powers and duties under this Order or the interpretation or application of this Order.

64. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

65. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or outside of Canada, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

66. **THIS COURT ORDERS** that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

67. **THIS COURT ORDERS** that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

68. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order (the "**Effective Time**") and that from the Effective Time to the time of the granting of this Order any action taken or notice given by any creditor of the Applicant or by any other Person to commence or continue any enforcement, realization, execution or other remedy of any kind whatsoever against the Applicant, the Property, the Business or the funds deposited pursuant to the Deposit Posting Order shall be deemed not to have been taken or given, as the case may be.

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 OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

Court File No: CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AMENDED AND RESTATED INITIAL ORDER

McCarthy Tétrault LLP
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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 OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

Court File No: CV-19-616779-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

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DOC#19113279

Tab 21

See pp. 4-5; 11-12

473 B.R. 117
United States Bankruptcy Court,
N.D. Texas,
Dallas Division.

In re VITRO, S.A.B. DE C.V., Debtor in a Foreign Proceeding.
Vitro, S.A.B. de C.V., Plaintiff,
v.
ACP Master, Ltd.; AD Hoc Group of Vitro Noteholders; Aurelius Capital Master, Ltd.; Aurelius Convergence Master, Ltd.; Elliott International L.P.; The Liverpool Limited Partnership; and Does 1–1000, Defendants.

Bankruptcy No. 11–33335–HDH–15.
|
Adversary No. 12–03027.
|
June 13, 2012.

Synopsis

Background: Foreign representatives in proceeding ancillary to foreign main case sought enforcement of judgment entered by Mexican court, which not only modified debts owed by foreign debtor but novated and extinguished guarantees of foreign debtor's indebtedness by its nondebtor subsidiaries.

The Bankruptcy Court, Harlin Dewayne Hale, J., held that judgment could not be enforced, so as to permanently enjoin suits in the United States against debtor's nondebtor subsidiaries, as manifestly contrary to United States public policy.

Motion denied.

Attorneys and Law Firms

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Does 1–1000, pro se.

Memorandum Opinion

HARLIN DEWAYNE HALE, Bankruptcy Judge.

On March 2, 2012, Alejandro Francisco Sanchez–Mujica and Javier Arechavaleta Santos, acting as Foreign Representatives of the above-captioned debtor, Vitro, S.A.B. de C.V. ("Vitro SAB"), filed a *Motion of Foreign Representatives of Vitro S.A.B. de C.V. for an Order Pursuant to 11 U.S.C. §§ 105(a), 1507 and 1521 to (I) Enforce the Mexican Plan of Reorganization of Vitro S.A.B. de C.V., (II) Grant a Permanent Injunction, and (III) Grant Related Relief* ("Enforcement Motion"). Wilmington Trust, National Association ("Wilmington"), U.S. Bank National Association, as Indenture Trustee ("U.S. Bank"), and the Ad Hoc Group of Vitro Noteholders ("Ad Hoc Group") (collectively, the "Objecting Parties"), who are claimants under various indentures issued by Vitro SAB in the United States and guaranteed by its subsidiaries, responded. On March 5, 2012, the Court heard the Enforcement Motion on an expedited basis.

In addition to the Enforcement Motion, on March 2, 2012, the Foreign Representatives filed, under seal, a *Motion for a Temporary Restraining Order and Preliminary Injunction* ("TRO Motion"), supported by 1) a *Verified Complaint for Temporary Restraining Order and Injunctive Relief,* 2) the Enforcement Motion and 3) Declarations of certain individuals. In response, the *Objection Of U.S. Bank National Association, As Indenture Trustee, To Foreign Representatives' Motion For A Temporary Restraining Order And Preliminary Injunction* and the *Ad Hoc Group of Vitro Noteholders' Objection to Motion for Temporary Restraining Order* were timely filed with the Court. On March 7, 2012, also on an expedited basis, the Court heard arguments for and against the TRO Motion. On March 12, 2012, the Court entered an *Order Granting Limited Temporary Restraining Order to Maintain Status Quo* ("TRO"). The TRO was extended by the parties' agreement.

On May 25, 2012, the Objecting Parties each timely filed with the Court an objection ("Ad Hoc Noteholders Objection," "Wilmington Trust Objection," and "U.S. Bank Objection" respectively) to the Enforcement Motion. Beginning June 4, 2012, this Court held a four day trial on the Enforcement Motion, on a schedule agreed to by the parties. Vitro SAB and the Objecting Parties put on a number of witnesses and introduced hundreds of exhibits. The Court took the matter under advisement.

I. Background Facts

The events leading to the Debtor's commencement of this Chapter 15 case are generally described in this Court's memorandum opinion of June 24, 2011, denying the request of the foreign representatives of Vitro SAB to enjoin lawsuits filed against its non-debtor guarantors in New York state court.[1] As explained therein, at that time the proceedings in Mexico were in an early stage, and it was unclear ***120** whether they would be successful.[2] This Court determined that the pre-recognition injunction should be granted in favor of Vitro SAB only, and did not find that the litigation by the noteholders against the subsidiary guarantors of Vitro SAB should be enjoined when the subsidiaries were not in an insolvency proceeding.

Thereafter, in August 2011, a group of noteholders filed suit against Vitro SAB's subsidiaries in New York state court, seeking a money judgment on certain guarantees and declaratory relief. *Wilmington TRUST N.A. v. Vitro AUTOMOTRIZ S.A. De C.V.,* No. 652303–2011 (N.Y. Sup.Ct. filed Aug. 17, 2011). Specifically, in addition to a judgment on their guarantees, the noteholders wanted a declaratory judgment stating that Vitro SAB's reorganization attempts would not impact their guaranties from Vitro SAB's nondebtor subsidiaries. *Id.* In December 2011, the New York state court ruled in favor of the noteholders, finding that the indentures prevent non-consensual modification of the subsidiaries' guaranties. *Wilmington TRUST N.A. v. Vitro AUTOMOTRIZ S.A. De C.V.,* No. 652303–2011 (N.Y.Sup.Ct. Dec. 5, 2011).

In its decision, the New York state court noted that the subsidiaries had waived their rights under Mexican law. *Id.* On December 18, 2011, the noteholders obtained a temporary restraining order from the New York state court that enjoined the subsidiaries from giving their consent to the *Concurso* plan. *Wilmington Trust N.A. v. Vitro Automotriz S.A. de C.V.,* No. 653459–2011 (N.Y.

Sup.Ct. filed Dec. 14, 2011). However, upon Vitro SAB's request, this Court, finding that the lockup agreement between Vitro SAB and its subsidiaries was an asset of Vitro SAB's estate, entered an order enforcing the automatic stay and enjoining the Noteholders' seeking injunctive relief in the New York State Court. Despite an appeal by the noteholders,[3] that order remained in effect and the subsidiaries were permitted to vote on the *Concurso* plan. The subsidiaries voted in favor of the plan and though they were insiders, their votes were counted to win approval of the plan.

On February 3, 2012, the Federal District Court for Civil and Labor Matters for the State of Nuevo León, the United Mexican States (the "District Court of Nuevo León") issued a *Concurso* Approval Order under the *Ley de Concursos Mercantiles* (the "LCM") in Vitro SAB's voluntary judicial reorganization proceeding (the "Mexican Proceeding"). After the issuance of the *Concurso* Approval Order, the objecting Noteholders continued to take actions against Vitro SAB's non-debtor subsidiaries, attempting to collect debts owed to them under various guarantees to indentures issued by Vitro SAB.[4] In response, Vitro SAB filed the Enforcement Motion and sought the TRO and permanent injunction, which led to the trial upon which this opinion is rendered.

The *Concurso* Approval Order not only modifies the debts owed by Vitro SAB to the noteholders under various indentures, it also novates and extinguishes the guarantees, effectively discharging the obligations of Vitro SAB's non-debtor subsidiary guarantors to the noteholders.

In the Enforcement Motion, the Foreign Representatives ask the Court to enforce the *Concurso* Approval Order, which approves Vitro SAB's *Concurso* Plan. Specifically, the Enforcement Motion asks the ***121** Court to 1) give "full force and effect in the United States to the *Concurso* Approval Order," 2) "grant a permanent injunction prohibiting certain actions in the United States against Vitro SAB," as well as its non-debtor subsidiaries and 3) "grant certain related relief," all pursuant to §§ 105(a), 1507, and 1521 of Title 11 of the United States Bankruptcy Code.

II. Issues

There are two main issues that must be addressed in order to determine whether the Enforcement Motion should be granted: (1) whether the provisions of the *Concurso* Approval Order that grant a permanent injunction prohibiting certain actions in the United States against Vitro SAB's non-debtor subsidiaries may be extended to creditors in the United States by this Court through §§ 1521 or 1507 consistent with the principles of comity; and (2) if so, does the § 1506 public policy exception, which limits the extension of comity where it would be "manifestly contrary" to the public policy of this country, prevent enforcement of the *Concurso* Approval Order.

III. Analysis

The Court has jurisdiction pursuant to 28 U.S.C. § 1334. The proceeding is core, pursuant to 28 U.S.C. § 157(b)(2)(P).

Beyond the mandatory effects of recognition of a foreign main proceeding[5] found in 11 U.S.C. § 1520, additional relief "may" be granted to protect the assets of the debtor or the interests of creditors pursuant to § 1521, as well as additional assistance that may be provided to a foreign representative of the debtor consistent with the principles of comity, pursuant to § 1507.

Under § 1521, a bankruptcy court may "grant any appropriate relief" in order to "effectuate the purpose of this chapter and to protect the assets of the debtors or the interests of the creditors." 11 U.S.C. § 1521(a). This includes, at the request of the foreign representative, entrusting "the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected." 11 U.S.C. § 1521(b).

Section 1522(b) permits the court to impose conditions on any discretionary relief that it grants either pre- or post-recognition, which permits the court to achieve an appropriate balance between the interests of creditors and other interested entities, including the debtor. *See In re Tri–Continental Exchange Ltd.,* 349 B.R. 627, 637 (Bankr.E.D.Cal.2006); 11 U.S.C. § 1522(b).

In addition to the relief enumerated in § 1521, § 1507(a) of the Bankruptcy Code provides that "the court, if recognition is granted, may provide additional assistance to a foreign representative." 11 U.S.C. § 1507(a). In determining whether to provide such additional assistance, courts must look to § 1507(b) for guidance, which provides that:

> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with principles of comity, will reasonably assure:
>
> ***122** 1) just treatment of all holders of claims against or interests in the debtor's property;
>
> 2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> 3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> 4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> 5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507(b). Comity should be the Court's primary consideration when applying § 1507(b). *See In re Petition of Garcia Avila,* 296 B.R. 95, 108 n. 14 (Bankr.S.D.N.Y.2003). Comity has been defined as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws." *Hilton v. Guyot,* 159 U.S. 113, 163–64, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Granting comity to judgments in foreign bankruptcy proceedings is appropriate as long as U.S. parties are provided the same fundamental protections that litigants in the United States would receive. *See id.* at 202–03, 16 S.Ct. at 158–59.

Vitro SAB urges the Court to defer in favor of the Enforcement Motion in the interests of comity. However, "The principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States." *In re Treco,* 240 F.3d 148, 157 (2d Cir.2001); *see also, Overseas Inns S.A., P.A. v. United States,* 911 F.2d 1146 (5th Cir.1990) (comity was not accorded to Luxembourg bankruptcy plan that treated IRS as general, rather than priority, creditor); *In re Schimmelpenninck,* 183 F.3d 347, 365 (5th Cir.1999) ("foreign laws ... must not be repugnant to our laws and policies").

Public Policy Exception—§ 1506

If the Court finds that the *Concurso* Approval Order should be enforced, pursuant to § 1507, then the Chapter 15 of the Bankruptcy Code provides a final hurdle for Vitro SAB to overcome in the public policy exception found in § 1506. Specifically, § 1506 provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

The parties spent much of their time on this issue. Unfortunately, the Bankruptcy Code does not define what should be considered "manifestly contrary to the public policy of the United States." Therefore, this Court must look to the legislative history and to relevant case law for guidance.

Although few published opinions discuss the scope of section 1506, "it appears well settled that the exception is to be construed narrowly." *In re British Am. Isle of Venice, Ltd.,* 441 B.R. 713, 717 (Bankr.S.D.Fla.2010) (citing *In re Qimonda AG Bankr. Litig.,* 433 B.R. 547, 567–70 (E.D.Va.2010)). Further, it should be "invoked only under exceptional circumstances concerning matters

of fundamental importance for the United States." *In re Ran,* 607 F.3d 1017, 1021 (5th Cir.2010) (citing ***123** *In re Iida,* 377 B.R. 243 (9th Cir. BAP 2007)); *In re Atlas Shipping A/S,* 404 B.R. 726 (Bankr.S.D.N.Y.2009); *In re Ernst and Young, Inc.,* 383 B.R. 773, 781 (Bankr.D.Colo.2008)). "The word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333, 336 (S.D.N.Y.2006) (citing H.R. REP. NO. 109–31(I), at 109, as reprinted in 2005 U.S.C.C.A.N. 88, 172).

Despite § 1506's limited scope, the statute has also been described as a "safety valve"[6] that offers "specific protections"[7] to creditors in Chapter 15 proceedings. When determining whether to apply § 1506,

> courts have focused on two factors: (1) whether the foreign proceeding was procedurally unfair; and (2) whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would 'severely impinge the value and import' of a U.S. statutory or constitutional right, such that granting comity would 'severely hinder United States bankruptcy courts' abilities to carry out ... the most fundamental policies and purposes' of these rights.
>
> *Id.* (quoting *In re Qimonda AG Bankr. Litig.,* 433 B.R. at 568–69) (citations omitted).

Although not much case law exists, several courts have recently considered the § 1506 public policy exception. Because Chapter 15 of the Bankruptcy Code was not enacted until 2005, the scope of § 1506 has not yet been clearly defined. Therefore, a review of some of the more recent cases is helpful.

In *In re Ephedra Prods. Liability Litig.*, the bankruptcy court had to determine whether granting an order recognizing and enforcing an order of the Canadian insolvency tribunal would violate § 1506. 349 B.R. 333 (S.D.N.Y.2006). The Canadian order at issue approved a claims resolution procedure that provided for mandatory mediation, which could result in the liquidation of claims by creditors who never approved of the plan. *Id.* at 335. Some of the claimants argued that the foreign "procedure was manifestly contrary to U.S. policy because it deprived them of due process and a jury trial." *Id.* The bankruptcy court looked to the legislative history and found that the word "manifestly" is restrictive so that the public policy exception should be "narrowly interpreted." *Id.* at 336. Looking at an 1895 Supreme Court decision, *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), the *Ephedra* court added that foreign judgments should be recognized and enforced when the foreign " 'proceedings are according to the course of a civilized jurisprudence,' *i.e.,* fair and impartial." *In re Ephedra Prods. Liability Litig.,* 349 B.R. at 336 (quoting *Hilton,* 159 U.S. at 205–06, 16 S.Ct. 139).

With respect to the claimants' due process argument, the court acknowledged that there was at least some merit to the objection because the Claims Officer had originally refused to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. *Id.* at 335. However, the bankruptcy court ultimately rejected the due process argument because the Ontario Court adopted amendments to the Canadian order that cured the due process problems. *Id.* With respect to the claimants' second argument, based on deprivation of their right to a jury trial, the court held that "neither § 1506 nor any other law prevents a United ***124** States court from giving recognition and enforcement ... simply because the procedure alone does not include a right to jury." *Id.* at 335–36. Although the bankruptcy court recognized that the constitutional right to a jury trial is important to the American legal system, it did not find that a jury trial is absolutely necessary in order to have a fair and impartial verdict. *Id.* at 337 (citing *Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir.1991); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal,* 809 F.2d 195, 199, 202 (2d Cir.1987)). Because the court found that the claimants' real complaint had to do with the loss of leverage during settlement negotiations, the court rejected the argument. *Id.* It explained that "[d]eprivation of such bargaining advantage hardly rises to the level of imposing on plaintiffs some fundamental unfairness." *Id.*

In *In re Qimonda AG Bankr. Litig.,* the United States District Court discussed the § 1506 public policy exception at length. 433 B.R. 547, 567–71 (E.D.Va.2010). Qimonda, a German company and producer of computer chips, claimed to hold approximately 12,000 patents, including at least 4,000 U.S. patents and over 1,000 pending U.S. patent applications. *Id.* at 552. Before the commencement of insolvency proceedings in Germany, Qimonda entered into various joint venture and patent cross-licensing agreements with international electronic companies. *Id.* In the foreign insolvency proceeding, Qimonda sought to terminate

these patent cross-licensing agreements. The attorney appointed as Insolvency Administrator of Qimonda's estate filed a petition for recognition of the German insolvency proceeding in the U.S. Bankruptcy Court. *Id.*

The bankruptcy court below in *In re Qimonda AG,* had a hearing and issued two orders. *Id.* at 552 (discussing *In re Qimonda AG,* 2009 WL 4060083 (Bankr.E.D.Va.2009) (No. 09–14766–RGM), *aff'd in part, remanded in part sub nom. In re Qimonda AG Bankr. Litig.,* 433 B.R. 547 (E.D.Va.2010)). According to the United States District Court, "[t]he first order correctly recognized the insolvency proceeding as a 'foreign main proceeding.' " *Id.* (citing 11 U.S.C. § 1517). The second order granted discretionary relief to Qimonda and the Insolvency Administrator, including a paragraph that made particular "provisions of the Bankruptcy Code applicable to Qimonda's Chapter 15 proceeding." *Id.* at 552–53. After the bankruptcy court issued the orders, the Insolvency Administrator sent letters to some of the international electronic companies in order to elect nonperformance of their patent cross-licensing agreements pursuant to German Insolvency Code Section 103. *Id.* at 553. In response to these letters sent on behalf of Qimonda, certain international electronic companies argued that election of these agreements was impermissible under § 365(n) of the U.S. Bankruptcy Code, which was made applicable by the bankruptcy court's second order. *Id.* In order to resolve the dispute, the Insolvency Administrator filed a motion with the bankruptcy court seeking to amend the second order. *Id.* The bankruptcy court granted the motion and issued a new order, stating that:

> [t]he application of section 365 to the instant proceeding shall not in any way limit or restrict (i) the right of the Administrator to elect performance or nonperformance of agreements under § 103 German Insolvency Code or such other applicable rule of law in the Foreign Proceeding, or (ii) the legal consequence of such election; provided, however, if upon a motion by the Administrator under Section 365 of the Bankruptcy Code, the Court enters an Order providing for the assumption or rejection of an executory contract, then Section 365 shall apply ***125** without limitation solely with respect to the contracts subject to such motion.

In re Qimonda AG Bankr. Litig., at 553–54 (citation omitted). The bankruptcy court also revised the second order. Specifically, it added the following language to the paragraph making certain provisions of the U.S. Bankruptcy Code applicable: "provided, however, Section 365(n) applies only if the Foreign Representative rejects an executory contract pursuant to Section 365 (rather than simply exercising the rights granted to the Foreign Representative pursuant to the German Insolvency Code)." *Id.* at 554 (citation omitted).

On appeal, the international electronic companies argued that "the Bankruptcy Court erred in conditioning the applicability of § 365(n) on the Foreign Representative's formal rejection of the parties' cross-licensing agreements under the Bankruptcy Code." *Id.* at 554. The district court focused on "whether § 365(n) embodies the fundamental public policy of the United States, such that subordinating [it] to German Insolvency Code § 103 is an action 'manifestly contrary to the public policy of the United States.' " *Id.* at 565 (citing 11 U.S.C. § 1506). The district court reviewed applicable case law and found three guiding principles for analyzing whether an action taken in a Chapter 15 proceeding is manifestly contrary to the public policy of the United States:

1) The mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception.

2) Deference to a foreign proceeding should not be afforded in a Chapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections.

3) An action should not be taken in a Chapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding.

Id. at 570. The district court found that, based on the record, it was unclear whether the three principles were applied to "the Bankruptcy Court's decision to condition the applicability of § 365(n) on the formal rejection of an executory contract under the Bankruptcy Code." *Id.* Instead, the bankruptcy court merely held that U.S. courts administering Chapter 15 proceedings must "cooperate on an international basis and ... give precedence to the [foreign] main proceeding." *Id.* at 570–71 (citing *In re Qimonda AG,* 2009 WL 4060083, at *2). Therefore, the district court remanded the case to the bankruptcy court so that it could be determined whether there had been a violation of fundamental U.S. public policies under § 1506. *Id.* at 571.

Upon remand, the bankruptcy court held that deferring to German law, to the extent that it would allow for the cancellation of U.S. patent licenses, would be manifestly contrary to U.S. public policy. *In re Qimonda AG,* 462 B.R. 165, 185 (Bankr.E.D.Va.2011). Although the bankruptcy court acknowledged that terminating the licenses would result in greater value to the debtor's estate, it found that interest to be outweighed by the risk to substantial investments by the licensees in research and manufacturing facilities in reliance on the design freedom provided by cross-licensing agreements. *Id.* at 182–83 (considering § 1522(a) of the U.S. Bankruptcy Code). With respect to the § 1506 analysis, procedural fairness was not the issue. *Id.* at 183. In fact, the objecting parties ***126** never argued that the German proceedings or German insolvency laws were procedurally unfair. *Id.* Instead, the analysis hinged on whether the application of German insolvency law would impinge on a "U.S. statutory or constitutional right such that deferring to German law would defeat the most fundamental policies and purposes of such rights." *Id.* at 184. The bankruptcy court expressed concern that terminating the licenses would result in uncertainty, which would lead to a slower pace of innovation to the detriment of the U.S. economy. *Id.* at 185. Specifically, the objecting parties argued that the uncertainty would discourage investments in research and development, as well as "construction of manufacturing facilities that are required in the ... industry." *Id.* In furtherance of that argument, all but one of the objecting parties offered Professor Jerry A. Hausman as an expert witness. *Id.* at 176, n. 9. He testified that eliminating the protection § 365(n) provides to licensees if the licensor files bankruptcy would impair innovation by creating uncertainty, which would ultimately impact investment decisions. *Id.* at 176. In fact, Professor Hausman posited that if § 365(n) was inapplicable then many innovative products, such as the iPhone, might have reached the market later. *Id.* at 185. Despite conflicting evidence, the bankruptcy court was persuaded by Professor Hausman's position. *Id.* According to the bankruptcy court, failing to apply § 365(n) to the facts of this case would result in uncertainty, which would ultimately impinge on the important statutory protection provided to licensees of U.S. patents. *Id.* Therefore, a separate order was entered "denying the foreign administrator's motion to amend the Supplemental Order and confirming that § 365(n) applies." *Id.*

In *In re Gold & Honey, Ltd.,* a bankruptcy court applied § 1506 and determined that recognition of an Israeli receivership proceeding as a foreign proceeding would be manifestly contrary to the public policy of the United States. 410 B.R. 357, 371 (Bankr.E.D.N.Y.2009). Gold & Honey, Ltd. ("GH Ltd.") and Gold & Honey (1995) L.P. ("GH LP") were debtors in non-consolidated Chapter 15 cases, as well as in administratively consolidated Chapter 11 proceedings, which were pending with the bankruptcy court before the Chapter 15 cases were filed. *Id.* at 360. In fact, the debtors filed their petitions for the Chapter 11 cases on September 23, 2008,[8] at which time § 362 of the Bankruptcy Code automatically stayed all litigation against GH Ltd. and GH LP.[9] Despite the filing of the Chapter 11 cases, First International Bank of Israel ("FIBI") continued to pursue its pending application for the appointment of a temporary receiver before an Israeli Court.[10] Ultimately, this fact led to the bankruptcy court's finding that § 1506 applied and that recognition of the foreign proceeding would be manifestly contrary to the public policy of the United States. Specifically, the bankruptcy court refused to recognize the foreign proceeding "because such recognition would reward ***127** and legitimize FIBI's violation of both the automatic stay and [its] Orders regarding the stay." *Id.* at 371.

In *In re Gold & Honey, Ltd.,* the debtors applied to the U.S. bankruptcy court for an order stating that the automatic stay applied to the debtors' "property wherever located and by whomever held" on October 3, 2008. *Id.* at 363. Agreeing with the debtors, on October 6, 2008, the bankruptcy court entered an Order stating the same. *Id.* Furthermore, the bankruptcy court "advised FIBI that if it proceeded before the Israeli Court in the Israeli Receivership Proceeding, it did so at its own peril." *Id.* (citation omitted). Nevertheless, FIBI continued its actions in the Israeli Receivership Proceeding. *Id.* at 364. Thereafter, the U.S. bankruptcy court's Order and the record of the October 6 Hearing were presented to the Israeli Court. *Id.* In the Israeli Court's decision, dated October 30, 2008, it determined that neither the automatic stay nor the U.S. bankruptcy court's Order should be given effect and that the Israeli Receivership Proceeding could continue irrespective of the debtors' chapter 11 cases. *Id.* On November 30, 2008, pursuant to FIBI's application in the Israeli Receivership Proceeding, the Israeli Court appointed receivers for GH Ltd. and GH LP. *Id.* The receivers filed petitions, in the Chapter 15 cases, for recognition of the Israeli Receivership Proceeding as foreign main proceedings of GH Ltd. and GH LP. *Id.* at 365.

The bankruptcy court denied the receivers' petitions for recognition of the Israeli Receivership Proceeding as a foreign proceeding, based on the public policy exception in § 1506. *Id.* at 371–73. First, it recognized, as does this Court, that "the legislative history of Section 1506 demonstrates that this exception should be applied narrowly" so that it is "invoked only when fundamental policies of the United States are at risk." *Id.* at 372 (citing *In re Iida,* 377 B.R. 243 (9th Cir. BAP 2007); *In re Atlas Shipping A/S,* 404 B.R. 726 (Bankr.S.D.N.Y.2009); *In re Ernst & Young, Inc.,* 383 B.R. 773, 781 (Bankr.D.Colo.2008) (citing H.R.REP. NO. 109–31(I) at 109 (2005), reprinted in U.S.C.C.A.N. 88, 172)). Next, it examined the cases relied upon by the receivers seeking recognition and distinguished them from the facts in *In re Gold & Honey, Ltd. Id.* For example, the bankruptcy court discussed *In re Ephedra Prods. Liab. Litig.*, and pointed out that the "United States District Court only approved the Ontario claims resolution procedure after the Ontario court adopted certain procedural changes requested by the United States court 'to assure greater clarity and procedural fairness.' " *In re Gold & Honey, Ltd.,* 410 B.R. at 371 (quoting *In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333, 334 (S.D.N.Y.2006)). Also, the *Gold & Honey* court noted that "jury trials in bankruptcy courts are quite rare and not typically invoked in a claims allowance process" whereas "allowing the offensive use of an automatic stay violation ... would severely impinge the value and import of the automatic stay." *Id.* The bankruptcy court reasoned that recognition of a "foreign seizure of a debtor's assets post-petition would severely hinder [our] bankruptcy courts' abilities to carry out two of the most fundamental policies and purposes of the automatic stay." *Id.* Additionally, "condoning FIBI's conduct ... would limit a federal court's jurisdiction over all of the debtors' property ... as any future creditor could follow FIBI's lead and violate the stay in order to procure assets that were outside the United States, yet still under the United States court's jurisdiction." *Id.* (citing 28 U.S.C. § 1334(e)).

***128** *In re Toft* is another published opinion where relief sought is denied based on the public policy exception in § 1506. 453 B.R. 186, 189 (Bankr.S.D.N.Y.2011). In *Toft* the bankruptcy court refused to recognize and enforce foreign orders, which would have permitted the foreign representative to access the debtor's email accounts stored on servers within the United States. *Id.* at 188–89. In the foreign proceeding, the foreign representative was granted a "Mail Interception Order"[11] in a German Court, and that order was later recognized and enforced by an *ex parte* order issued in an English Court. *Id.* at 188. The foreign representative argued that the U.S. bankruptcy court should "grant comity" based on §§ 1521, 1507 and 1519(a) of the Bankruptcy Code. Reviewing these statutes, among others,[12] the bankruptcy court found that "there is no doubt that the relief available under Chapter 15 ... should be consistent with the principle of comity." *Id.* at 189–90 (citing *In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685, 697 (Bankr.S.D.N.Y.2010)). In fact, it added that § 1507 expressly provides so "with respect to 'additional assistance,' and more broadly, § 1509(b)(3) directs that once a foreign representative obtains recognition, 'a court in the United States shall grant comity or cooperation to the foreign representative.' " *Id.* at 190. However, the bankruptcy court also found that "all relief under Chapter 15 is subject to the caveat in § 1506, providing the court with authority to deny the relief requested where such relief would be 'manifestly contrary to the public policy of the United States.' " *Id.* at 191 (citing 11 U.S.C. § 1506; *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333 (S.D.N.Y.2006)). In other words, the foreign representative could not force the bankruptcy court to apply foreign laws in the U.S. proceeding by merely "making an impassioned appeal to comity." *Id.*

In the *Toft* opinion, Judge Gropper provides a detailed discussion of the applicable case law before concluding that an order of recognition as requested would violate § 1506, including the cases discussed previously in this opinion.[13] Additionally, Judge Gropper analyzed *In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685, 697 (Bankr.S.D.N.Y.2010), in which a bankruptcy court determined that § 1506 did not bar enforcement of third-party releases that were part of a Canadian plan. *In re Toft,* 453 B.R. at 193–95. As does this Court, Judge Gropper recognized that "those courts that have considered the public policy exception codified in § 1506 have uniformly read it narrowly and applied it sparingly." *Id.* at 195. And that "foreign law need not be identical to U.S. law" in order to avoid violating § 1506, so it was not dispositive that U.S. law differed from German law. *Id.* at 198 (citations omitted). Ultimately, however, the court determined that "this is one of the rare cases that calls for its application" because "any *ex parte* recognition and enforcement of the Mail Interception Order would directly contravene the U.S. laws and public policies." *Id.* at 196. According to Judge Gropper, the question to be asked was ***129** "whether the German procedures [were] in accord with U.S. public policy," addressing:

i. the manner in which an order of recognition would be entered—without notice to the debtor—and

ii. the relief sought—that German procedures be given effect in this country regardless of the fact that they exceed traditional limits on the powers of a trustee in bankruptcy under U.S. law and constitute relief that is banned by statute in this country and might subject those who carried it out to criminal prosecution.

Id. Judge Gropper rejected the foreign representative's arguments because providing the relief sought "would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States." *Id.* Said differently, these particular German procedures were not in accordance with U.S. public policy; therefore, such relief "would impinge severely a U.S. constitutional or statutory right." *Id.* at 198 (citing *In re Qimonda AG Bankr. Litig.*, 433 B.R. at 570).

Objecting Parties' Arguments

The Objecting Parties have raised multiple objections to Vitro SAB's Enforcement Motion. The Objecting Parties contend the *Concurso* plan should not be enforced in the United States because (1) Vitro cannot meet its burden under section 1507(b); (2) enforcing the plan would violate the manifest public policy of the United States; and (3) Vitro has not met the requirements for issuing an injunction.

Section 1507(b)

The Objecting Parties assert that Vitro SAB cannot meet any of the section 1507(b) requirements to enforce the plan. The Objecting Parties contend the plan violates: (1) subsection (b)(1) by discriminating between foreign and non-foreign creditors; (2) subsection (b)(2) by protecting creditors from the inconvenience in the processing of claims in the foreign proceeding; (3) subsection (b)(3) by failing to reasonably assure the prevention of fraudulent transfers; and (4) violates subsection 1507(b)(4) by failing to distribute the proceeds of the estate in substantial accordance with the Bankruptcy Code.

Specifically, the Objecting Parties assert that the *Concurso* plan discriminates between foreign and non-foreign creditors by giving creditors with guaranties the same treatment as other unsecured creditors, by the "death trap" provision of the plan which penalizes the Objecting Parties, and by the allocation of value to creditors' claims in accordance with the face amount, not the total amount, of their claim. The Objecting Parties assert that the *Concurso* plan violates subsection 1507(b)(2) by treating the nondebtor guarantors as debtors, and by not providing an opportunity for creditors of the non-debtor guarantors to vote. The Objecting Parties also assert that the *Concurso* plan encourages fraudulent transfers; and that the *Concurso* plan does not distribute proceeds of the estate in accordance with Title 11 because the plan fails to follow the absolute priority rule under 11 U.S.C. § 1129, and because it grants equity interests substantially more than they would likely receive in a Chapter 11 bankruptcy.

In addition, the Objecting Parties urge the Court to invoke the § 1506 "public policy exception" by refusing to grant any action that is manifestly contrary to the public policy of the United States. The Objecting Parties contend enforcing the *Concurso* plan violates the public policies of (1) the absolute priority rule; (2) discharging ***130** non-debtor debts; (3) good faith dealing; (4) enforcement of negotiated instruments; (5) the prohibition of vote buying; and (6) violated many, if not all, of the protections afforded creditors under Title 11.

As part of their public policy argument, the Objecting Parties assert that enforcing the *Concurso* plan will erode the status of the United States as a financial center, harming the United States and other nations. The Objecting Parties argue refusing to protect creditors bargained for protections from foreign courts will signal to bond markets U.S. law does not protect creditor rights, harming banks. Finally, the Objecting Parties contend the plan will harm the Mexican economy by raising interest rates on Mexican companies.

The Objecting Parties further argue the Mexican process violated United States notions of an impartial and disinterested tribunal, based on the *Conciliador's* alleged financial interest and the *Conciliador's* accounting firm's relationship with Vitro SAB. The

Objecting Parties also believe a lack of transparency in the Mexican Proceeding violated due process. Additionally, the Objecting Parties contend several standing issues prevented them from receiving due process. The Objecting Parties allege the systemic corruption of the Mexican judiciary undermines confidence in the judiciary as a whole. In support of this corruption argument, the Objecting Parties cite reports by, among others, the U.S. State Department, United Nations, World Bank, Transparency International.

Conclusions by the Court

Having reviewed the evidence and considered the testimony of witnesses over four days, this Court believes that a portion of the *Concurso* plan should not be enforced as presented. However, the Court will first address certain of the Objecting Parties' arguments that must be overruled.

Overruled Objections

Corruption Argument

The Objecting Parties have argued that the judicial system in Mexico is corrupt and its rulings should not be respected by this Court. Their expert, Dr. Stephen D. Morris, who testified for the Objecting Parties on this point appeared to be a knowledgeable and qualified witness on corruption in Mexico generally, but the application of his studies to the Vitro proceedings was not persuasive. Further, the Objecting Parties' own Mexican counsel testified that in his forty years of practice he had not bribed an official. To date, this Court has not seen evidence that the Mexican Proceeding is the product of corruption, or that the LCM itself is a corrupt process.

Impact on the Credit Markets

The Objecting Parties offered the expert testimony of Dr. Elaine Buckberg, a former economist at the International Monetary Fund, who testified that confirmation of the *Concurso* plan will have an adverse impact on the financial markets in the United States. She testified credibly that approval of the *Concurso* plan in the United States will adversely impact the attractiveness of the United States to foreign issuers. Although Dr. Buckberg was a good witness and credible, she was unable to quantify the effect. For example, she could not testify as to the amount of any increase in rates for indentures for Mexican companies if the *Concurso* plan was enforced. For these reasons, the Court is unable to conclude that approval would have an adverse impact on credit markets.

Unfairness Argument

A number of the objections raised by the Objecting Parties fall under the ***131** category of general unfairness. For example, they emphasize that Vitro SAB had many *ex parte* meetings with the presiding judges. *Ex parte* contact with judges is apparently common in Mexico; in fact, the Objecting Parties' counsel had *ex parte* meetings of their own. And they say that the Mexican courts did not consider their objections. However, the changes made to the *Concurso* plan suggest that at least some of their concerns were addressed. In any event, such a complaint is better raised in Mexico in the appeal that has been filed. Finally, they complain that the *Conciliador* was not disinterested. Such argument is for the Mexican court system.

On the whole, this Court cannot conclude that the *Concurso* proceeding was unfair to the Objecting Parties.

Violations of Mexican Law and Process

The Objecting Parties have raised a number of objections concerning the process in Mexico. Those issues of Mexican law will have to be decided by the Mexican courts.

Meritorious Objections—Arguments That Preclude Enforcement

Third Party Releases

For the past year, this Court has expressed concerns regarding the most problematical part of the Mexican Proceeding, the extinguishment of claims held by the Objecting Parties against non-debtor subsidiaries, entities which did not avail themselves of protection in the Mexican Proceeding. *In re Vitro S.A.B. de C.V.,* 455 B.R. 571 (Bankr.N.D.Tex.2011). This Court expressed its views at that time that it had grave concerns about any plan in Mexico that would protect non-filing subsidiaries that guaranteed United States indentures. However, Vitro SAB proceeded with such a plan anyway.

Generally speaking, the policy of the United States is against discharge of claims for entities other than a debtor in an insolvency proceeding, absent extraordinary circumstances not present in this case. Such policy was expressed by Congress in Bankruptcy Code Section 524, and in numerous cases in this circuit. *See, e.g., Matter of Zale Corp.,* 62 F.3d 746 (5th Cir.1995). This protection of third party claims is described both in terms of jurisdiction and also as a policy. *See id.* at p. 102, n. 28.

The Fifth Circuit has largely foreclosed non-consensual non-debtor releases and permanent injunctions outside of the context of mass tort claims being channeled toward a specific pool of assets. *See In re Pacific Lumber Co.,* 584 F.3d 229, 252 (5th Cir.2009), rev'd on other grounds, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. ——, 132 S.Ct. 2065, 182 L.Ed.2d 967 (2012).

In its argument, Vitro SAB points to the *Metcalfe & Mansfield Alt. Invs.,* decision discussed above that enforced a Canadian Order that allowed for a limited third party release. 421 B.R. 685, 688. However, in *Metcalfe,* there was no question that the Canadian Proceedings should be recognized as a foreign main proceeding. Instead, the issue arose in enforcement of the Canadian Orders which contained a third-party nondebtor release and an injunction. *Id.*

The facts in *Metcalfe* differ from the facts in the present case. In *Metcalfe,* there was near unanimous approval of the plan by the creditors, who were not insiders of the debtor. Also, the plan was negotiated between the parties and there appears not to have been a timely objection to the order. Finally, the language of the opinion indicates that the release was not complete like the one in the present case.

***132** For three reasons the Enforcement Motion must be denied.

Section 1507

The *Concurso* Approval Order does not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11. *See* 11 U.S.C. § 1507(b)(4). Under a Chapter 11 plan, the noteholders would receive their distribution from the debtor and would be free to pursue their other obligors, in this case the non-debtor guarantors. The *Concurso* plan provides drastically different treatment in that the noteholders receive a fraction of the amounts owed under the indentures from Vitro SAB and their rights against the other obligors are cut off.

Section 1521

Second, the *Concurso* Approval Order neither sufficiently protects the interests of creditors in the United States, nor does it provide an appropriate balance between the interests of creditors and Vitro SAB and its non-debtor subsidiaries. One could argue that Vitro SAB, as a holding company, is trying to achieve, through its *Concurso* plan, an entrustment of the distribution of the assets of its non-debtor U.S. subsidiaries without sufficiently protecting the Objecting Creditors, pursuant to §§ 1521(b) and 1522(a).

Public Policy

The expression by Congress in § 524, paired with the case law in this Circuit, lead this Court to conclude that the protection of third party claims in a bankruptcy case is a fundamental policy of the United States. The *Concurso* Approval Order does not simply modify such claims against non-debtors, they are extinguished. As the *Concurso* plan does not recognize and protect such rights, the *Concurso* plan is manifestly contrary to such policy of the United States and cannot be enforced here.

Possible Meritorious Objections

As noted above, this Court sustains the Objecting Parties' primary objection, that the *Concurso* plan improperly released claims against non-debtors in violation of § 1507, 1521 and the public policy of the United States. However, there are two other strong objections that this Court notes for the appellate court, but does not reach, because the Court has sustained the objection to the release of the third party claims against the nondebtor subsidiaries.

Voting Irregularities

The noteholders have raised and submitted evidence of at least suspect voting on the *Concurso* plan. The Mexican court allowed insiders to vote and counted such votes, which swamped the noteholders' votes. *See* Testimony of Mr. Claudio del Valle. In fact, it is undisputed that Vitro issued bonds to insiders as a defense shortly before the *Concurso* plan was filed, and such votes were cast and counted. *Id.* Allowing insiders to vote, including the subsidiaries who voted to extinguish their own guarantees to the Objecting Parties, gives the Court pause. This argument, however, may be one of Mexican law, which should be decided by a court in Mexico.

Absolute Priority Rule

Under the *Concurso* plan, equity retains a value of approximately $500 million. Creditors, such as the Objecting Parties, are not paid in full. Such a plan would violate the absolute priority rule in the United States. By allowing the retention of equity, and, at the same time, not paying the Objecting Parties in full, the *Concurso* plan arguably runs afoul of § 1507 because the result is demonstrably different than would occur in Chapter 11.

The wide variance in return to creditors from what would be expected in a Chapter ***133** 11 plan in this country was the subject of testimony by Dr. Joseph W. Doherty, an expert put forth by the Objecting Creditors. His testimony was credible.

IV. Conclusion

Accordingly, this Court concludes that the *Concurso* plan approved in this instance, which extinguishes the guarantee claims of the Objecting Creditors that were given under an indenture issued in the United States against non-debtor entities that are subsidiaries of Vitro, should not be accorded comity to the extent it provides for the extinguishment of the non-debtor guarantees of the indentures. Such order manifestly contravenes the public policy of the United States and is also precluded from enforcement under §§ 1507, 1521 and 1522 of the Bankruptcy Code.

Generally, reorganization pursuant to the LCM is found to be a fair process, worthy of respect. In other and subsequent cases this Court would expect that *Concurso* decisions would be enforced in this country. However, if approved for enforcement, the present order would create precedent without any seeming bounds. The *Concurso* plan presently before the Court discharges the unsecured debt of non-debtor subsidiaries. What is to prevent this type of plan from eventually giving non-consensual releases to discharge the liabilities of officers, directors, and any other person?

Because of the importance of this case to the financial and legal community, the Court will stay its decision until June 29, 2012, at 5:00 p.m. Central Daylight Time, and will maintain the TRO for fourteen days to allow Vitro time to appeal and to seek a stay on appeal. Any further stay or extension of the TRO should be sought from the district court or court of appeals.

The Objecting Parties shall submit an order consistent with this decision within ten days from the date of entry of this opinion.

All Citations

473 B.R. 117, 56 Bankr.Ct.Dec. 183

Footnotes

1 *In re Vitro S.A.B. de C.V.,* 455 B.R. 571 (Bankr.N.D.Tex. June 24, 2011).

2 *Id.* at 583.

3 *See In re Vitro S.A.B. de C.V.,* No. 11–CV–3554–F (N.D. Tex. filed Dec. 23, 2011).

4 *See In re Vitro S.A.B. de C.V.,* 455 B.R. at 575–76.

5 A "foreign main proceeding" is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4).

6 *In re Basis Yield Alpha Fund (Master),* 381 B.R. 37, 45 n. 27 (Bankr.S.D.N.Y.2008).

7 *In re Tri–Cont'l Exch. Ltd.,* 349 B.R. 627, 638 (Bankr.E.D.Cal.2006).

8 *In re Gold & Honey, Ltd.,* 410 B.R. 357, 363 (Bankr.E.D.N.Y.2009).

9 This Court, like the bankruptcy court in *In re Qimonda AG Bankr. Litig.,* acknowledges that courts and commentators have disagreed about whether the § 362 automatic stay may be applied extraterritorially, but finds, nevertheless, that resolution of this question would not impact the import of *In re Gold & Honey* to the facts of *In re Qimonda AG Bankr. Litig. See* 433 B.R. 547, 570 n. 43 (Bankr.E.D.Va.2010) (citing *French v. Liebmann (In re French),* 320 B.R. 78, 81–83 (E.D.Va.2004)).

10 "In late July 2008, FIBI seized substantially all of GH Ltd. and GH LP's assets and accounts, and commenced the Israeli Receivership Proceeding." *In re Gold & Honey, Ltd.,* 410 B.R. at 362.

11 The Mail Interception Order permitted the foreign representative and administrator of the German estate, Prager, to intercept Toft's postal and electronic mail. *In re Toft,* 453 B.R. at 188.

12 The Court addressed the Wiretap Act and the Stored Communications Act, which are both subparts of the Electronic Communications Privacy Act (the "Privacy Act"). 18 U.S.C. § 2511, *et seq.*

13 *In re Qimonda AG Bankr. Litig.,* 433 B.R. 547 (E.D.Va.2010); *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333 (S.D.N.Y.2006); *In re Gold & Honey, Ltd.,* 410 B.R. 357 (Bankr.E.D.N.Y.2009).

Tab 22

See p. 9

453 B.R. 186
United States Bankruptcy Court,
S.D. New York.

In re Dr. Jürgen TOFT, Debtor in a Foreign Proceeding.

No. 11–11049 (ALG).
|
July 22, 2011.

Synopsis

Background: Foreign representative of debtor who was the subject of insolvency proceedings in Germany moved for order allowing him access to existing e-mails of debtor which were stored on servers of two internet service providers (ISPs) located in the United States, and for order in effect granting him a wire tap on debtor's future e-mails.

Holdings: The Bankruptcy Court, Allan L. Gropper, J., held that:

court had jurisdiction to consider foreign representative's request, notwithstanding that debtor had no tangible property or place of business located in the United States, but

request had to be denied as "manifestly contrary" to public policy of the United States.

Motion denied.

Attorneys and Law Firms

***188** Haynes and Boone, LLP, By: Judith Elkin, Esq., New York, NY, for Dr. Martin Prager, Insolvency Administrator in Germany for Dr. Jürgen Toft.

Tracy Hope Davis, By: Elizabetta Gasparini, Esq., New York, NY, for United States Trustee.

MEMORANDUM OF OPINION

ALLAN L. GROPPER, Bankruptcy Judge.

INTRODUCTION

The applicant, Dr. Martin Prager ("Prager" or the "Foreign Representative"), is the insolvency administrator in a proceeding in Germany regarding Dr. Jürgen Toft ("Toft" or "the Debtor"), an orthopedic surgeon who assertedly has debts exceeding 5.6 million euros ($7.6 million) owed to approximately 110 creditors. Prager initiated this chapter 15 proceeding for the purpose of gaining access to Toft's e-mail accounts stored on the servers of two internet service providers ("ISPs") located in the United

States. The Verified Petition states that the Debtor otherwise has no assets in the United States, is not a party to any lawsuits pending in the United States, and is not believed to be currently residing in the United States. Verified Petition at ¶ 8.

The German proceeding was initiated before the Munich District Insolvency Court (the "German Court") on June 10, 2010. It is represented that Toft refused to cooperate with the administrator and has in fact secreted his assets and relocated to an unknown country outside of Europe, possibly the Philippines. On July 8, 2010, in accordance with what is alleged to be common German practice, the German Court entered a "Mail Interception Order" authorizing Prager, as administrator of the German estate, to intercept Toft's postal and electronic mail.[1] Having received information that Toft might have relocated to London, Prager initiated a proceeding on January 28, 2011 in England. The English High Court of Justice issued an *ex parte* order (the "English Order") on February 16, 2011, which granted recognition and enforcement to the German Mail Interception Order.[2]

***189** The present motion has been filed publicly but requests *ex parte* relief in accordance with what is said to be German (and English) practice. No notice was provided to the Debtor, and it is requested no notice be required if relief is granted so that the Foreign Representative can continue to investigate the affairs of a debtor whose intransigence, obstructionism, and evasive tactics have allegedly thwarted the German insolvency proceeding. Prager requests that the Court recognize and "grant comity" to the orders of the German and English Courts and enter an order enforcing the Mail Interception Order in the United States by compelling the ISPs, AOL, Inc. and 1 & 1 Mail & Media, Inc., to disclose to Prager all of the Debtor's e-mails currently stored on their servers and to deliver to Prager copies of all e-mails received by the Debtor in the future. Prager contends that this relief is available after recognition of the German main proceeding under §§ 1521 and 1507 of the Bankruptcy Code, and that relief is also available prior to recognition under § 1519(a) of the Bankruptcy Code or alternatively under the power of the Court to recognize orders entered in a foreign proceeding.

A hearing was held on the motion on April 5, 2011, at the request of the Court, with the U.S. Trustee present and opposing the motion. Counsel for the Foreign Representative stated at the hearing that notice had been provided to the ISPs, but neither ISP was represented. In deciding this motion, it is assumed that the foreign proceedings are in conformity with German and English law in all relevant respects. There is also no question that German and English insolvency proceedings are ordinarily entitled to recognition in this country, and that Prager is an experienced and accomplished insolvency administrator. However, through this proceeding, Prager seeks in effect the undisclosed production of past e-mails as well as what can only be described as a wiretap of Toft's future e-mail correspondence.

A bankruptcy trustee would not be entitled to such relief under United States law, and a chapter 15 proceeding cannot ordinarily be pursued without notice to the debtor. The relief requested would also contravene the protection against disclosure of e-mails by internet service providers contained in the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701, *et seq.*, ("Privacy Act" or "Stored Communications Act"), and would appear to constitute an unlawful interception of electronic communications in transit under the Wiretap Act, 18 U.S.C. § 2511, *et seq.* Effectuation of the relief sought might subject the Foreign Representative, or his U.S. agents and possibly an ISP disclosing the debtor's e-mails, to U.S. criminal liability. For the reasons stated hereafter, this is one of the rare cases in which the relief sought by the Foreign Representative must be denied under § 1506 of the Bankruptcy Code as manifestly contrary to the public policy of the United States.

DISCUSSION

Chapter 15 of the Bankruptcy Code, which adopted the substance and most of the text of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross–Border Insolvency ("Model Law"), provides a comprehensive scheme for recognizing and giving effect to foreign insolvency proceedings. Chapter 15 contemplates a short and (in most cases) fairly simple petition ***190** for recognition. 11 U.S.C. § 1515. Where the foreign case is recognized as a foreign main proceeding,[3] certain relief goes into effect automatically. 11 U.S.C. § 1520. The Court thereafter has discretion to grant a foreign representative relief as provided in § 1521, which includes "the examination of witnesses, the taking of evidence or the delivery

of information concerning the debtor's assets, affairs, rights, obligations, or liabilities." 11 U.S.C. § 1521(a)(4). In addition to relief available after an order for recognition has been entered, the foreign representative may request preliminary relief under § 1519, in order to "protect the assets of the debtor or the interests of the creditors" pending the order of recognition. 11 U.S.C. § 1519(a). Section 1519(a)(3) specifically references § 1521(a)(4) as a form of relief available on a preliminary, emergency basis.

Section 1507 further provides that the Court is authorized to grant any "additional assistance" available under the Bankruptcy Code or under "other laws of the United States," provided that such assistance is consistent with the principles of comity and satisfies the fairness considerations set out in the statute.[4] The relationship between § 1507 and § 1521 is not entirely clear; one court has stated that such post-recognition assistance is "largely discretionary and turns on subjective factors that embody principles of comity." *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333 (S.D.N.Y.2008), *aff'g* 374 B.R. 122 (Bankr.S.D.N.Y.2007). In any event, there is no doubt that the relief available under chapter 15, and particularly additional assistance granted pursuant to § 1507, should be consistent with the principle of comity. *See In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685, 697 (Bankr.S.D.N.Y.2010). Section 1507 specifically so provides with respect to "additional assistance," and more broadly, § 1509(b)(3) directs that once a foreign representative obtains recognition, "a court in the United States shall grant comity or cooperation to the foreign representative."

Notwithstanding the direction that a U.S. court grant comity or cooperation to a recognized foreign representative in insolvency matters, it is also beyond question that, "The principle of comity has never meant categorical deference to foreign proceedings. It is implicit in the concept that deference should be withheld ***191** where appropriate to avoid the violation of the laws, public policies, or rights of the citizens of the United States." *In re Treco,* 240 F.3d 148, 157 (2d Cir.2001); *see also Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru,* 109 F.3d 850, 854 (2d Cir.1997); *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713 (2d Cir.1987); *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir.1985). Consistent with the traditional limits of comity, all relief under chapter 15 is subject to the caveat in § 1506, providing the court with authority to deny the relief requested where such relief would be "manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506; *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333 (S.D.N.Y.2006). The principal issue in this proceeding is whether the relief Prager seeks would be manifestly contrary to U.S. public policy.

The Foreign Representative states that the recognition of the German Mail Interception Order would not be contrary to U.S. public policy. He urges that it be given global effect and ratified in the United States based principally on the fairness of the German procedures and the principle of comity. There is authority that relief granted in a foreign insolvency case can be recognized and given effect in this country. *See In re Artimm, S.r.l.,* 278 B.R. 832, 843 (Bankr.C.D.Cal.2002). But Prager cannot cause this Court to apply the laws of Germany—or England—in proceedings in this country simply by making an impassioned appeal to comity. For one thing, foreign procedures are not routinely imported into U.S. law—disclosure here proceeds in accordance with U.S. practices and principles, and discovery is conducted in U.S. courts under our rules of civil procedure even when foreign litigants are involved. *See Societe Nat. Ind. Aerospatiale v. U.S. Dist. Court for S.D. Iowa,* 482 U.S. 522, 546, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).[5] More generally, courts have a compelling interest in applying the procedural rules of the forum regarding how proceedings are conducted. *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1156 (2d Cir.1986), *rev'd on other grounds,* 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987); *Adelphia Recovery Trust v. Bank of Am., N.A.,* 624 F.Supp.2d 292, 307 (S.D.N.Y.2009); *Restatement (Second), Conflict of Laws,* § 122 (comment a) (1971). Certainly, there are limits to the assistance that can be rendered to foreign proceedings, as recognized by the English courts despite their generous extension of comity in insolvency matters. As Lord Hoffmann stated in *Cambridge Gas Trans. Corp. v. Official Comm. Of Unsecured Creditors of Navigator Holdings plc,* [2006] UKPC 26 at ¶ 22 (Privy Council 2006), "it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system." The sweeping relief requested by the Foreign Representative is not incorporated into U.S. law merely because of the principle of comity and because it is available in his home jurisdiction.

In any event, consistent with the traditional limits of comity, there must be a sufficient basis for the exercise by a court ***192** of its jurisdiction, and the relief requested must not only be cognizable under U.S. law but not manifestly contrary to U.S. public

policy. For the reasons set forth hereafter, this Court has jurisdiction respecting the relief Prager seeks, but the relief must be denied, on public policy grounds.

I. Jurisdiction

The Bankruptcy Court has subject matter jurisdiction over matters that arise under chapter 15 as core proceedings under 28 U.S.C. §§ 1334 and 157(b)(2)(P). The German court has jurisdiction over Toft as a German citizen with assets and creditors there, and the English court understood Toft to have been physically present in England and/or in possession of assets there at the time it granted relief. The petition indicates that Toft's only connection with the United States is the apparently fortuitous storage of his e-mails on servers operated by ISPs located in this country. The petition seemingly concedes that Toft does not have contacts with the United States sufficient to allow the exercise of *in personam* jurisdiction, *see Int'l Shoe Co. v. State of Wash.,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and he has no tangible property in the United States over which this Court could exercise traditional *in rem* jurisdiction. The Foreign Representative admits that the foreign debtor does not have a place of business or assets in the United States or a lawsuit pending against him in a federal or state court, but he nonetheless argues that jurisdiction exists to consider this proceeding, particularly as it is "consistent with the interests of justice and convenience of the parties" in the United States, namely the ISPs. Verified Petition, ¶ 7, Dkt. No. 2.

The absence of tangible property or a place of business of a debtor in the United States is not fatal to a case under chapter 15, designed as it is to provide assistance to a foreign proceeding. *See* 11 U.S.C. § 1501(b)(1). Chapter 15 cases begin as ancillary proceedings, in which recognition is sought under § 1504, even when a plenary proceeding may later be brought under a different chapter through § 1511. Section 1528 specifically provides that the foreign debtor must have assets in the United States in order for a plenary case under another chapter to be initiated, leading to the conclusion that the statute contemplates the commencement of a chapter 15 case even where there are no assets of the debtor in the United States.

Prior to the adoption of chapter 15, it was also held that the bankruptcy courts had jurisdiction under § 304 of the Bankruptcy Code to order the examination of witnesses for the purpose of investigating the affairs of a foreign debtor, even where the foreign debtor had no business or assets in the United States.[6] In *In re Gee,* 53 B.R. 891 (Bankr.S.D.N.Y.1985), the receiver in a Cayman Islands insolvency proceeding brought a petition under § 304 to obtain discovery in the United States regarding the affairs of a business debtor that admittedly held no property in the United States. The Court granted the relief requested, reasoning that although the traditional basis for bankruptcy jurisdiction is *in rem,* jurisdiction also exists under the Bankruptcy Code over debtors who have no property at all. The broad statutory authority to grant "other appropriate relief" as assistance to a foreign proceeding under § 304(b)(2) was held to be a sufficient basis for the court's exercise of jurisdiction. *Id.* at 899; *see also* ***193** *Cunard S.S. Co. v. Salen Reefer Servs. AB,* 773 F.2d at 455, citing *Angulo v. Kedzep, Ltd.,* 29 B.R. 417, 419 (S.D.Tex.1983); *In re Hughes,* 281 B.R. 224 (Bankr.S.D.N.Y.2002); *In re Petition of Brierley,* 145 B.R. 151, 170 (Bankr.S.D.N.Y.1992).

Chapter 15 is more explicit than § 304 in that it specifically provides that a foreign representative can request discovery in aid of a foreign proceeding. *See* 11 U.S.C. § 1521(a)(4), authorizing discovery after entry of an order of recognition, and § 1519(a)(3), which provides for such relief on an interim, emergency basis pending an order of recognition. The eligibility standards in § 109 for filings under the various chapters of the Bankruptcy Code do not require that a debtor in a foreign proceeding have a place of business or property in the United States. *See also* § 1502(1), defining debtor in a chapter 15 case as "the subject of a foreign proceeding." There is no authority that the adoption of chapter 15 was intended to abrogate the availability of the tools of discovery to foreign representatives, whether or not the foreign debtor has assets in the United States. Based on the plain text of the statute, this Court has jurisdiction over this application for disclosure in connection with Prager's investigation of the Debtor's affairs.

II. Public Policy Exception of Section 1506

Although chapter 15 creates a process for obtaining discovery in the United States in aid of a foreign insolvency proceeding and promotes the extension of comity to recognized foreign proceedings, relief is not granted if it would be "manifestly contrary" to the public policy of this country. As noted above, public policy is an integral limitation on a court's authority to grant comity

to foreign courts and foreign proceedings, and it is codified in § 1506 of the Bankruptcy Code, which provides that "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."

The public policy exception is clearly drafted in narrow terms, as the action must be "manifestly contrary" to the public policy of the United States. The few reported cases that have analyzed § 1506 at length recognize that it is to be applied sparingly, and they merit extended analysis. In the first such case, *In re Ephedra Prods. Liability Litig.,* 349 B.R. 333 (S.D.N.Y.2006), the representative of a foreign main proceeding in Canada sought enforcement of a Canadian Claims Resolution Procedure included in a reorganization scheme in an insolvency case pending in Canada under the Companies' Creditors Arrangement Act. The U.S. District Court had earlier expressed concerned about the Canadian procedures, in that the claims officer had been entitled to refuse to receive evidence and provide parties with an opportunity to be heard. These due process deficiencies had, however, been cured, and the *Ephedra* decision considered only whether the Canadian procedures were contrary to U.S. public policy because they denied claimants the right to a jury trial.

The *Ephedra* court looked to the words of the statute as well as the UNCITRAL Guide to Enactment to the Model Law. United Nations General Assembly, Guide to Enactment of the UNCITRAL Model Law on Cross–Border Insolvency ("the Guide to Enactment"), U.N. Doc A/CN.9/442 (1997).[7] Guide to Enactment ¶¶ 86–89. The Guide recognizes that public ***194** policy differs from nation to nation and thus that—as applicable to this case—the public policy of the United States may differ from that of Germany. The Guide to Enactment further recognizes that in some nations "the expression 'public policy' may be given a broad meaning in that it might relate in principle to any mandatory rule of national law." However, it continues by observing that in many states the public policy exception "is construed as being restricted to fundamental principles of law, in particular constitutional guarantees," and it notes that the purpose of the use of the word "manifestly" is "to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State." *Id.*

Quoting this language, the *Ephedra* court held that the term "manifestly contrary to public policy" was to be invoked only under "exceptional circumstances concerning matters of fundamental importance." It found that foreign judgments are generally granted comity as long as the proceedings in the foreign court "are according to the course of a civilized jurisprudence, *i.e.* fair and impartial." *Ephedra* at 336, citing and quoting the seminal case on comity, *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). The *Ephedra* court also relied on *Ackermann v. Levine,* 788 F.2d 830 (2d Cir.1986), where "the Second Circuit expressly reaffirmed '[t]he narrowness of the public policy exception to enforcement [of foreign judgments].' " The Court in *Ephedra* concluded that because U.S. courts have generally enforced foreign judgments without regard to whether a jury was available, abrogation of the right to a jury trial connection with the liquidation of claims in a foreign insolvency proceeding does not provide a basis to refuse enforcement of a foreign claims procedure under § 1506.

In *In re Metcalfe & Mansfield Alt. Invs.,* 421 B.R. 685 (Bankr.S.D.N.Y.2010), the Court again reached the § 1506 public policy exception in deciding whether to grant comity to a Canadian plan of arrangement that included third-party releases that arguably could not be granted in a U.S. bankruptcy proceeding. It held, "The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness," and it concluded that § 1506 did not bar enforcement of the third-party releases because the Canadian court had statutory authority to grant such relief, the question of the Canadian court's jurisdiction had been fully litigated and carefully considered in Canada, including on appeal, and "the procedures used in Canada meet our fundamental standards of fairness." *Id.* at 697.

In the case of *In re Gold & Honey, Ltd.,* 410 B.R. 357, 371 (Bankr.E.D.N.Y.2009), the public policy exception of § 1506 was not at issue in connection with an application for enforcement of a foreign plan or scheme of reorganization—arguably when a request for comity is particularly compelling. It arose in connection with a chapter 15 petition for recognition brought by receivers who were appointed in Israel after the commencement of a U.S. chapter 11 case involving the same debtor. The creditor who commenced the receivership in Israel had appeared in the U.S. case and continued to prosecute its application in Israel despite a finding by the U.S. court that the automatic stay of § 362 of the Bankruptcy Code prohibited such action without an

order granting relief from the stay. *Id.* at 364. The U.S. court refused to recognize the foreign proceeding on several grounds, including the public policy exception of § 1506, holding that recognition ***195** of the Israeli proceeding would amount to a reward for an end-run around the automatic stay.[8]

In the final case in which § 1506 has been subjected to extensive analysis, *In re Qimonda AG Bankr. Litig.,* 433 B.R. 547 (E.D.Va.2010), the District Court reviewed the cases discussed above and adopted a three-point test for analyzing the public policy exception. It stated, first, that the public policy exception is only implicated in cases where there is a conflict between foreign law and U.S. law or where there is procedural unfairness in the foreign proceeding. *Id.* at 568. If § 1506 is implicated by a conflict of laws, the court should examine whether the foreign proceeding provided adequate protection to the procedural rights of the parties. *Id.* at 570. If a conflict of laws exists but the procedural fairness of the foreign proceeding is not at issue, then the Court should examine the extent to which taking the requested action under chapter 15 "would frustrate a U.S. court's ability to administer the Chapter 15 proceeding and/or would impinge severely a U.S. constitutional or statutory right, particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding." *Id.*[9]

Based on the foregoing cases, those courts that have considered the public policy exception codified in § 1506 have uniformly read it narrowly and applied it sparingly, consistent with the statutory command that the action in question be "manifestly" contrary to U.S. public policy.[10] Sparing application of the provision would also indicate that the public policy exception should ordinarily be resorted to only if another, more specific provision of chapter 15 does not govern the dispute, consistent with the principle that more specific statutory provisions usually prevail ***196** over general provisions. *See Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 170, 127 S.Ct. 2339, 168 L.Ed.2d 54 (2007); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384–85, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). For example, a court can grant discretionary relief in a chapter 15 case "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a).[11] Similarly, under 11 U.S.C. § 1521(b), U.S. assets may be entrusted to a foreign representative for administration in the foreign case only if the court is satisfied that "the interests of creditors in the United States are sufficiently protected." In many cases, these provisions would appear adequate to resolve a dispute arising from a conflict between U.S. and foreign law, and the public policy exception would not have to be invoked. It also appears patent that relief should not be granted or denied in a cross-border case where there is a conflict between U.S. and foreign law without a conflict of law analysis—*i.e.,* should U.S. or foreign law be applied to a particular issue based on familiar choice of law principles coupled with (where appropriate) due regard for the principle of comity. *See In re Maxwell Commc'n Corp.,* 93 F.3d 1036, 1047 (2d. Cir.1996).

Notwithstanding that § 1506 is to be narrowly construed and should be applied only where another, more specific limitation in the statute does not govern, this is one of the rare cases that calls for its application. In this case, the issue is not one of fashioning relief in a manner that "sufficiently protects" all interested parties, as any *ex parte* recognition and enforcement of the Mail Interception Order would directly contravene the U.S. laws and public policies analyzed herein. Similarly, it cannot simply be concluded on application of traditional conflict of law principles that Germany would have the primary interest in the resolution of the present matter, as the question is whether the German procedures are in accord with U.S. public policy. The public policy issue must be squarely faced with respect to (i) the manner in which an order of recognition would be entered —without notice to the Debtor—and (ii) the relief sought—that German procedures be given effect in this country regardless of the fact that they exceed traditional limits on the powers of a trustee in bankruptcy under U.S. law and constitute relief that is banned by statute in this country and might subject those who carried it out to criminal prosecution. In anticipation of the problematic nature of the relief sought, the Court requested that the Foreign Representative submit supplemental briefing on the availability of an order similar to the Mail Interception Order under U.S. law. Finding the Foreign Representative's arguments unavailing, the Court denies the relief as manifestly contrary to U.S. public policy. We start with U.S. privacy legislation.

a. *Electronic Communications Privacy in the United States*

Electronic communications privacy is subject to comprehensive statutory protection ***197** in the United States under (i) the Wiretap Act, 18 U.S.C. § 2511, *et seq.,* and (ii) the Privacy Act, 18 U.S.C. § 2701, *et seq.* Under the Wiretap Act, civil and criminal penalties can be imposed on any person who "intentionally intercepts ... any wire, oral, or electronic communication."

18 U.S.C. § 2511(1)(a). A warrant issued in the course of a criminal investigation upon a heightened showing of necessity is required in order to conduct a wiretap lawfully without the consent of one of the parties to the communication. 18 U.S.C. § 2518. Courts that have applied the provisions of the Wiretap Act to e-mails have held that the clandestine interception of e-mails of an individual, occurring contemporaneously with delivery, constitutes an illegal wiretap. *See United States v. Councilman,* 418 F.3d 67, 80 (1st Cir.2005) (holding that for purposes of the Wiretap Act, e-mails can be considered "electronic communications," and the secret redirection of e-mails interception); *see also Pure Power Boot Camp v. Warrior Fitness Boot Camp,* 587 F.Supp.2d 548 (S.D.N.Y.2008). The Foreign Representative argues that the inspection of e-mails is not a wiretap because the e-mails are inspected after their delivery and not while in transit, but no authority has been provided to support this narrow construction of the Wiretap Act.

In any event, once an e-mail has been delivered, unauthorized access to the contents of the communication is governed by the Stored Communications Act, 18 U.S.C. § 2701, *et seq.,* which is part of the Electronic Communications Privacy Act ("Privacy Act"). *See Pure Power Boot Camp,* 587 F.Supp.2d at 555. The Privacy Act, which is intended to prevent third parties from "obtaining, altering, or destroying certain stored electronic communications," imposes criminal and civil penalties when a person "accesses an electronic communication service, or obtains an electronic communication while it is still in storage, without authorization." *Id.* at 555. The contents of e-mail communications may be released by an ISP only under the specifically enumerated exceptions found in §§ 2702 and 2703 of the Privacy Act. Those exceptions require a search warrant issued under the Federal Rules of Criminal Procedure or a subpoena issued in the course of a criminal investigation.[12] *In re Subpoena Duces Tecum to AOL, LLC,* 550 F.Supp.2d 606, 611 (E.D.Va.2008), *citing F.T.C. v. Netscape Commc'n Corp.,* 196 F.R.D. 559 (N.D.Cal.2000) (discovery of e-mails from ISP not available under Fed.R.Civ.P. 45). Indeed, one court has held that the disclosure procedures under the Privacy Act are unconstitutional to the extent they permit warrantless searches of e-mails, because a reasonable expectation of privacy exists and e-mails are subject to the Fourth Amendment's protection from warrantless searches and seizures. *See United States v. Warshak,* 631 F.3d 266, 288 (6th Cir.2010). In this case, the Court does not reach any Fourth Amendment issue—among other things, it is unclear whether the Debtor, a foreign national not located in the United States, would be entitled to claim the protections of the ***198** Fourth Amendment. *See United States v. Verdugo–Urquidez,* 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Nevertheless, without regard to the Debtor's constitutional rights under the Fourth Amendment, the Privacy Act has been held to apply irrespective of the foreign nationality of the account holder. *See In re § 2703(d) Order,* 2011 WL 900120, at *7 (E.D.Va. March 11, 2011) (application of 18 U.S.C. § 2703(d) to foreign users involved in WikiLeaks investigation not an extraterritorial application of U.S. law because statute governs disclosure by the American service provider).

The fact that U.S. law differs from German law with respect to the disclosure of e-mail communications does by itself not mean that the relief sought by the Foreign Representative is manifestly contrary to U.S. public policy. As many cases have held, foreign law need not be identical to U.S. law. *See, e.g. In re Treco,* 240 F.3d at 158; *Ephedra,* 349 B.R. at 336–37; *In re Metcalfe & Mansfield,* 421 B.R. at 698–99; *cf. In re Garcia Avila,* 296 B.R. 95, 109 (Bankr.S.D.N.Y.2003); *In re Board of Directors of Multicanal S.A.,* 307 B.R. 384, 391 (Bankr.S.D.N.Y.2004). Here, however, the relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States.[13] Such relief "would impinge severely a U.S. constitutional or statutory right." *Qimonda,* 433 B.R. at 570.

Moreover, as discussed below, the powers that the Foreign Representative is seeking to exercise in this country go far beyond the powers that have traditionally been afforded to a U.S. estate representative.

b. *Power of an Estate Representative Under U.S. Law*

The Foreign Representative argues that the Mail Interception Order can be approved, as not manifestly contrary to public policy, because the relief requested would be within the usual powers of a U.S. estate administrator, resembling an examination under

Bankruptcy Rule 2004 or a mail redirection order of a type that has been authorized in bankruptcy cases. However, there is no basis to conclude that a U.S. bankruptcy trustee could use the procedures available under the Privacy Act; a trustee in bankruptcy is not entitled to a search warrant under the Federal Rules of Criminal Procedure because he is "neither a federal 'law enforcement officer' nor an 'attorney for the government' " as required by Fed.R.Crim.P. 41(a). *Application of Trustee in Bankruptcy for a Search Warrant,* 173 B.R. 341 (N.D.Ohio 1994). Nor is there any authority for the proposition that a trustee in bankruptcy can conduct a criminal investigation.

The Foreign Representative is correct that an examination under Bankruptcy Rule 2004 may be commenced by an *ex parte* motion. *See e.g. In re Riverside–Linden Inv. Co.,* 99 B.R. 439 (9th Cir.BAP 1989); *In re Metiom, Inc.,* 318 B.R. 263, 268 (S.D.N.Y.2004). However, once an order is entered authorizing a Rule 2004 examination, the proceeding does not remain secret, as the debtor has ***199** knowledge that a bankruptcy case is pending and access to the public docket. Moreover, civil discovery proceeds by way of the examination of witnesses and production of documents through typical discovery devices, which require notice. *See* Federal Rules of Bankruptcy Procedure 2002, 7026–7037, 9014, 9016.

In any event, as stated above, the civil discovery available in the course of a Rule 2004 examination, such as a subpoena *duces tecum* from this Court, could not compel an ISP to produce a subscriber's e-mails. *See In re Subpoena Duces Tecum to AOL, LLC,* 550 F.Supp.2d at 611. Moreover, there is authority that any subpoena issued to obtain production of e-mail correspondence would properly be directed at Toft, rather than the ISPs alone. *See Flagg v. City of Detroit,* 252 F.R.D. 346, 366 (E.D.Mich.2008) (third-party subpoena against internet service provider problematic in light of the restrictions imposed by the Privacy Act, 18 U.S.C. § 2702(a); proper request for documents should be directed at the party whose consent would be required for lawful disclosure under the statute).

In asking the Court to issue an order compelling disclosure of e-mails based solely on its equitable powers and the alleged intransigence of the Debtor, the Foreign Representative contends that some courts have issued *ex parte* orders providing for a trustee to perform an inspection of the debtor's residence. There appear to be only two reported cases which have granted this relief under the Bankruptcy Code, and in both cases the debtor or a family member was aware of the proceedings and present at the time of the inspection. *In re Bursztyn,* 366 B.R. 353 (Bankr.D.N.J.2007); *In re Barman,* 252 B.R. 403 (Bankr.E.D.Mich.2000).[14] By contrast, the Foreign Representative has requested access to the Debtor's e-mails under conditions of total secrecy and by way of a wiretap that is prohibited by statute. In any event, inspection orders have been criticized for their impact on privacy rights and the protections of the Fourth Amendment to the U.S. Constitution. A. Mechele Dickerson, *Using Criminal Law Remedies to Unearth Hidden Assets,* 10 J. Bankr.L. & Prac. 541 (2001).

Nor does the requested relief resemble an order permitting the redirection of the mail of an individual debtor engaged in business. Bankruptcy trustees have been authorized to intercept the mail of a debtor engaged in business so that they can operate the business and investigate the debtor's financial affairs, but the reported cases under the Bankruptcy Code require notice and measures to protect postal secrecy with respect to debtors who are individuals. For example, *In re Benny,* 29 B.R. 754 (N.D.Cal.1983), was a Chapter 7 case in which the debtor objected after discovering that the trustee had induced the post office to redirect all mail from his business and his residence without notice to him and without prior court approval. *Id.* at 757. The Court held that the trustee's action was inappropriate in light of ***200** the intrusion into personal and possibly privileged communications, and said that although the trustee's powers under 11 U.S.C. § 704 include authority to seize and control business-related mail of the debtor, the trustee did not have the authority to redirect the mail of an individual debtor, whether business or personal, without notice to the debtor and an opportunity to object. *Id.* at 760–62. Similarly, in *In re Crabtree,* 37 B.R. 426, 427 (Bankr.E.D.Tenn.1984), an involuntary case, the trustee sought an order redirecting mail addressed to the individual debtor after the debtor refused to disclose his assets and liabilities. After an objection from the debtor, the *Crabtree* court ordered that a neutral third party maintain a record of the mail received and provide the debtor any mail that appeared to be personal or privileged. *Id.* at 429.[15]

In both *Benny* and *Crabtree,* the courts imposed limits upon the trustee's authority to redirect a debtor's mail, especially with respect to privileged or private communications unrelated to the bankruptcy proceeding, and they recognized the debtor's right

to have notice of the proceedings and an opportunity to object. By contrast, the relief sought by the Foreign Representative goes much further and requests unfettered access to all communications received by the Debtor at the specified e-mail addresses, both past and future. The Foreign Representative admits that the Debtor may receive privileged communications that would need to be screened, and he states that "nothing contained in such mail will be used to support any motions before any court." Motion at ¶ 32. Although procedures could potentially be put in place to protect against disclosure of privileged communications, these procedures would not be sufficient to justify the relief sought herein.

c. *Notice*

In addition to requesting authorization to secretly intercept Toft's e-mails, the Foreign Representative asks that the Court refrain from providing the foreign debtor any notice of this chapter 15 proceeding, to keep confidential the investigation of the Debtor's affairs and preserve the possibility of collecting useful information from the Debtor's ongoing use of the e-mail addresses in question. This relief, too, would be contrary to U.S. law. Under Bankruptcy Rule 2002(q)(1) the Court is directed to provide notice of a petition for recognition under chapter 15 to the debtor, parties against whom provisional relief is sought under § 1519, and other parties in interest. Although the Debtor's whereabouts are unknown at this time, it would appear that a first step in providing notice would be to send an e-mail to the addresses that are to be investigated.

As discussed above, every substantive rule of U.S. law need not be followed in a chapter 15 ancillary proceeding. However, since Bankruptcy Rule 2002(q) was specifically designed for use in chapter 15 cases, it would presumably be a rare case in which its requirements could be disregarded—if they ever could be. In light of the conclusions set forth above that the relief sought by the Foreign Representative is manifestly contrary to U.S. public policy, this is not such a case.

*201 CONCLUSION

This is one of the rare cases in which an order of recognition on the terms requested would be manifestly contrary to U.S. public policy, reflected in rights that are based on fundamental principles of protecting the secrecy of electronic communications, limiting the powers of an estate representative, and providing notice to parties whose rights are affected by a court order. The motion of the Foreign Representative for *ex parte* relief is therefore denied. This is without prejudice to the right of the Foreign Representative to seek recognition of the German proceeding as a foreign main proceeding after providing notice pursuant to Bankruptcy Rule 2002(q) and without prejudice to the grant of other appropriate relief consistent with U.S. public policy thereafter.

IT IS SO ORDERED.

All Citations

453 B.R. 186, 66 Collier Bankr.Cas.2d 323, 55 Bankr.Ct.Dec. 61

Footnotes

1 Declaration of Foreign Representative, Ex. A and Ex. A–12, Dkt. No. 3. According to Prager, an application to extend the effect of the Mail Interception Order was granted on July 21, 2010, and an application by Toft to set aside the Mail Interception Order was rejected by the German Court. *Id.*

2 Supplemental Brief of the Foreign Representative, Ex. A, Dkt. No. 6. It appears that the English court held that the relief granted in Germany did not violate English public policy because, under § 371 of the English Insolvency Act of 1986, the Court could enter a mail redirection order similar to the one entered in Germany. *See* Supp. Brief of the Foreign Representative, ¶¶ 8–12 and Ex. A; English Order at ¶ 20–23, *citing* Case C–444/07, *MG Probud Gdynia sp. z o.o.,* ¶ 30–34, 2010 E.C.R. 00. The English court also held that there should be no concern about lack of procedural fairness in granting *ex parte* relief, because the Debtor had been able to oppose the Mail Interception Order in the German proceeding, and his challenge was rejected by the German Court.

3 A "foreign main proceeding" is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). The Foreign Representative asserts that as to Toft, the proceeding in Germany is a foreign main proceeding and the proceeding in England is a foreign nonmain proceeding. The statute defines a "foreign nonmain proceeding" as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5).

4 Section 1507(b) sets forth several factors for the Court to consider: "whether such additional assistance, consistent with the principles of comity, will reasonably assure—(1) just treatment of all holders of claims against or interests in the debtor's property; (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (3) prevention of preferential or fraudulent dispositions of property of the debtor; (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns." These are five of the six factors that a court was directed to consider in determining whether to grant relief under former § 304 of the Bankruptcy Code, which was repealed when chapter 15 was adopted. The sixth factor was comity.

5 Discovery in aid of foreign litigation is also available in accordance with U.S. practice pursuant to 28 U.S.C. § 1782(a), which provides, in part "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a). Section 1782 has been used in connection with insolvency cases. *See Lancaster Factoring Co. Ltd. v. Mangone,* 90 F.3d 38, 39–43 (2d Cir.1996) (discovery at request of foreign trustee for use in Italian bankruptcy case).

6 Section 304, which was repealed when chapter 15 was adopted in 2005, also provided for ancillary proceedings to recognize and give effect to a foreign insolvency proceeding.

7 Article 6 of the UNCITRAL Model Law is virtually identical to 11 U.S.C. § 1506 and served as its model.

8 Interestingly, the Court nevertheless did grant the secured creditor, on whose behalf the Israeli receivers were acting, prospective relief from the automatic stay, and it held that it would abstain from hearing any issues relating to the U.S. debtor's property in Israel. 410 B.R. at 373. The Court accordingly afforded the Israeli receivers much of the relief to which they would have been entitled after recognition. *See* 11 U.S.C. § 1528.

9 There are several additional cases in which the courts have refused to find that certain requested relief would constitute action manifestly contrary to U.S. public policy but in which the provision was not analyzed extensively. *See e.g. In re Fairfield Sentry Ltd.,* 2011 WL 1998374 (Bankr.S.D.N.Y. May 23, 2011); *In re British Am. Isle of Venice (BVI), Ltd.,* 441 B.R. 713 (Bankr.S.D.Fla.2010).

10 It has also been given a narrow reading in the construction of the cross-border insolvency laws of other countries. (Under § 1508 of the Bankruptcy Code, the provisions of chapter 15 are to be interpreted in a manner that promotes consistency with foreign application of similar laws. 11 U.S.C. § 1508.) Although there does not appear to be any extensive analysis of Article 6 of the Model Law, English courts have recognized that the enactment in that country of the Cross–Border Insolvency Regulations, 2006, included the adoption of the public policy exception of Article 6. *Samsun Logix Corp. v. DEF,* [2009] EWCH 576(Ch) at ¶ 4. In addition, the European Insolvency Regulation, which served in some respects as a model for the UNCITRAL Model Law, *see In re Tri–Continental Exchange Ltd.,* 349 B.R. 627, 633–34 (Bankr.E.D.Cal.2006), has a similar public policy exception that permits a member state to refuse to enforce a judgment in an insolvency proceeding if "enforcement would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual." Council Regulation (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings, Art. 25(3) and 26, 2000 O.J. (L 160) 1; *see* Case C–444/07, *MG Probud Gdynia sp. z o.o.,* ¶ 30–34, 2010 E.C.R. 00; *see also* Case C341/04, *Eurofood IFSC* [2006] E.C.R. I–3813, ¶ 28. In both cases under the European Insolvency Regulation, the public policy exception was sparingly applied, with the decision emphasizing the narrow scope of the statutory exclusion.

11 The term "sufficiently protected", which appears in § 1522, is not defined by the statute but has been construed by one court to mean that a court should tailor relief balancing the interests of the foreign representative and those affected by the relief. *In re Tri–Continental Exchange Ltd.,* 349 B.R. 627, 637 (Bankr.E.D.Cal.2006). Chapter 15 uses the term, "sufficiently protected" instead of the term used in the Model law, "adequately protected," and the U.S. legislative history makes clear that the change was made so as "to avoid confusion with a very specialized legal term in United States bankruptcy, 'adequate protection.' " H.R. Rep. No. 109–31, Pt. 1, 109th Cong., 1st Sess. 116 (2005), U.S. Code Cong. & Admin.News 2005, pp. 88, 178.

12 E-mails which are less than 180 days old may only be disclosed to a governmental entity pursuant to a valid warrant issued pursuant to the Federal Rules of Criminal Procedure. 18 U.S.C. § 2703(a). A warrant is also required in all instances when the contents of electronic communications are requested without notice to the subscriber. 18 U.S.C. § 2703(b)(1)(A). After notice to the subscriber, a court order under § 2703(d) may be used to compel disclosure, but such an order "shall issue only if ... the records ... are relevant

and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). A subscriber may challenge disclosure under 18 U.S.C. § 2704(b) within fourteen days of receiving notice.

13 For a list of states with constitutional provisions specifically protecting the right to privacy, *see* Privacy Protections in State Constitutions, National Conference of State Legislatures, http://www. ncsl.org/default.aspx?tabid=13467.

14 The Court in *In re Bursztyn* issued an order granting the bankruptcy trustee *ex parte* relief by authorizing entry into and inspection of the debtor's residence to search, seize, and appraise estate property. *In re Bursztyn,* 366 B.R. at 361–62. However, the trustee personally served the order upon the debtor at her residence. *Id.* at 361. The Court in *In re Barman* also issued an order to allow the bankruptcy trustee to inspect the debtor's property without prior disclosure to the debtor, who had a history of violating court orders and obstructing the litigation process, so that a full and candid disclosure of assets could be made. *In re Barman,* 252 B.R. at 410. However, the debtor's attorney was notified by fax on the morning of the search, and the debtor's wife consented to the search after consulting with her attorney. *Id.* at 411.

15 It is also worth noting that one of the reasons the *Crabtree* court authorized the mail redirection was that the business correspondence of a debtor usually contains checks in payment of the accounts receivable of the business, which are property of the estate. There is no such issue in this case, as the e-mails are sought solely for the purpose of obtaining information on Toft's assets and whereabouts, not in order to intercept payments that he might wrongfully convert.

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Tab 23

See p. 2

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Toft, Bankr.S.D.N.Y., July 22, 2011

349 B.R. 333
United States District Court,
S.D. New York.

In re EPHEDRA PRODUCTS LIABILITY LITIGATION. In re Muscletech Research and Development Inc., et al.; Foreign Applicants in Foreign Proceedings. In re RSM Richter Inc., as Foreign Representative of Muscletech Research and Development Inc. and Its Subsidiaries, Plaintiff, v. Sharon Aguilar, an individual; et al., Defendants.

Nos. 04 MD 1598(JSR), 06 Civ. 538(JSR), 06 Civ. 539(JSR).
|
Aug. 11, 2006.

Synopsis
Background: In multi-district products liability litigation brought by consumers of products that contained ephedra, monitor appointed in insolvency proceeding in Canadian court for Canadian company that marketed products containing ephedra in the United States moved for recognition and enforcement of Canadian court's order, which approved claims resolution procedure designed to speedily assess and value all claims of Canadian company's creditors, including the consumers.

Holding: The District Court, Rakoff, J., held that Canadian court's order was entitled to recognition and enforcement.

Motion granted.

West Headnotes (1)

[1] **Bankruptcy** Cases Ancillary to Foreign Proceedings

Canadian court's order in insolvency proceeding, which approved claims resolution procedure designed to speedily assess and value all claims of Canadian company's creditors, was entitled to recognition and enforcement in multi-district products liability litigation in the United States against Canadian company, where the order fell within purview of Bankruptcy Code sections providing for appropriate relief upon the recognition of a foreign proceeding and issuance of any necessary or appropriate order, and the procedure afforded claimants a fair and impartial proceeding. 11 U.S.C.A. §§ 105(a), 1521(a).

42 Cases that cite this headnote

Attorneys and Law Firms

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Ken Coleman, Allen & Overy LLP, New York, NY, Daniel Joseph Guyder, Allen & Overy, LLP, New York, NY, Barry Edward Newman, Spohrer Wilner, Maxwell, ***334** and Matthews, Jacksonville, FL, for Plaintiffs.

John D. Goldsmith, Tampa, FL, Angela L. Milch, Smith Mazure, New York City, NY, for Defendants.

OPINION AND ORDER

RAKOFF, District Judge.

Before the substance known as ephedra was banned by the U.S. Food and Drug Administration in 2004, a Canadian-based company named Muscletech Research and Development, Inc. (here referred to, along with its subsidiaries, as "Muscletech") marketed products containing ephedra in the United States. Some of the consumers suffered severe injuries, such as heart attacks and strokes, and eventually more than thirty civil actions for personal injuries

and wrongful deaths allegedly caused by ephedra were filed against Muscletech in state and federal courts in the United States. As part of the *In re Ephedra Products Liability Litigation,* the federal cases were subsequently transferred to this Court.

Early in 2006, Muscletech commenced an insolvency proceeding in Ontario Superior Court pursuant to Canada's Companies' Creditors Arrangement Act. The Ontario Court appointed RSM Richter, Inc. as Monitor, and the Monitor, in turn, appeared in this Court as the designated foreign representative of the Ontario Court. Acting pursuant to the recently enacted Chapter 15 of the Bankruptcy Code, 11 U.S.C. §§ 1501 *et seq.,*[1] this Court eventually granted, following several hearings, the Monitor's motion for an order recognizing the Canadian proceeding as a "foreign main proceeding," *i.e.,* "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502; *see* Order, Mar. 2, 2006. Thereafter, the state cases against Muscletech were transferred to this Court pursuant to 28 U.S.C. § 157(b)(5) and consolidated with the previously transferred federal cases. *See* Case Management Order No. 25 ¶ 4, May 22, 2006.

Meanwhile, in Canada, the Monitor and other interested parties negotiated a Claims Resolution Procedure (the "Procedure") designed to speedily assess and value all creditor claims, including the claims of the plaintiffs in the Muscletech actions in the United States, who by this time had filed claims and otherwise appeared in the Ontario insolvency proceeding. The Procedure was approved by the Ontario Court, with the consent of the vast majority of claimants, on June 8, 2006 (the "June 8 Order"). On June 16, 2006, the Monitor moved pursuant to 11 U.S.C. §§ 105(a) and 1521 for an order recognizing and enforcing the June 8 Order within the United States. Four claimants filed papers in opposition. On July 12, 2006, after briefing and oral argument, the Court granted the Monitor's motion, contingent on the Ontario Court's approving certain amendments to the Procedure designed to assure greater clarity and procedural fairness. The Ontario Court approved these amendments on August 1, 2006 (the "August 1 Order"). Accordingly, this Court now grants the Monitor's motion to recognize and enforce in the United States the August 1 Order approving the amended Procedure. The reasons for this ruling are as follows:

Section 1521(a) of the Bankruptcy Code permits this Court, "[u]pon the recognition ***335** of a foreign proceeding," to grant, at the foreign representative's request, "any appropriate relief" "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Section 105(a) of the Bankruptcy Code similarly provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* § 105(a). In the instant application, the Monitor asks the Court to recognize and enforce a foreign procedure that implements a claims resolution process that easily falls within the purview of §§ 105(a) and 1521(a).

Section 1506 of the Bankruptcy Code provides, however, that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." The June 8 Order and the August 1 Order embodying the amended Procedure provide for mandatory mediation and, if the mediation results in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims by a Claims Officer appointed by the Ontario Court. *See* Notice of Motion, Jun. 16, 2006, Exh. B (the June 8 Order); Notice of Entry, Aug. 1, 2006, Exh. A (the August 1 Order). Primarily on the basis of § 1506, the four objectors ask this Court to refuse to recognize and enforce the Procedure, arguing that it is manifestly contrary to the public policy of the United States in that it deprives the objectors of due process and trial by jury.

As to due process, while most of the objectors' objections are frivolous, there were various paragraphs of the June 8 Order that conceivably could have been read as permitting the Claims Officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. At this Court's initiative, the Monitor proposed amendments to the June 8 Order that entirely cured these problems. The Ontario Court promptly adopted these amendments in its August 1 Order, and it is only as a result that this Court now gives its approval to recognition and enforcement of the Procedure.

As for the objection that enforcement of the Procedure effectively denies the objecting plaintiffs the right to jury trial that they would have retained if their cases went to trial in the United States, it may well be the case, as the Monitor argues, that the objectors waived this objection when they filed their claims in the Ontario Court and appeared there to argue the same objections they here make.[2] *See* Reply Mem. of Law of RSM Richter Inc. 7; Tr. 7/6/2006, at 54, 57–58. But the Court does not reach the waiver issue because it finds

that, in any event, neither § 1506 nor any other law[3] prevents a United States ***336** court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to jury.

In adopting Chapter 15, Congress instructed the courts that the exception provided therein for refusing to take actions "manifestly contrary to the public policy of the United States" should be "narrowly interpreted," as "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." H.R.Rep. No. 109–31(I), at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172. This is the standard meaning accorded the word "manifestly" in international law when it refers to a nation's public policy. Indeed, the official Guide to the Enactment of the Model Law on Cross–Border Insolvency (from which Chapter 15 derives) expressly states that

> [t]he purpose of the expression "manifestly," used also in many other international legal texts as a qualifier of the expression "public policy," is to emphasize that public policy exceptions should be interpreted restrictively and that article 6[4] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

United Nations General Assembly, Guide to Enactment of the UNCITRAL Model Law on Cross–Border Insolvency, ¶ 89, U.N. Doc A/CN.9/442 (1997). This takes on even added relevance when one recognizes that the House Judiciary Committee, in enacting Chapter 15, specifically indicated that the Guide "should be consulted for guidance as to the meaning and purpose of [Chapter 15's] provisions." H.R.Rep. No. 109–31(I), at 106 n. 101, *as reprinted in* 2005 U.S.C.C.A.N. 169 n. 101.

Determining what foreign procedures are "manifestly contrary to the public policy of the United States" is, moreover, familiar territory to federal courts, who have long had to confront similar issues when determining whether or not to enforce foreign judgments rendered on the basis of foreign proceedings that were plainly fair but that did not include some commonplace of American practice. As early as 1895, in the leading case of *Hilton v. Guyot,* 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895), the Supreme Court determined that a foreign judgment should generally be accorded comity if "its proceedings are according to the course of a civilized jurisprudence," *i.e.,* fair and impartial. *Hilton,* 159 U.S. at 205–06, 16 S.Ct. 139. More recently, in *Ackermann v. Levine,* 788 F.2d 830 (2d Cir.1986), the Second Circuit expressly reaffirmed "[t]he narrowness of the public policy exception to enforcement [of foreign judgments]," adding that, "[a]s Judge Cardozo so lucidly observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' " *Ackermann,* 788 F.2d at 842 (quoting *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 110–11, 120 N.E. 198 (1918) (Cardozo, J.)).

Accordingly, federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign. Only last year, for example, the district court for the Northern District of Ohio granted summary judgment to a plaintiff seeking to enforce against a U.S. company a foreign judgment given by the Supreme Court of the Republic of Korea. ***337** *See Samyang Food Co. v. Pneumatic Scale Corp.,* No. 05 Civ. 636, 2005 WL 2711526 (N.D.Ohio Oct. 21, 2005). Against defendant's argument that the Korean judgment should not be recognized because South Korea did not afford defendant a jury trial, the district court held that all that was required was a fair and impartial hearing and that, despite the absence of jury trial, the Korean procedure was eminently fair. *Samyang Food,* 2005 WL 2711526, at *6–*7. As the district court noted, "[t]he Korean judicial system provides substantially the same substantive and procedural due process protections as those afforded by Ohio," *viz.,* "notice, the right to ... legal counsel, the right to present evidence and witnesses and to examine evidence offered against them, and a right to appeal to a higher court." *Samyang Food,* 2005 WL 2711526, at *6. All these protections are likewise present in the Ontario Court.

Similarly, federal courts, in the Second Circuit and elsewhere, have regularly dismissed U.S. cases in favor of foreign forums despite the objection that the foreign forum provides no trial by jury. *See, e.g., Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir.1991) (finding, in affirming forum non conveniens dismissal, that fact that Japan would not conduct jury trial to resolve dispute "does not render Japanese courts an inadequate forum"); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal,* 809 F.2d 195, 199, 202 (2d Cir.1987) (affirming district court's forum non conveniens dismissal based on finding that Indian courts were adequate forum despite, *inter alia,* absence of juries).

Obviously, the constitutional right to a jury trial is an important component of our legal system, and § 1411 stresses its importance in the context of personal injury cases. But the

notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world. Indeed, England, where the jury concept originated, has long since limited jury trials in civil proceedings to only those cases involving allegations of libel, slander, malicious prosecutions, fraud, and false imprisonment. *See* Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context,* 53 Am. J. Comp. L. 709, 712–13 (2005) (internal quotation omitted). The historic function of the jury to stand as a bulwark against government abuse plainly has limited application in the civil arena, and it is difficult to detect what unfairness a plaintiff suffers from having a civil case decided by a judge rather than a jury. Here, the objectors' primary claim of "prejudice" from the absence of a right to jury trial is simply that it will give them less of a bargaining position in negotiating a settlement of their claims than they would have if a jury—which, unlike the Claims Officer, would have no knowledge of competing claims—were asked to value their claims. *See* Tr., 7/6/2006, at 37, 40. Deprivation of such bargaining advantage hardly rises to the level of imposing on plaintiffs some fundamental unfairness.

In any event, the Procedure here in issue, as amended, plainly affords claimants a fair and impartial proceeding. Nothing more is required by § 1506 or any other law.

Accordingly, for the foregoing reasons, the Court hereby recognizes and enforces the Claims Resolution Procedure initially promulgated by the Ontario Superior Court on June 8, 2006 and amended and adopted by the Ontario Superior Court on August 1, 2006.

All Citations

349 B.R. 333, 56 Collier Bankr.Cas.2d 734

Footnotes

1 Chapter 15, which took effect in October 2005, was derived from the Model Law on Cross–Border Insolvency drafted by the United Nations Commission on International Trade Law ("UNCITRAL").

2 Although it might also be argued that the objection to the denial of a jury trial is premature because, at this stage, the Claims Officer has not begun the liquidation process, the Court agrees with the objectors that denial of a jury trial impacts their bargaining position at every stage of the implementation of the Procedure.

3 The objectors also purport to rely on 11 U.S.C. § 1507, which, however, adds nothing to the arguments made under § 1506. Although none of the objectors relied on, or even cited, 28 U.S.C. § 1411–which provides that, except in the case of involuntary bankruptcies, "this chapter and *title 11* do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim," 28 U.S.C. § 1411(a) (emphasis added)-nevertheless, the Court, *sua sponte,* raised § 1411 at the time of oral argument and gave the objectors ample opportunity to address its relevance. *See* Tr., 7/6/2006, at 9–75.

4 "Article 6" refers to Article 6 of the Model Law, from which section 1506 is taken virtually verbatim.

Tab 24

See p. 3

359 B.R. 54
United States Bankruptcy Court,
S.D. New York.

In re ADELPHIA COMMUNICATIONS CORP., et al., Debtors.

No. 02–41729 (REG).
|
Dec. 11, 2006.

Synopsis

Background: Bondholders filed motion to "designate" certain creditors and disallow votes that they had filed in favor of proposed Chapter 11 plan.

Holdings: The Bankruptcy Court, Robert E. Gerber, J., held that:

[1] mere fact that creditors, in exchange for voting in favor of proposed plan, may have obtained special consideration in form of releases, exculpation and reimbursement of fees, which other members of same class that voted against plan did not obtain, was not sufficient basis for draconian sanction of disallowing creditors' votes; and

[2] creditors' ownership, in multi-debtor Chapter 11 case, of claims in several debtors did not, by itself, rise to level of "bad faith," and did not afford sufficient basis on which to disqualify votes filed by these creditors in favor of proposed plan.

Motion denied.

West Headnotes (11)

[1] **Bankruptcy** Acceptance

Motions to "designate" particular entity as not having voted on proposed Chapter 11 plan in good faith, such that its vote will be disallowed, are within bankruptcy court's discretion. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[2] **Bankruptcy** Acceptance

Ability to vote on reorganization plan is one of the most sacred entitlements that creditor has in Chapter 11 case and should not be denied except for highly egregious conduct, principally, when creditor seeks to advance interests apart from its recovery as creditor under the plan, or when creditor seeks to extract plan treatment that is not available to other members of same class. 11 U.S.C.A. § 1126(e).

4 Cases that cite this headnote

[3] **Bankruptcy** Acceptance

Bankruptcy Code provision authorizing court to "designate" particular entity as not having voted on proposed Chapter 11 plan in good faith, such that its vote will be disallowed, is permissive, and not mandatory, in nature. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[4] **Bankruptcy** Determination

Burden on party seeking to have a plan ballot disallowed is heavy one. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[5] **Bankruptcy** Acceptance

"Designation," i.e., disallowance, of creditor's vote on proposed Chapter 11 plan is a drastic remedy, and, as result, designation of votes is the exception, not the rule. 11 U.S.C.A. § 1126(e).

10 Cases that cite this headnote

[6] **Bankruptcy** Acceptance

"Badges" of bad faith, such as bankruptcy court may consider when it rules on motion to "designate" particular creditors and to disallow the votes that they have filed for or against proposed Chapter 11 plan, include votes designed to (1) assume control of debtor; (2) put debtor out of business or otherwise gain

competitive advantage; (3) destroy debtor out of pure malice or (4) obtain benefits available under a private agreement with third party which depends on debtor's failure to reorganize. 11 U.S.C.A. § 1126(e).

3 Cases that cite this headnote

[7] **Bankruptcy** Acceptance

Movant must demonstrate more than mere selfish motive by party voting on proposed Chapter 11 plan in order for court to "designate," i.e., disallow, that party's vote. 11 U.S.C.A. § 1126(e).

4 Cases that cite this headnote

[8] **Bankruptcy** Acceptance

Disqualification of creditor's vote is appropriate, when Chapter 11 plan voting process is used as device with which to accomplish some ulterior purpose, that is out of keeping with purpose of reorganization process itself, and that is only incidentally related to creditor's status qua creditor. 11 U.S.C.A. § 1126(e).

3 Cases that cite this headnote

[9] **Bankruptcy** Acceptance

Mere fact that group of creditors, in exchange for voting in favor of proposed Chapter 11 plan, may have obtained special consideration in form of releases, exculpation and reimbursement of fees, which other members of same class that voted against plan did not obtain, was not sufficient basis for draconian sanction of disallowing creditors' votes, especially where creditors' conduct was fully disclosed under plan. 11 U.S.C.A. § 1126(e).

[10] **Bankruptcy** Acceptance

When creditors are acting to maximize their recoveries, their overly aggressive conduct in Chapter 11 process is not basis for disqualifying their votes. 11 U.S.C.A. § 1126(e).

2 Cases that cite this headnote

[11] **Bankruptcy** Acceptance

Creditors' ownership, in multi-debtor Chapter 11 case, of claims in several debtors did not, by itself, rise to level of "bad faith," and did not afford sufficient basis on which to disqualify votes filed by these creditors in favor of proposed Chapter 11 plan. 11 U.S.C.A. § 1126(e).

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White & Case LLP by J. Christopher Shore, Esq., Gerard Uzzi, Esq., New York, NY, by Thomas E. Lauria, Esq., Richard S. Kebrdle, Esq., Miami, FL, for the Ad Hoc Committee of Arahova Noteholders.

Kasowitz, Benson, Torres & Friedman LLP by David M. Friedman, Esq., Adam L. Shiff, Esq., New York, NY, for the Official Committee of Unsecured Creditors.

BENCH DECISION[1] ON MOTION TO DESIGNATE VOTES OF CERTAIN CREDITORS IN THE CLASS OF ACC SENIOR NOTES

ROBERT E. GERBER, Bankruptcy Judge.

In this contested matter in the chapter 11 cases of Adelphia Communications Corporation and its subsidiaries (the "Debtors"), I have before me the motion of a ***56** group of holders of ACC Senior Notes (the "ACC Bondholders Group") to designate[2] the votes in the class of ACC Senior Notes of three creditor groups that voted to support the Plan now before me for confirmation:[3]

> (1) the members of a "crossover committee" of holders of both ACC Senior Notes and notes of Arahova Communications Corp., an indirect ACC subsidiary (the "ACC II Committee");
>
> (2) accounts maintained or managed by W.R. Huff Asset Management Co., some or all of which are likewise holders of notes of each of ACC and Arahova (referred to, for simplicity, simply as "Huff"); and
>
> (3) those members of the Arahova Noteholders Committee who also hold ACC Senior Notes.
>
> The three of them (the "Targeted Creditors"), joined by the Creditors Committee, oppose the motion, arguing, among other things, that even if the underlying factual contentions are true, there is no basis for disqualifying their votes.

The antagonists on both sides of the issue are predominantly or exclusively investors in distressed debt. And in this and now-withdrawn litigation going in the other direction—where similar efforts to designate were aimed at members of the ACC Bondholders Group—many expressed concerns as to the confidentiality of distressed debt trader investments, trading positions, and trading practices. At various times in these cases, I ruled that as a general matter, there is no absolute rule prohibiting discovery of distressed debt investors' debt trading activities, but that I'd limit discovery of these activities to situations where such was sufficiently relevant.[4] Accordingly, I said I'd initiate consideration of the issues presented under this motion by demurrer—*i.e.,* by 12(b)(6) motions—with discovery (and, if necessary, an evidentiary hearing) to follow if such should be necessary.[5]

[1] **[2]** As described more fully below, motions to designate are within the discretion of the court. Here I conclude that even if all of the factual allegations asserted by the ACC Bondholders Committee were true, I would not disqualify the Targeted Creditors' votes. The ability to vote on a reorganization plan is one of the most sacred entitlements that a creditor has in a chapter 11 case. And in my view, it should not be denied except for highly egregious conduct —principally, seeking to advance ***57** interests apart from recovery under the Plan, or seeking to extract plan treatment that is not available for others in the same class.

While creditor tactics, activities or requests (or plan provisions that result from them) may be objectionable, the Code provides for other ways to address concerns that arise from such (such as upholding objections to confirmation), without the draconian measure of denying one's franchise to vote.[6] And while I assume it to be true that creditors of different debtors in a multi-debtor chapter 11 case have interests contrary to each other (and that the different debtors themselves do as well), that is a fact of life in most, if not all, large chapter 11 cases.[7] If, under section 1126(e) (which now is silent on the matter) or otherwise, creditors who hold claims of multiple debtors are to be denied the right to vote all of their claims, in all of the debtors in which they hold debt—even assuming, once again, that the individual debtors have interests contrary to each other, and that the recoveries of one debtor come at the expense of another—that is a matter for Congress to decide.

Thus the motion is denied. Findings of Fact, Conclusions of Law and bases for the exercise of my discretion in this regard follow.

Facts

For the purposes of this demurrer, the relevant facts are undisputed.[8]

The Plan

On October 17, 2006, I approved a supplement to the disclosure statement and authorized solicitation of votes on what is now the present Plan. A central feature of the Plan is the settlement of disputes relating to the intercompany relationships among the Debtors. Settling parties include Huff, the ACC II Committee, the Creditors' Committee, the ACC Settling Parties, the Arahova Noteholders Committee and certain other ad hoc committees of unsecured creditors. The Plan includes provisions for releases, exculpation and fee reimbursements for members of ad hoc committees and for individual creditors who signed onto the settlement and agreed to support the Plan, and for the same releases to go to any and all ACC Senior Noteholder creditors that support the Plan.[9] The Targeted Creditors voted all of ***58** their claims,

including any ACC claims, in support of the Plan. The ACC Bondholders vehemently oppose the Plan and the underlying settlement and, thus, voted against the Plan.

Inter–Creditor Dispute

The principal inter-creditor dispute, and the one most relevant to the motion at hand, is a dispute between holders of ACC Senior Notes and the holders of Arahova Notes. Creditors of ACC Parent and of the Arahova Debtors have asserted positions that in nearly all respects would cause one group to benefit at the expense of the other—though under the settlement, ACC recoveries were augmented from debtors other than the Arahova debtors, to the end that ACC benefited without a corresponding detriment to Arahova. In nearly all respects, an increase in any recovery on the Arahova Notes results in a decrease in recovery on the ACC senior notes, and vice versa.

Earlier in this case, the Arahova Noteholders filed numerous motions and engaged in related acts (together, the "Arahova Motions") seeking to thwart the judicial determination of interdebtor issues that the Debtors proposed and that I had approved; seeking relief which, if granted, would have been devastating to creditor recoveries in these cases (including, most significantly, a motion seeking the appointment of a chapter 11 trustee for the Arahova debtors, which would have been a breach of the Debtors' DIP financing facility and an event excusing Time–Warner and Comcast from closing on their purchase); and entering into an agreement to put their motions on hold pending the outcome of settlement negotiations. The ACC Bondholder Group asserts, and I take it as true for the purposes of this motion, that these were tactics on the Arahova Bondholders Group's part to improve its recovery. As the ACC Bondholders group appropriately notes,[10] I "sharply criticized" the Arahova Bondholders' tactics, and was "understandably dismayed" by them. In a lengthy decision in January 2006 addressing Arahova Debtors' motions, I stated:

> [T]he Court further decides these motions in light of the compelling inference that the motions were filed as part of a scorched earth litigation strategy that would provide the Arahova Debtors with little benefit that they do not already have (trumped, dramatically, by a resulting prejudice to the Arahova Debtors themselves, along with all of the other Debtors), and which would have the effect (and, the Court believes, the purpose) of imperiling the pending Time Warner/Comcast transaction and the Debtors' DIP financing in an effort to extract a greater distribution, sidestepping the Court-approved process for determining the Intercreditor Dispute issues on their respective merits.[11]

I stated at the conclusion:

> The bringing of motions like these is not unethical, or sanctionable, but neither should it be encouraged, or rewarded. Motions that would bring on intolerable consequences for an estate should not be used as a tactic to augment a particular constituency's recovery.[12]

***59** *Huff's Rule 2004 Discovery*

Huff sought and obtained Rule 2004 discovery to investigate the creation and dissemination of a letter sent by certain members of the ACC Noteholders Committee to the Board of Directors of ACC and to the Wall Street Journal on April 17, 2006. Huff sought discovery based on the premise that dissemination of the letter was an attempt to manipulate the market and an improper solicitation under section 1125(b) of the Code. The ACC Bondholders contend (and I must accept as true for the purposes of a demurrer) that this was not, in fact, Huff's true intent, and instead was an effort to improperly pressure ACC Noteholders.[13]

Plan Agreement

The ACC Bondholders then contend that only two days after I expressed an adverse reaction to alleged activities on the part of certain ACC Bondholders which were the subject of the now-withdrawn motion directed at them, and "in the midst of Huff's coercive tactics," two other holders of ACC Senior Notes agreed to a term sheet embodying a plan settlement, including a settlement of the interdebtor issues.[14] That term sheet, following further modifications, now serves as the basis for the Plan. "Among other egregious positions," the Plan included "thinly-veiled threats of litigation and continued discovery against ACC Senior Notes" who refused to join in the agreement, hire the counsel for the assenting ACC Bondholders, and vote to accept the proposed Plan, and provided broad release provisions for those who satisfied those conditions.[15]

Discussion

I.

Under well-settled principles, when considering a motion to dismiss, as made applicable under Fed. R. Bankr.P. 7012(b), a complaint's factual allegations are presumed true, and are construed in favor of the pleader.[16] "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[17] As the Supreme Court held in *Scheuer v. Rhodes:*

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.[18]

Dismissal should be granted only when the plaintiff's allegations, taken as true, along with any inferences that flow from them, are insufficient as a matter of law.[19]

***60** The court is not, however, bound to accept as true legal conclusions or theories.[20] Similarly, mere conclusory allegations without factual support are insufficient to survive a motion to dismiss.[21] Rather, to withstand a motion to dismiss, there must be specific and detailed factual allegations to support the claim.[22] A court "will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading."[23]

II.

Section 1126(e) of the Bankruptcy Code provides:

> On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

[3] Section 1126(e) is permissive in nature,[24] and a bankruptcy judge has discretion in designating votes.[25] The issue before me, then, is whether, assuming all of the ACC Bondholders' contentions to be true, I should (or would) disqualify, by "designation," any of the Targeted Creditors' votes.

While 1126(e) does not define "bad faith," the courts have designated votes as having been cast in "bad faith" in the following instances:

> (1) if the claimant is using obstructive tactics and hold-up techniques to extract better treatment for its claim compared to the treatment afforded similarly situated claimholders in the same class; or
>
> (2) if the holder of the claim casts its vote for the ulterior purpose of securing some advantage to which it would not otherwise be entitled; or
>
> (3) when the motivation behind its vote is not consistent with a creditor's protection of its own self-interest.[26]

Some courts have held that some type of wrongdoing must be present to evidence bad faith.[27]

***61** **[4]** **[5]** As the ACC Bondholders Group noted in its brief opposing an effort, in the other direction, to designate the votes of some of its members,[28] the burden on a party seeking to have a ballot disallowed is heavy.[29] When others were threatening to target members of the ACC Bondholders Group with a motion to designate in the other direction, I noted the severe implications of vote designation.[30] A right to vote on a plan is a fundamental right of creditors under chapter 11. Designation of a creditor's vote is a drastic remedy,[31] and, as a result, designation of votes is the exception, not the rule.[32] The party seeking to have a ballot disallowed has a heavy burden of proof.[33]

[6] In his decision in *Dune Deck Owners,* in this district, Chief Judge Bernstein canvassed the law in this area, and noted that the "badges" of the requisite bad faith include creditor votes designed to (1) assume control of the debtor; (2) put the debtor out of business or otherwise gain a competitive advantage; (3) destroy the debtor out of pure malice or (4) obtain benefits available under a private agreement with a third party which depends on the debtor's failure to

reorganize.[34] A moment earlier, he capsulized the standards that would satisfy the requisite bad faith as (i) where a claim holder attempts to extract or extort a personal advantage not available to other creditors in the class, or (ii) where a creditor acts in furtherance of an ulterior motive, unrelated to its claim or its interests as a creditor.[35]

[7] **[8]** Notably, a movant must demonstrate more than a mere selfish motive on behalf of a voting party in order for a court to designate that party's vote.[36] "[W]hen the voting process is being used as a device with which to accomplish some ulterior purpose, out of keeping with the purpose of the reorganization process itself, and only incidentally related to the creditor's status *qua* creditor," disqualification is appropriate.[37]

III.

Though the ACC Bondholder Group's lengthy initial and responsive submissions, perhaps inevitably, articulate its arguments in slightly different ways, they nevertheless have two themes. First they assert that the Targeted Creditors extracted special consideration for themselves—releases, exculpation and fee awards—that was not awarded to other members of their voting classes who voted against the ***62** settlement (and used such as a coercive "carrot" to induce additional acceptances of the Plan), and, with respect to some of the Targeted Creditors, that they acted beyond the bounds of acceptable behavior in the process that led to the ultimate solicitation of the Plan. Second, they assert that the Targeted Creditors voted their ACC claims for ulterior purpose of benefiting their Arahova claims and the Arahova estate, and/or that holding claims of different debtors, which have conflicting interests as against each other, represents a kind of *per se* ulterior motive.

A. Special Consideration

[9] The ACC Bondholders argue that the votes on the ACC claims of the Targeted Creditors should be designated because these creditors obtained special consideration in the form of releases, exculpation and reimbursement of fees expressly conditioned upon their acceptance of the settlement in the Plan, and used such as an enticement to others to support the Plan. Members of the same class who rejected the Plan did not secure those benefits.

These matters may support confirmation objections, but they are not matters of the type that warrant disqualification of the Targeted Creditors' votes. The factors identified above as badges of bad faith do not come even close to being applicable here. The Targeted Creditors did not seek to (1) assume control of the debtor; (2) put the debtor out of business or otherwise gain a competitive advantage; (3) destroy the debtor out of pure malice or (4) obtain benefits available under a private agreement with a third party which depends on the debtor's failure to reorganize. Taking the ACC Bondholders Group's allegations at face value, the Targeted Creditors whose behavior was challenged (*i.e.,* those other than the ACC II Committee) were overly aggressive, and/or stepped over the line, in taking action to benefit their economic interests in securing the confirmation of this Plan, and overreached, in particular, in benefiting themselves and using enticements to others to likewise support the Plan.

But to the extent complaints as to that conduct are justified, they can be addressed in the confirmation process. The disputed plan provisions will need to be examined, as part of the confirmation process, to evaluate their compliance with law, and to ascertain whether they are or are not appropriate benefits for those settle, and for those who choose to vote in favor of a chapter 11 plan. And depending on the particular provision concerned, various measures might have to be taken as part of the confirmation process if the contested plan provisions turn out to be objectionable.[38] But whether or not the disputed provisions pass muster at confirmation, they are in any event all variants of measures to advance one's interests in maximizing recoveries under a reorganization plan, which have consistently been held to be acceptable exercises of creditor power. Proposing them is not the type of conduct that warrants vote designation, especially when it is fully disclosed under the Plan.

Likewise, I do not believe that the conduct alleged on the part of the Arahova Bondholders and Huff, even taking the allegations with respect to that conduct as true, warrants designation. Without question, at least some of it was overly aggressive and overreaching. But it was, once more, an effort to maximize recoveries as a creditor under a prospective plan.

***63** **[10]** To be sure, a culture has developed in large chapter 11 cases in which many consider it acceptable, and indeed expected, to use the litigation process as a means to assert or follow through on threats, and to seek various kinds of relief, to secure "leverage" in efforts to increase recoveries. I don't like it. And I particularly don't like it when supposedly

critical concerns then somehow turn out to be not so critical, and threatened or filed motions are put on hold or withdrawn pending "negotiation." But aside from saying, in precatory terms, that I don't like such tactics and that they are a good way to irritate the judge, I don't think that I can or should do anything about them on a motion of this character. In particular, I don't think I should disenfranchise creditors from their statutory voting rights based on my personal views as to the way they should behave. My views as to acceptable behavior in chapter 11 intercreditor disputes may be naïve, or they may be right on the money, but in either event I believe that where, as here, creditors are acting to maximize their recoveries, their overly aggressive conduct in the chapter 11 process is not a basis for disqualifying their votes.

Thus, assuming, as I do, that all of the allegations of the motion are true, they boil down to activities that, while distasteful and heavy handed, are sufficiently within what the law permits, and sufficiently tied to maximize creditor recoveries, that I should not disenfranchise creditors from their statutory rights.

B. Ulterior motives

[11] The ACC Bondholders argue that the Court should designate the ACC votes of Targeted Creditors because they own both Arahova and ACC bonds; because by reason of the economics of the interdebtor issues, the Targeted Creditors stand more to gain by enhanced incremental recoveries at Arahova; and because their economic interests are oriented in favor of the Arahova estate. Thus, the ACC Bondholders allege and argue, Targeted Creditor votes in favor of the Plan in the ACC Senior Notes Class were driven by an ulterior motive—a desire to get a maximized recovery in another class, of another Debtor, under the Plan (that of the class of Arahova notes).

As discussed above, courts have found bad faith where the creditor has an "ulterior motive," such as to procure some collateral or competitive advantage that does not relate to its claim. But the kinds of motives that have so far been held to warrant vote designation have been to assume control of the debtor; to put the debtor out of business or otherwise gain a competitive advantage; to destroy the debtor out of pure malice, or to obtain benefits available under a private agreement with a third party which depends on the debtor's failure to reorganize.[39] None, so far as I'm aware or the parties' briefs have revealed, has been to maximize an economic recovery, or to hedge, by owning bonds of multiple debtors in a single multi-debtor chapter 11 case, or (as I think concerns would be analogous), to hold bonds in different, antagonistic, classes of a particular debtor in a single chapter 11 case.

I assume, both because I have before me a demurrer and because I think the assumption is warranted, that there are inherent conflicts of interest between creditor classes in this case, whether within a single debtor or across multiple debtors, competing, in every practical sense, for maximized shares of the Debtors' limited pot of assets. So the issue, then, is whether ***64** I should find from that an ulterior motive sufficient to warrant the designation of votes of the Targeted Creditors because of their ownership of bonds in each of those classes.[40]

The ACC Bondholders do not cite, and I am not aware of, any case where a parent and a subsidiary debtors were treated as competitors for the purposes of section 1126(e). Inter-company debts and liabilities, which enhance recoveries of some creditors and dilute recoveries of others, are inherent in any multi-debtor bankruptcy. And conflicts between classes of a single debtor, which likewise involve competing claims on the part of those classes to what will usually be a pool of limited assets, will be present in many, if not most, chapter 11 cases as well, and while one can not then speak of "competitor" business entities, many like considerations apply. The statutory trigger for ordering vote designation is an absence of good faith, and I do not believe that holding (or acquiring) claims of different debtors in the same chapter 11 case fairly can be regarded as representing the kind of ulterior motive or "bad faith" that has heretofore been held to warrant vote designation. Thus I must rule that a creditor's ownership of claims in several debtor entities does not, by itself, amount to bad faith under 1126(e), and does not afford a sufficient basis on which to disqualify votes of creditors who have voted to accept the plan.

I come to that conclusion for two other reasons as well. First, as noted, the law has long upheld creditors' efforts to maximize their individual recoveries in their self-interest as creditors under a plan. While this is of course subject to the ulterior interest exception, holding long positions in bonds of various debtors is much more closely akin to ordinary recovery maximization strategies than it is to the efforts of a business competitor to drive the debtor out of business, or to harm it in other ways.[41]

And second, I note, with the assistance of Judge Bernstein's opinion in *Dune Deck Owners,* that Congress once considered a formulation of section 1126 that might support designation here, but that the alternate formulation did not find its way into the Bankruptcy Code.

As Judge Bernstein observed, the original Bankruptcy Code House Bill included a provision, denominated § 1126(e), that expressly authorized the Court to designate the vote of an "entity that has, *with respect to such class,* a conflict of interest that is of such a nature as would justify exclusion of such entity's claim or interest" from the amounts and number of claims or interests required for acceptance.[42] The present § 1126(e) was then codified as § 1126(f). The House drafters expressed an intention to ensure that a creditor who held conflicting claims in two classes could be excluded from voting in one—though not necessarily ***65** both—of those classes.[43] But the conflict of interest section, which was not included in the Senate bill, did not make it into the Code as enacted. Senator DeConcini expressed the view that Congress deemed the provision unnecessary because in its view, section 105 "constitutes a sufficient power in the court to designate exclusion of a creditor's claim on the basis of a conflict of interest."[44]

Since the time the Code was enacted, we have come to place great reliance on what statutes actually say (notwithstanding statements in legislative history that might lead to a contrary result), and I think I must find some significance in the fact that at one time, Congress considered a provision that would impose the requirement sought here, and that it did not enact it. In light of that, I'm reluctant to enact it by judicial fiat. And while I fully recognize that Senator DeConcini regarded section 105 as a means to achieve vote designation notwithstanding the absence of statutory language that would explicitly provide for it, recent section 105 jurisprudence has displayed a marked reluctance to use section 105 to achieve results that are not authorized under the Code or substantial caselaw precedent.[45]

In my view, imposing the disqualification rule sought here in the absence of a clearer statutory or caselaw foundation would be too much of a jump. Congress could, if it wished, declare that when creditors hold claims of multiple classes or debtors in multi-class or multi-debtor chapter 11 cases, they must choose the particular class or debtor with which they will wish to be allied. But it did not enact a provision that would have done exactly that. I cannot now establish such requirements in the absence of a legislative direction, especially retroactively, when no court has previously so held, and creditors had no advance notice that such rules would be applied to take away their statutory right to vote. While I fully recognize that the Code gives me the power to designate for "bad faith," I do not believe that I should apply such an abstract standard in an unprecedented way in a matter of this importance.

Conclusion

The motion of the ACC Bondholders to designate ACC votes of Huff, Arahova Noteholders Committee and ACC II Committee is denied.

All Citations

359 B.R. 54, 47 Bankr.Ct.Dec. 125

Footnotes

1 I use bench decisions to lay out in writing decisions that are too long, or too important, to dictate in open court, but where time does not permit more extensive or polished discussion. Because they often start as scripts for decisions to be dictated in open court, they typically have fewer citations and other footnotes, and have a more conversational tone.

2 As discussed below, "designate" is a word of art in bankruptcy parlance, meaning, in essence, "disqualify."

3 Familiarity with the events in this case, and defined terms used in the ongoing related litigation, is assumed.

4 I authorized discovery to a certain extent, upon a showing of possibly (but not plainly) improper activities, and said I'd authorize it to a greater extent if one side pressed claims based on those activities and the other side expressed a desire to show that essentially the same activities were engaged in by those on the attacking side.

5 While Fed. R. Bankr.P. 9014, governing contested matters, does not by its terms include Fed. R. Bankr.P. 7012 (and hence Fed.R.Civ.P. 12(b)(6)) as rules that are automatically applicable in contested matters (in contrast, *e.g.,* to those providing for discovery and summary judgment), Rule 9014 provides that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Fed. R. Bankr.P. 9014(c). In the *Adelphia* cases and others, I've found demurrers to be a useful procedural mechanism to decide some kinds of contested matter disputes

economically, saving litigation costs for the benefit of creditors and other stakeholders. There was no objection to this procedure, which was likewise used by the ACC Bondholders Group in its own 12(b)(6) opposition to a like designation motion targeting some of its members.

6 If it is any consolation to the movants here, I'd regard these same principles to be applicable if the now-withdrawn motion in the other direction had been pressed. Several aspects of the discussion that follows have been taken, in some cases nearly verbatim, from the brief filed by the ACC Bondholders Group in response to the attack that had been launched against some of its members.

7 *See In re Adelphia Commc'ns Corp.,* 336 B.R. 610, 617, 644–653 (Bankr.S.D.N.Y.) (Gerber, J.) (the "*Arahova Motions Decision* ") (discussing how prevalent inter-debtor issues are, and how they had been addressed in other cases), *aff'd* 342 B.R. 122 (S.D.N.Y.2006) (Scheindlin, J.)

8 The movants properly observe in their response that the submissions on the demurrers in many cases tried to argue facts, and sought to debate allegations that need to be taken as true on a demurrer. I've disregarded factual arguments of that character, and have taken the basic facts as alleged as true.

9 The Plan may have an ambiguity as to whether a vote in favor of the Plan is enough or whether qualification for release rights is more limited. Particularly if the latter, this is a potential confirmation issue.

The Plan also has provisions at least seemingly awarding legal fees without court approval of the fees under section 503(b), or satisfaction of section 503(b)(3)(D)'s requirements for "substantial contribution," though they also provide that the parties seeking such fees "shall comply with any procedures required by the Bankruptcy Court in connection with seeking reimbursement" of such fees. *See* Plan § 6.2(d). The U.S. Trustee (who lacks the ACC Bondholder Group's axe to grind) has objected to this aspect of the Plan, and it too presents an issue on confirmation, or an issue as to whether I must impose supplemental procedures or requirements to comply with the Code.

10 *See* Designation Motion ¶ 24.

11 *Adelphia,* 336 B.R. at 618–619.

12 *Id.* at 677–678.

13 *See* Designation Motion ¶ 27 and ¶ 30.

14 *See* Designation Motion ¶ 31.

15 *Id.*

16 *See, e.g., Luedke v. Delta Air Lines, Inc.,* 159 B.R. 385, 389 (S.D.N.Y.1993) (Patterson, J.), cited in *In re Lois/USA, Inc.,* 264 B.R. 69, 89 (Bankr.S.D.N.Y.2001).

17 *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); accord *Northrop v. Hoffman of Simsbury, Inc.,* 134 F.3d 41, 44 (2d Cir.1997) (quoting *Conley*); *In re Granite Partners, L.P.,* 210 B.R. 508, 514 (Bankr.S.D.N.Y.1997) (Bernstein, J.) (denying motion to dismiss complaint, noting dismissal would be proper only when the plaintiff would not be entitled to any type of relief, even if it prevailed on the merits of its factual allegations).

18 *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

19 *See, e.g., Sykes v. James,* 13 F.3d 515, 519 (2d Cir.1993), cert. denied, 512 U.S. 1240, 114 S.Ct. 2749, 129 L.Ed.2d 867 (1994) (applying the standard discussed above but nevertheless dismissing, where claims for relief were legally insufficient); *In re 80 Nassau Assocs.,* 169 B.R. 832, 841 (Bankr.S.D.N.Y.1994) (Bernstein, J.) (granting motion to dismiss complaint for failure to allege a legally sufficient injury).

20 *See In re Sunbeam Corp.,* 284 B.R. 355, 360 (Bankr.S.D.N.Y.2002) (Gonzalez, J.).

21 *See DeJesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 70 (2d Cir.1996) (citations omitted) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).")

22 *See Friedl v. City of New York,* 210 F.3d 79, 85–86 (2d Cir.2000).

23 5A Wright & Miller, Federal Practice and Procedure, § 1363 (2d ed. 1990 & 2002 Supp.)

24 "... the court *may* designate ...." (emphasis added).

25 *See Century Glove, Inc. v. First American Bank of New York,* 860 F.2d 94, 97 (3rd Cir.1988) (Section 1126(e) "grants the bankruptcy court discretion to sanction any conduct that taints the voting process, whether it violates a specific provision or is in 'bad faith' ").

26 *See In re Kovalchick,* 175 B.R. 863, 875 (Bankr.E.D.Pa.1994) (citations omitted); see also *Collier,* § 1126.06.

27 *See In re Allegheny Int'l., Inc.,* 118 B.R. 282, 293 (Bankr.W.D.Pa.1990) (Cosetti, C.J.) (holding that the court should designate the votes of only those creditors or interest holders who were engaged in wrongdoing).

28 *See* ACC Bondholders Group's 12(b)(6) Motion to Dismiss "Motion ... to Designate Votes of [certain ACC Bondholders]," ¶ 9.

29 *See Kovalchick,* 175 B.R. at 875.

30 *See* Hrg Tr. 75:13–20, Apr. 27, 2006 ("I have, indeed, said that I believe very strongly in creditor democracy, and that I believe that the designation of votes is a serious matter.").

31 See *In re Peter Thompson Assocs., Inc.,* 155 B.R. 20, 23 (Bankr.D.N.H.1993).

32 *See In re Dune Deck Owners Corp.,* 175 B.R. 839, 844 (Bankr.S.D.N.Y.1995) (Bernstein, C.J.).

33 *Kovalchick,* 175 B.R. at 863.

34 *See Dune Deck Owners,* 175 B.R. at 844–845.

35 *Id.* at 844.

36 *See Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am.,* 118 F.3d 635, 639 (9th Cir.1997); *In re Pine Hill Collieries Co.,* 46 F.Supp. 669, 671 (E.D.Pa.1942) ("If a selfish motive were sufficient to condemn reorganization policies of interested parties, very few, if any, would pass muster."); *Dune Deck Owners,* 175 B.R. at 844 (same, quoting *Pine Hill Collieries*).

37 *In re Landing Assocs., Ltd.,* 157 B.R. 791, 807 (Bankr.W.D.Tex.1993) (Leif Clark, J.).

38 Under the Plan, some might simply be inoperative if the Court otherwise ordered; others, if inappropriate, might require Plan provisions to modified. But these would be confirmation matters, not designation issues.

39 *See* page 61 above.

40 A related issue, which I do not need to address given my conclusions, is what, if I found a basis for designation here, I should do with respect to what I believe is many other creditors in the *Adelphia* cases, who hold bonds of several Debtors, or bonds at competing levels of priority (*e.g.,* senior and sub debt), of the same Debtor, albeit in situations where the interdebtor or intercreditor disputes were not as bitter.

41 I don't need to decide, and don't now decide, the extent to which like considerations apply if the creditor's economic interest is enhanced by driving down the value of the estate as a whole, or by causing the entire reorganization—as contrasted to a particular plan proposal—to fail.

42 *See Dune Deck Owners,* 175 B.R. at 845 n. 13 (emphasis added).

43 *Id.,* citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 411 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5963, 6367.

44 *Id.,* citing 124 Cong.Rec. S17420 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).

45 *See, e.g., In re Dairy Mart Convenience Stores, Inc.,* 351 F.3d 86, 92 (2d Cir.2003) ("This Court has long recognized that Section 105(a) limits the bankruptcy court's equitable powers, which must and can only be exercised within the confines of the Bankruptcy Code.... It does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.") (internal quotations and citations omitted); *In re Aquatic Development Group, Inc.,* 352 F.3d 671, 680 (2d Cir.2003) (Straub, J., concurring) (same).

Tab 25

See paras. 51, 53, 69-70

SUPREME COURT OF CANADA

CITATION: 9354-9186 Québec inc. *v.* Callidus Capital Corp., 2020 SCC 10

APPEALS HEARD AND JUDGMENT RENDERED: January 23, 2020
REASONS FOR JUDGMENT: May 8, 2020
DOCKET: 38594

BETWEEN:

9354-9186 Québec inc. and 9354-9178 Québec inc.
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier
Respondents

- and -

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals
Interveners

AND BETWEEN:

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Respondents

- and -

Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc.,
Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 117)	Wagner C.J. and Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

9354-9186 Québec inc. and
9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation,
International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
IMF Bentham Limited (now known as Omni Bridgeway Limited),
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation,

International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc.,
9354-9186 Québec inc.,
9354-9178 Québec inc., Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals *Interveners*

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.
Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion

to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As

a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable

treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or

bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual

circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the

objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish

the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of

deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1]

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000;

creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting

unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the

Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court (2018 QCCS 1040) (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when

> its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3)

if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. *Quebec Court of Appeal (2019 QCCA 171) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial

discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*

(2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred

to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999

ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167–68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

Indalex, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue!*

The Companies' Creditors Arrangement Act, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a

diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp- 566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion

unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its

voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at N§149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan

(*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at N§45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that,

under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at N§33, *Red Cross*; *Re 1078385*

Ontario Inc. (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the

CCAA will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring

jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the

BIA (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so[4]. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the

New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques*

San Francisco Inc. v. Richter & Associés Inc., 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

> **Interim financing**
>
> **11.2 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form

or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

> **Priority — secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> **(a)** the period during which the company is expected to be subject to proceedings under this Act;
>
> **(b)** how the company's business and financial affairs are to be managed during the proceedings;

> **(c)** whether the company's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> **(e)** the nature and value of the company's property;
>
> **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.
>
> (*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs,

in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. National Bank of Canada*, 2006 QCCA 557 [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding

furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising

judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian*

> *Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at N§33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It

follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped

his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment

on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise

will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
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> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the

mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was

unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Tab 26

See para. 38

Ontario Supreme Court
Menegon v. Phillip Services Corp.
Date: 1999-08-27

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as Amended

In the Matter of a Plan of Compromise or Arrangement of Philip Services Corp. and the Applicants Listed on Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Joseph Menegon, Plaintiff and Philip Services Corp., Salomon Brothers Canada Inc., Merill Lynch Canada Inc., CIBC Wood Gundy Securities Inc., Midland Walwyn Capital Inc., First Marathon Securities Limited, Gordon Capital Corporation, RBC Dominion Securities Inc., TD Securities Inc., and Deloitte & Touche, Defendants

Ontario Superior Court of Justice [Commercial List] Blair J.

Judgment: August 27, 1999

Docket: 99-CL-3442, 4166CP/98

David R. Byers, Sean Dunphy and Colleen Stanley, for Philip Services Corp. et al.

John McDonald, for the Class Proceedings Plaintiffs.

J.L. McDougall, Q.C. and B.R. Leonard, for Deloitte & Touche.

B. Zarnett, for Merrill Lynch Canada Inc., Midland Walwyn Capital Inc.,

First Marathon Securities Limited, Gordon Capital Corporation and Salomon Brothers Canada Inc. ("The Underwriters").

Hilary Clarke, for Royal Bank of Canada.

Pamela Huff and Susan Grundy, for Lenders under the Credit Agreement.

Joseph Groia and Subrata Bhattacharjee, for certain Directors.

E.A. Sellers, for CIBC as Account Intermediary.

Steven Graff, for PHH Vehicle Leasing.

Blair J. **:**

I—Facts

Background

[1] The issues raised on these Motions touch upon difficult areas in the burgeoning field of cross-border insolvencies.

[2] Philip Services Corp. is the ultimate parent company of a network of approximately 200 directly and indirectly owned subsidiaries in Canada, the United States and elsewhere. The operations of this international conglomerate of companies are service oriented, with a primary focus on what are referred to as “Metals Services” and “Industrial Services”. The former involves the collection, processing and recycling of scrap metal for steel mills and for the foundry and automotive industries. The latter entails providing such things as cleaning and maintenance services, waste collection and transportation, emergency response services and tank cleaning for major industries (“outsourcing services”), and providing “by-products recovery services”, with heavy emphasis on chemicals and fuel and polyurethane recycling, for the same industries.

[3] The Philips conglomerate—with consolidated revenues in 1998 of U.S. $2 billion, but a consolidated, net loss of U.S. $1,587 billion for the period ending December 31, 1998—has fallen into insolvent circumstances. On June 25, 1999, Philip Services Corp. and its Canadian subsidiaries sought and obtained the protection of this Court under the provisions of the CCAA to enable them to attempt to restructure their affairs. On the same date, Philip Service Corp. and its primary subsidiary for its U.S. operations, Philip Services (Delaware) Inc., together with other U.S. subsidiaries, filed for Chapter 11 protection under the *U.S. Bankruptcy Code* in United States Bankruptcy Court (District of Delaware). On July 12, 1999, a “Disclosure Statement and a Plan of Reorganization” was filed in the U.S. Bankruptcy Proceedings (“the U.S. Plan”). On July 15th, a Plan of Compromise and Arrangement was filed in the CCAA Proceedings (“the Canadian Plan”).

[4] As the parties and counsel have done, I shall refer to Philip Services Corp. as “Philip” and to Philip Services (Delaware) Inc. as “PSI”. I shall refer to the conglomerate as a whole as “Consolidated Philip”.

[5] Philip is an Ontario corporation with head offices in Hamilton, Ontario. It is a public company with stock trading on the Toronto Stock Exchange, the Montreal Exchange, and the

New York Stock Exchange. Although trading is suspended at the present time, the bulk of trading occurred on the New York Stock Exchange. Eighty-two percent of Philip's issued and outstanding shares are owned by U.S. residents. Moreover, it appears, the majority of Philip's operating assets, and of its operations, are located in the United States. Consolidated Philip carries on business at more than 260 locations, and employs more than 12,000 employees, primarily in North America. Its customer list includes more than 40,000 industrial and commercial customers world-wide. In Canada, there are 94 locations, about 2,000 employees, and annual revenues in the neighbourhood of U.S. $333 million.

[6] Philip expanded very rapidly in the past few years—perhaps too rapidly, as it turns out. Consolidated Philip grew by more than 40 new businesses acquisitions in 1996 and 1997. Associated with this expansion was the negotiation of a U.S. $1.5 billion Credit Agreement between Philip and PSI as borrowers and a syndicate of more than 40 lenders (the "Lenders"). Under the Credit Agreement Philip guaranteed the borrowings of PSI, and PSI guaranteed the borrowings of Philip. In addition, certain subsidiaries of Philip and PSI guaranteed all of the liabilities of Philip and PSI to the lenders, and the guarantees from the subsidiaries were secured by general agreements and specific assignments of assets. In short, the Lenders have security over virtually all of the assets of Consolidated Philip. Moreover, subject to certain specific exceptions, it is first security.

[7] During this same period of expansion, Philip raised about U.S. $362 million through a public offering in the U.S. and Canada. Seventy-five percent of these shares were sold in the U.S. As events transpired, these public offerings have led to a series of class actions against Philip both in the U.S. and in Canada. They arose out of certain discrepancies between copper inventory as shown on the books and records of Philip and actual inventory on hand, which were revealed in audits in early 1998. Publicity surrounding the discrepancies led to a drop in the price of Philip shares, which led to various class actions. Eventually, it was determined that Philip's liabilities had been understated by approximately U.S. 35 million. As a result, it was required to file an Amended Form 10-K with the U.S. Securities and Exchange Commission restating its financial results for 1997 to show an additional loss of $35 million. It was also required to revise the amount of pre-tax special and non-recurring charges for that same year.

[8] It is said that the unsettling effects of the financial irregularities and the class action proceedings, in conjunction with a general uncertainty in the markets serviced by Consolidated Philip, caused Philip's earnings to drop dramatically. It could not refinance its long-term debt under the Credit Agreement. Its trade credit was curtailed. It lost contracts and, because its bonding capacity was impaired, it was further hampered in its ability to win new contracts. In spite of concerted efforts over a period of nearly a year, Philip was not able to re-finance its debt or to restructure its affairs outside of the court restructuring context. Cash conservation measures in late 1998 led to defaults under the Credit Agreement. Debt restructuring negotiations with *the Lenders* since that time led ultimately to the parallel insolvency proceedings in Canada and the U.S. to which I have referred above.

The Class Proceedings

[9] Developments in the class action proceedings are what have led specifically to the Motions which are presently before this Court.

[10] In February and March of 1998 various class actions were filed in the United States against Philip, certain of its past and present directors and officers, the underwriters of the Company's November 1997 public offering, and the Company's auditors (Deloitte & Touche)[1]. The actions, now consolidated, alleged that Philip's financial disclosure for various time periods between 1995 and 1997 contained material misstatements or omissions in violation of U.S. federal securities laws.

[11] In May, 1998, a class proceeding was also commenced in Ontario, under the *Class Proceedings Act,* 1992 ("the CPA Proceeding"). The plaintiff is Joseph Menegon, a retired school teacher living in Hamilton, who had purchased 300 common shares of Philip on the TSE in November, 1998. The CPA Proceedings is an action for misrepresentation, negligent misrepresentation and recission relating to the purchase of shares of Philip by people in Canada between February 28 and May 7, 1998. The defendants are Philip, the various Underwriters, and Deloitte & Touche.

[12] At the instance of Philip and Deloitte & Touche, however, a motion was brought for an order dismissing the U.S. Class Action on the grounds that the United States Court was not the proper Court for the disposition of the claims, but that the Ontario Court was. This motion

was successful and on May 4, 1999 the U.S. Class Action was dismissed. A motion to reconsider was also dismissed. Although the U.S. Class Action plaintiffs have appealed, the present status of those proceedings is that they have been dismissed.

[13] Nonetheless, the U.S. claims persist, and there have been negotiations between counsel for the U.S. and Canadian Class Action plaintiffs and Philip since early 1999 with a view to arriving at a settlement of the class action claims against Philip. Because of the nature of these claims, and the potential quantum of any judgments that might be obtained, a resolution of the Class Action proceedings, according to Philip, is an essential element of any successful restructuring. On June 23, 1999, the parties to the negotiations entered into a Memorandum of Understanding which outlined a proposed settlement between Philip and the U.S. Class Action and CPA Proceedings plaintiffs.

[14] Philip and the CPA Proceeding plaintiff now seek certification of the CPA Proceeding and approval of the Settlement by the Court. Philip, separately, seeks approval of this Court under the CCAA to enter into the proposed Settlement. These motions have triggered the series of matters that are now to be disposed of. Deloitte & Touche not only opposes the Motions, but seeks separate declaratory relief on its own part touching upon the Settlement itself and as well the overall "fairness" and "reasonableness" of the proposed Canadian Plan. I shall return to the specifics of the competing Motions and the relief sought shortly. First, however, some brief reference to the controversial aspects of the Canadian and U.S. Plans, and to the terms of the Settlement, is required.

The Controversial Aspects of the Plans, and the Settlement

[15] The principle terms and conditions of the U.S. and Canadian Plans, as they presently stand, were hammered out in a "Lock-Up Agreement" entered into in April, 1999 and later amended on June 21st, between Philip (as Canadian borrower), PSI (as U.S. borrower), and a Steering Committee representing the Lenders. There were also negotiations with certain of Philip's major unsecured creditors and with counsel for the U.S. and Canadian class action plaintiffs. The Lock-Up Agreement is variously described as the result of "heavy" negotiations and "very hard bargaining". No doubt that is indeed the case.

[1] These various actions were eventually consolidated and transferred to the United States District Court, Southern District of New York, by order dated June 2, 1998.

[16] The amended Lock-Up Agreement provides in substance that the Lenders will become the holders of 91% of the equity in the newly restructured Philip, and that they will as well receive U.S. $300 million of senior secured debt (now reduced to $250 million through asset sales) and $100 million of secured “payment in kind” notes. Under the U.S. Plan the remaining 9% of the equity in the restructured Philip is to be made available to other stakeholders, on the following basis: 5% (plus U.S. $60 million in junior notes) is to be for the compromised unsecured creditors; 2% for the existing shareholders; 1.5% for the Canadian and U.S. class action plaintiffs; and, 0.5% for the holders of other securities claims. The formula is conditional upon cross-approvals of the U.S. and Canadian Plans.

[17] From Philip’s perspective the Plans filed in both the U.S. and in Canada are interdependent and form a single Plan from a “business point of view”. The general concept of the overall plan is that each class of stakeholders in the Consolidated Philip with similar characteristics are to be treated similarly whether they are located in the U.S. or in Canada. With this in mind, and having regard to the need for a coordinated restructuring of claims and interests against Philip, PSI, and the Canadian and U.S. subsidiaries, the Plans provide that,

a) creditors with claims against *Philip’s Canadian subsidiaries but not against Philip itself* are to file their claims in the CCAA proceedings in Canada, and are to be dealt with in the Canadian Plan; and,

b) creditors with claims *against Philip* or its U.S. subsidiaries are to have their claims processed in the U.S. proceedings and are to be dealt with in the U.S. Plan.

[18] The result of this is that the claims of *Philip’s* creditors, whether Canadian or U.S., are to be dealt with under the U.S. Plan and governed by Chapter 11 of the *U.S. Bankruptcy Code.* This includes the claims of Deloitte & Touche and of the Underwriters, and of certain former officers and directors, for contribution and indemnity in relation to the U.S. and Canadian class proceedings. It also includes the claims of certain creditors, such as Royal Bank of Canada, in relation to personal property leases.

[19] Not surprisingly, those so affected take umbrage at this treatment. They submit that it contravenes the provisions of the CCAA and their substantive rights under Canadian law, and should not be countenanced. It renders the Canadian Plan unfair and unreasonable, in their submission, and should not be sanctioned. Philip argues, on the other hand, that matters

relating to whether or not the Plan is fair and reasonable are matters to be dealt with at the sanctioning hearing, when the Plan is brought before the Court for approval after it has received the earlier approval of the Company's creditors. Counsel for Philip—supported by counsel for the Lenders and counsel for the Canadian class action plaintiff—submits that it is premature at this stage to consider such contentions. Counsel for Deloitte & Touche and for the Underwriters and for Royal Bank counter this argument, however, by asserting that the certification and approval of the Settlement as sought raises the very same issues and that they are so "inextricably linked" that they must be dealt with together. In an earlier endorsement, I agreed with this latter submission. It fails now to consider the two matters together.

The Proposed Settlement

[20] Under the proposed Settlement the Canadian and U.S. class action plaintiffs are to receive 1.5% of the common shares of a restructured Philip, as noted above. The shares are to be distributed *pro rata* amongst the Canadian and U.S. plaintiffs. There is to be, in addition, an amount of up to U.S. $575,000 for costs of counsel for the U.S. and Canadian class action plaintiffs. The Settlement is embodied in the U.S. Plan as "Allowed Class 8B Claims". It includes the right of persons caught by the class proceedings to opt out; however, any member of the class who elects to opt out of the proposed settlement is also to be dealt with in the U.S. Plan as a Class 8B claimant.

[21] The proposed Settlement is conditional upon its being approved by the Courts in Canada and in the U.S. and, according to Philip, upon the successful implementation of both the Canadian and the U.S. Plan. Philip has made it clear that it and its professional advisors do not believe that a restructuring of Philip can be accomplished without resolution of the class action claims in Canada and the U.S. Philip, counsel in the Canadian class action, and the Lenders all argue that in the event of liquidation, the plaintiffs will get nothing because—even if they are successful on liability—they will have no chance of recovering a damage award against the insolvent Philip. The Settlement is also recommended by Ernst & Young, the court appointed Monitor for Philip in the CCAA proceedings.

[22] What, then, are the specific issues that the Court is asked to determine on the pending Motions?

II—The Issues Raised

[23] The following Motions, as summarized, are before the Court:

1) A Motion by Philip pursuant to the CCAA for authorization and direction to enter into the proposed Settlement of the proceeding pending against it under the *Class Proceeding Act*;

2) A joint Motion by Philip and Mr. Menegon, the representative plaintiff in the CPA Proceedings, for certification of the class proceeding as against the defendant Philip only, and for approval of the Settlement Agreement together with directions regarding notification of members of the proposed class;

3) A cross-Motion by Deloitte *&* Touche—one of Philip's co-defendants in the CPA Proceedings, supported by the other co-defendant Underwriters—for declaratory relief in the nature of an order:

a) declaring, pursuant to s. 5.1(3) of the CCAA and s. 97 of the *Courts of Justice Act* that the Canadian Plan is not fair and reasonable in the circumstances, having regard to those provisions in the Canadian Plan which compromise the ability of Deloitte & Touche to claim contribution and indemnity against Philip and certain of its directors, officers and employees;

b) precluding the compromise of the Deloitte & Touche claims and amending both the Canadian Plan and the U.S. Plan so that Deloitte & Touche's rights are to be determined under the Canadian Plan alone, and in accordance with Canadian law and without unfairly prejudicing its rights.

4) A Motion by Royal Bank of Canada for an order,

a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;

b) declaring that the Canadian Plan is not fair and reasonable because it seeks to compromise the Bank's claims in the U.S. Plan, thus adversely affecting the Bank's rights and circumventing Philip's obligations under Canadian law;

c) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,

d) amending sub-paragraph 14(d) of the initial Order granted in the CCAA proceeding on June 25, 1999—which presently permits Philip to terminate any and all arrangements entered into by them—by providing that the sub-paragraph does not apply to leases of personal property; and, finally,

5) A Motion on behalf of certain former officers and directors of Philip seeking to have the Canadian Plan and the U.S. Plan declared not fair and reasonable in the circumstances, having regard to those provisions,

a) which attempt to compromise or otherwise limit the ability of the Moving Parties to claim contribution and indemnity from Philip without compensation whatsoever;

b) which call for releases to be provided to current directors and officers of Philip, but not to former directors and officers;

c) which deprive the Moving Parties of their rights as creditors to vote on the Canadian Plan.

III—Law and Analysis

The Class Proceedings

[24] There is little difference in substance between the joint Motion of Philip and the Canadian class action plaintiff under the *Class Proceedings Act,* and that of Philip alone, under the CCAA. Both ultimately seek approval and implementation of the proposed Settlement. However, the CCAA proceeding provides the context in which this approval is sought and, indeed—as I have already mentioned—Philip and others are of the view that a successful restructuring of Consolidated Philip is not possible without the implementation of the proposed Settlement, and that the converse is also true. Thus, there *is* a close link between the two, and in my opinion the issue of settlement approval cannot be viewed in isolation from the CCAA/restructuring environment in the context of which it was developed.

Certification

[25] I have little hesitation in certifying—and do certify—the CPA Proceeding as a class proceeding pursuant to subsection 5(1) of the *Class Proceedings Act,* as requested. That is, the proceeding is certified as a class proceeding as against the defendant Philip only and for settlement purposes only. It is without prejudice to any arguments the other defendants to the

CPA Proceedings may wish to make in opposition to any element of the plaintiff's claim, including, but not limited to, certification of a class as against them.

[26] For those purposes, however, I am satisfied that the tests set out in subsection 5(1) have been met. The statement of claim discloses a cause of action based upon faulty disclosure. There is an identifiable class, as articulated in the materials, and a common issue, as therein very broadly defined[2]. A class proceeding makes sense, and is the preferable procedure for the resolution of the common issue in the circumstances, and Mr. Menegon constitutes a representative plaintiff as called for in the subsection. An Ontario Court has jurisdiction pursuant to the *Class Proceedings Act* to certify a Canada-wide opt out class where the action has a "real and substantial" connection to Ontario, as is the case here: see, *Carom v. Bre-X Minerals Ltd.,* February 11, 1999, unreported, Court file No. 99-02614 (Ont. Gen. Div.) [reported at 43 O.R. (3d) 441]; *Nantais v. Telectronics Proprietary (Canada) Ltd.,* (1995), 25 O.R. (3d) 331 (Ont. Gen. Div.), leave to appeal refused (1995), 25 O.R. (3d) 331 at 347 (Ont. Gen. Div.).

Approval and Notice

[27] I have concluded, however, that Notice should be given at this time to the members of the class as certified, in accordance with the provisions of section 17 of the *Class Proceedings Act,* but that the proposed Settlement ought not to be approved at this time and at this stage of the restructuring proceedings.

[28] This conclusion is based not so much on the issue of whether notification under the *Act* may be given jointly for certification *and* approval, and not so much of the question of the merits of the proposed Settlement as between the class action plaintiffs and Philip. The former issue has not yet been settled, but need not be determined in this case. The latter is supported by the recommendations of the Monitor and seasoned U.S. representative counsel, and by the "reality check" that if there is no settlement it is unlikely that the class action plaintiffs will ever recover anything from Philip.

[29] Rather, my conclusion is based upon my sense that it is *premature* to approve a settlement of the U.S. and Canadian class action proceedings at this stage of the restructuring process. Philip and the Lenders have made it clear that the settlement of those

claims forms a central underpinning to the ability of Consolidated Philip to reorganize successfully. But the reverberations of the class actions extend to more than merely the relations between Philip and the class action plaintiffs. They affect the relations between Philip and the co-defendants in the proceedings, and between the class action plaintiffs and the co-defendants as well. The class action plaintiffs and the co-defendants are all unsecured claimants of Philip in the restructuring process—the claims of the co-defendants for contribution and indemnity against Philip and its former officers and directors arise out of the same "nucleus of operative facts"[3] as the claims of the class action plaintiffs against Philip; and one follows from the other. It has frequently been noted that the full name of the CCAA is "An Act to facilitate compromises and arrangements between companies and their creditors". In the bare-knuckled ring of commercial restructuring negotiations, this cannot be accomplished if one group of unsecured claimants is given an unwarranted advantage over another.

[30] To grant approval to the proposed Settlement of the class action plaintiffs with Philip at this stage would in effect immunize both those plaintiffs and Philip from the need to have regard to the co-defendants in resolving their dispute. It may well be that a plaintiff in an action with multi-party defendants can settle unilaterally with one of those defendants without creating other repercussions in the lawsuit. It may also be, however, that such a settlement cannot be effected without taking into account some aspects of the "other party" issues—things such as the impact of the settlement on the co-defendants' claims for contribution and indemnity, including the quantum of or a cap on recovery and questions of releases, to take only some examples.

[31] For instance, Philip is contractually bound under the terms of its Underwriting Agreement with the Underwriters to indemnify and hold the Underwriters harmless against all claims based on allegations of untrue statements or alleged untrue statements in a prospectus. More to the point, Philip *is not entitled without the consent of the Underwriters,* under the terms of the same Agreement, *to settle* any action in which such claims are made against it and unless the settlement includes an unconditional release in favour of the Underwriters. Approval of the proposed Settlement at this stage of the restructuring proceedings would deprive the Underwriters of that contractual right. What is significant at this point is not the attempt to

[2] The common issue is very broadly and vaguely defined, and while such a definition has received approval in other cases, I do not mean to be taken as having approved such a definition for any purposes other than those of this particular case.

compromise the claim, including the contractual right to the release, but rather the loss of the bargaining chip on the part of the Underwriters in the process as a result of the *unilateral* settlement as between Philip and the plaintiffs.

[32] Philip, the Lenders, and counsel for the class action plaintiffs have mounted an adamant chorus that if the proposed Settlement is not approved the U.S. and Canadian class action plaintiffs will get nothing because Philip will be liquidated and, in addition, that there is simply no room for the class action plaintiffs to receive anything more than the 1.5% share distribution in the restructured Philip which is currently on the table. The Lenders point out that they are fully secured and that they need not leave available even that 1.5% interest (not to mention the 9% equity interest which they have agreed to leave available to other stakeholders generally). These pronouncements may well reflect the final reality of the situation. However, I am somewhat less inclined to accept them at face value than the parties are to make them, particularly at this stage of the proceedings. It would not be the first time in restructuring negotiations where an adamant chorus turned into a more harmonious melody before the end of the day. Only the final moments of the process will tell the tale. In the meantime, as many negotiating options as possible should be kept open as amongst claimants of equal status in the restructuring, in my view.

[33] I do not say that this proposed Settlement, in its present or some other form, will not ultimately be approved. It is simply premature at this stage in the restructuring process to give it that imprimatur, in my opinion—if the imprimatur is to be given—for the reasons I have articulated. Accordingly, the question of approval of the proposed Settlement is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing. In the meantime, Notice of certification and of the *pending* motion for approval is to be sent to all members of the class.

The Fairness Issues Regarding the Canadian Plan.

[34] Much of the foregoing reasoning applies to the conclusions I have reached with respect to the issues raised by Deloitte & Touche and others respecting the Canadian Plan and its nexus with the proposed Settlement.

[3] To use the phrase adopted by the parties.

[35] The claim of the plaintiffs in the CPA Proceedings as against Deloitte & Touche and the Underwriters includes a claim for the difference between the value received by the plaintiffs as a result of the settlement and their actual loss. If the Settlement and the Canadian and U.S. Plans are approved, however, these co-defendants will lose their rights to claim contribution and indemnity from Philip in the class action. This, in itself, is not a reason for impugning the fairness and reasonableness of the Plans, because the ability to compromise claims against it is essential to the ability of a debtor corporation to restructure its affairs. Nonetheless, where the proposed structure of the reorganization affects the substantive rights of claimants in a fashion which treats them differently than they would otherwise be treated under Canadian law, and where the effect of that treatment is to place the claimants in a position where their ability to engage in full and complete negotiations with the debtor company are impaired, there is cause for concern on the part of the Court. That, in my view, is the case here.

[36] The effect of the Canadian Plan, as presently structured, is to deprive Deloitte & Touche, the Underwriters and others such as the former directors and officers of Philip who may have claims of contribution and indemnity as against Philip arising out of the same “nucleus of operative facts” pertaining to the class action claims, from pursuing those contribution claims in the Canadian CCAA proceeding. The same is true, but for different reasons, of the claim of Royal Bank with respect to its equipment leases. This is accomplished by carving out the claims in question from the CCAA proceedings and providing that they are to be dealt with under the U.S. Plan in U.S. Bankruptcy Court in accordance with the provisions of the *U.S. Bankruptcy Code. All claims against Philip* are to be dealt with in that fashion, notwithstanding that it was Philip which set in motion the CCAA proceedings in the first place and which sought and obtained the stay of proceedings preventing these very same claimants from pursuing their claims in Canada against it. At the same time, the Canadian Plan, but its very terms, is to be binding upon all holders of claims against Philip—including those which are subject to the Canadian Plan: see section 9.15 of the Canadian Plan. This is to be accomplished without even according the right to those claimants to vote on the Plan.

[37] The binding nature of the Canadian Plan has the effect of requiring the responding claimants to provide releases in favour of Philip while they are at the same time not released by Philip from claims that might be subsequently asserted against them. Furthermore, as the Plan presently stands, Deloitte & Touche and the Underwriters will be deemed to have

released former directors and officers from claims for contribution and indemnity. The Class Action plaintiffs have chosen not to pursue the directors and officers, at the present time, and there is apparently upwards of $100 million in insurance that might be available to satisfy such claims. This is a matter of considerable concern for Deloitte & Touche and for the Underwriters. Philip has advised, during the course of these motions and before, that it does not intend the proposed Settlement or the Plan to preclude the ability of Deloitte & Touche and of the Underwriters to pursue the former officers and directors. For the present, however, the Plan is worded in such a way that they will be so precluded. The real point is that all of this is being visited upon the responding claimants without there being entitled to any say in the Canadian proceedings as to their willingness or lack of willingness to be so treated.

[38] In my opinion it is the loss of the right to vote in the Canadian Plan which lies at the heart of the present dilemma. The mere fact that a Canadian creditor's rights are to be dealt with and affected by single or parallel insolvency proceedings in the U.S. Bankruptcy Court—or that the reverse may be the case (U.S. creditor/Canadian Court)—is not necessarily sufficient, in itself, to undermine the fairness and reasonableness of a proposed Plan: see, for example *Roberts v. Picture Butte Municipal Hospital* (1998), 64 Alta. L.R. (3d) 218 (Alta. Q.B.); *Re Starcom Services Corp.,* Bankr. W.D. Wash., case no. M-98-60005, Nov. 20, 1998. In Canadian insolvency proceedings under the CCAA, however, it is the right to vote on the compromise or arrangement which the debtor company proposes to make with them which is the central counterpart, on the part of the creditors, to the debtors right to attempt to make that compromise or arrangement. In my view, having chosen to initiate and take advantage of the CCAA proceedings, Philip cannot now evade the implications and statutory requirements of those proceedings by seeking to carve out certain pesky—and potentially large—contingent claimants, and to require them to be dealt with under a foreign regime (where they will be treated less favourably) while at the same time purporting to bind them to the provisions of the Canadian Plan. All of this without the right to vote on the proposal.

[39] While the fact that their treatment under U.S. Bankruptcy law will apparently be considerably less favourable than their treatment under Canadian law is not determinative, it is certainly a factor for consideration when taken in conjunction with the loss of voting rights in the Canadian Plan. As counsel have presented it, contribution claimants such as Deloitte & Touche, the Underwriters and the directors and officers will have the status equivalent to *equity* holders under the U.S. Plan. Their claims will not be considered as unsecured *debt*

claims in terms of priority ranking. Pursuant to the “cram down” provisions of the *U.S. Bankruptcy Code,* the Bankruptcy Court can approve a plan of reorganization even if a class of creditors votes not to accept the plan provided no junior-ranking class receives a distribution and the plan is otherwise fair and reasonable. Moreover, the U.S. Bankruptcy Court may on motion deem such a class of stakeholders to have voted to reject the plan in order to dispense with the necessity of having such a vote amongst its members. While Philip’s deponents and its counsel have not said so expressly, it is the clear inference from the materials filed that that is precisely the route which Philip proposes to follow *vis à vis* the contribution claimants whose claims have been left to be dealt with under the *U.S. Bankruptcy Code.*

[40] For purposes of the CCAA the claim of an unsecured creditor includes a claim in respect of any indebtedness, obligation or liability which would be a claim provable in bankruptcy, and therefore includes a contingent claim for unliquidated damages. Thus, Deloitte & Touche, the Underwriters, the officers and directors, and Royal Bank are all entitled to assert claims in the CCAA proceedings. They are Canadian claimants, asserting claims against a Canadian company in a Canadian proceeding. In respect of the claims for contribution and indemnity those claims arise out of a “nucleus of operating facts” which the U.S. Courts—at the urging of Philip, amongst others—have already determined are more conveniently litigated in Canadian class action proceedings.

[41] In respect of the Royal Bank, the claim relates to some 57 equipment leases entered into between the Bank and Philip under lease agreements governed by the laws of Ontario and with respect to equipment located (with one exception) in Ontario. However, under U.S. Bankruptcy laws, Philip would be entitled to “reject” leases, which it is not entitled to do under Ontario law, although it may of course “break” the leases if it is prepared to suffer the legal consequences. Again the attempt by Philip is to treat the claims under a regime which is more favourable to it and less so to the claimant. That attempt may not in itself be objectionable, but to the extent that it is accomplished by depriving the creditor of its right to vote and to participate in the Canadian proceedings which were initiated for the purposes of shielding Philip against the claim, it is troubling.

[42] The rights of creditors under the CCAA cannot be compromised unless,

a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;

b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;

c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,

d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors).

43 See CCAA, section 4,6 and 12; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.

[44] Here, for the reasons I have outlined, what Philip proposes is inconsistent with the foregoing.

[45] Philip and the Lenders argue that the issues raised in this regard by the Respondents go entirely to the fairness find reasonableness of the U.S. and Canadian Plans, and that such considerations should be reserved for determination at the sanctioning hearings. I agree that generally speaking matters relating to fairness and reasonableness are better considered in the overall context of the final sanctioning hearing. Where, as here, however, the debtor company has acted earlier to obtain approval of a step in the restructuring process—in this case, the Class Action Settlement—which gives rise to issues that are inextricably linked to the overall fairness of the proposed Plan, and its compliance with statutory requirements, the consideration of those issues may be called for. This is one of those cases, in my opinion, because the reverberations of approving the proposed Settlement—in conjunction with the manner in which the debtor intends to treat other claimants directly affected by the settlement, have the effect of requiring those claimants to participate in the subsequent restructuring negotiations without a full deck of cards.

[46] Philip and the Lenders also argue that "comity" demands that this Court defer to the U.S. Bankruptcy Court in allowing the claims of Deloitte & Touche, the Underwriters, the former directors and officers, and the Royal

Bank to be dealt with in the U.S. Plan. They point out that in its Initial Order in the CCAA proceedings this Court approved an international Protocol which provides for co-operation between the U.S. and Canadian Courts, to the extent possible. I do not think that either comity or the question of whether the claims will be dealt with ultimately under the U.S. Plan, are the issues here. In addition, the effect of the Protocol as I read it—given the circumstances outlined above—is to provide some protection to claimants on either side of the border from being swept into the rigours of the other countries regimes where to do so might prevent them from asserting their substantive rights under the applicable laws of their own jurisdiction.

[47] In this regard, the following provisions of the Protocol are worthy of note:

> **(C) Comity and Independence of the Courts**
>
> 7. The approval and implementation of this Protocol shall not divest or diminish the U.S. Court's and the Canadian Court's independent jurisdiction over the subject matter of the U.S. Cases and the Canadian Case, respectively. By approving and implementing the Protocol, neither the U.S. Court, the Canadian Court, the Debtors nor any creditors or interested parties shall be deemed to have approved or engaged in any infringement on the sovereignty of the United States or Canada.
>
> 8. The U.S. Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the U.S. Cases. The Canadian Court shall have sole and exclusive jurisdiction and power over the conduct and hearing of the Canadian Cases.
>
> 9. In accordance with the principles of comity and independence established in paragraphs 7 and 8 above, nothing contained herein shall be construed to:
>
> • increase, decrease or otherwise modify the independence, sovereignty or jurisdiction of the U.S. Court, the Canadian Court or any other court or tribunal in the United States or Canada…;
>
> • *preclude any creditor or other interested party from asserting such party's substantive rights under the applicable laws of the United States, Canada* or any other jurisdiction including, without limitation, the rights of interested parties or affected persons to appeal from the decisions taken by one or both of the Courts.
>
> (emphasis added)
>
> **(J) Preservation of Rights**
>
> 27. *Neither the terms of this Protocol nor any actions taken under the terms of this Protocol shall prejudice or affect the* powers, rights, *claims* and defenses *of* the Debtors and their estates, the Committee, the Estate Representatives, the U.S. Trustee *or any of the Debtors' creditors under applicable law, including the Bankruptcy Code and the CCAA.*
>
> (emphasis added)

[48] The extension of comity as between Courts in cross-border insolvency situations, and co-operation generally in such matters, are matters of great importance, to be sure, in order to facilitate the successful and orderly implementation of insolvency arrangements in such circumstances. Nothing I have said in these Reasons is intended to counter that ethic. However, comity and international co-operation do not mean that one Court must cede its authority and jurisdiction over its own process or over the application of the substantive laws of its own jurisdiction, whenever any kind of differences between the two jurisdictions may arise. Both the Protocol and the provisions of subsection 18.6(2) of the CCAA—which gives this Court authority "to make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under [the CCAA] with any foreign proceeding"—confirm this. Subsection 18.6(5) of the CCAA provides that "nothing in this section requires the Court to make any order that is *not in compliance with the laws of Canada* or to enforce any order made by a foreign court" (emphasis added).

[49] Here, there is yet no order of the U.S. Court, or treatment of the Claimants or Debtor to which comity may be extended, but there is—as I have outlined above—a failure to comply with the requirements of insolvency laws and procedure of Canada, as stipulated in the CCAA. I conclude, therefore, that the Canadian Plan as it presently stands is flawed because it seeks to exclude Canadian claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote.

[50] There was much debate in argument over whether the issue of treatment of the claims in the Canadian or U.S. proceedings was a function of the "real and substantial connection" of Philip with the U.S. jurisdiction, or a function of the "real and substantial connection" of the responding claimants and their claims to the Canadian proceedings. There is no doubt that Philip has a substantial connection with the United States in terms of the residence of the majority of shareholders and the location of the majority of operating assets. This connection certainly justifies the U.S. Chapter 11 proceedings. However, Philip also has a substantial connection to Canada, with its headquarters in Ontario, its Canadian subsidiaries, and its 94 locations and 2,000 employees throughout the country. This connection, together with its array of Canadian creditors, sustains the resort to the CCAA proceedings.

[51] I do not think that the analysis falls to be made, in these particular circumstances, on purely *foreign conveniens* grounds. There is more to the situation than that. Philip initiated the CCAA proceedings and sought and accepted the benefits flowing from that step. The responding claimants seek to assert claims in the Canadian proceeding against the Canadian company which instituted those proceedings, in relation to matters arising out of a Canadian class proceeding or (in the case of Royal Bank) out of Canadian contracts and equipment largely located in Canada. The substantive law of Canada under the CCAA, and the procedures therein laid down, entitle them to assert those claims in the Canadian proceedings and to have a vote on the "Plan" which is set forth by the debtor company to compromise them. They should not be deprived of those substantive and procedural rights without having any say in the matter. Putting it another way, I am satisfied that the unquestioned "juridical advantage" which Philip seeks to achieve through its proposed treatment of the responding claimants is outweighed by the unquestioned "juridical disadvantage" on the part of the latter, given that the juridical scales would otherwise be tipped towards Philip through the resort to a stratagem which in my view is not sanctioned under the CCAA.

[52] Philip and the Lenders argue that there is great urgency to effect the restructuring process, and that requiring Philip to adhere to the procedures relating to classification, the valuation of claims, and voting—with the numerous issues that may have to be determined in that context—may well doom the process from the beginning. The Lenders are truculent, as their secured position leads them to be; they say that if the reorganization is not completed quickly they may simply abandon the process and exercise their rights to realize on their security, and the entire restructuring process will fail, with dire consequences for all concerned. Mr. McDougall, on behalf of Deloitte & Touche, characterized this as "the cry of doom".

[53] I am very aware of the need for timeliness in situations such as these—particularly given the sensitive nature of Consolidated Philip's service oriented business. However, I do not think that the need for a timely resolution alone is justification for depriving claimants of their substantive rights under Canadian law, and for abrogating their right to vote which lies at the very heart of the Canadian restructuring process from the creditor's perspective. It is the tool which gives them ultimate leverage in the bargaining process, and without it their practical rights—as well as their substantive and procedural ones—are greatly diminished.

III—Conclusion

[54] An order will therefore go in terms of the foregoing.

The Class Proceedings

[55] As indicated, an Order is granted certifying the CPA Proceeding as a class proceeding, pursuant to subsection 5(1) of the *Class Proceedings Act,* as against Philip only and for settlement purposes only. The certification is without prejudice to any arguments the other defendants in the CPA Proceeding may wish to make in opposition to any element of the plaintiffs' claim including, but not limited to, certification of a class as against them. In addition, notice of the certification and of the pending motion for approval of the proposed Settlement is to given to members of the class as certified, in accordance with the provisions of section 17 of the *Act.* The question of approval of the Settlement, in its present form or some other form as may be advised, is adjourned to a date to be fixed which is more contemporaneous with the sanctioning hearing.

The Fairness/Substantive Law Issues

[56] Notwithstanding the observations in these Reasons about the Canadian Plan and the treatment of claims in the U.S. proceedings, I am reluctant to grant the sweeping declaratory relief sought by the Respondents. Whether the Plan is ultimately found to be fair and reasonable and in accordance with all necessary requirements remains still a matter for determination in the sanctioning hearing, after all the negotiations have been concluded and the votes counted. As much as is reasonably possible should be left to that process.

[57] I am prepared to make an Order, however—and do—declaring that the Canadian Plan as it is presently constituted fails to comply with the procedural and statutory requirement of the CCAA regime in that it seeks to exclude the responding claimants from participation in its process by providing that their claims against Philip itself are to be governed by and treated in the U.S. proceedings while at the same time seeking to bind them to the provisions of the Canadian Plan, all without affording those claimants any right to vote. Anything further in this respect, it seems to me, should be left to the negotiation arena.

[58] The position of the Royal Bank is slightly different. It is entitled, in addition, to an order,

a) declaring that the claim of Royal Bank against Philip under certain leases shall be determined with reference to Canadian law and in the Canadian proceedings;

b) amending the Canadian Plan so that the Bank's claim is not dealt with in the U.S. Plan; and,

c) amending sub-paragraph 14(d) of the Initial Order granted in the CCAA proceeding on June 25, 1999—which presently permits Philip to terminate any and all arrangements entered into by them—by providing that the sub-paragraph does not apply to the Royal Bank leases of personal property.

[59] There will be no order as to costs.

[60] Order accordingly.

Orders accordingly.

Tab 27

See para. 72

CITATION: Target Canada Co. (Re), 2016 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Linda Galessiere and *Gus Camelino* for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *Daniel Hamson* for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark and Melaney Wagner for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

Harvey Chaiton for the Directors and Officers of the Applicants

Stephen M. Raicek and *Mathew Maloley* for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada

Vern W. DaRe for Doral Holdings Limited and 430635 Ontario Inc.

Stuart Brotman for Sobeys Capital Incorporated

Catherine Francis for Primaris Reit

Kyla Mahar for Centerbridge Partners and Davidson Kempner

William V. Sasso, Pharmacist Representative Counsel

Varoujan C. Arman for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.

Brian Parker for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.

Roger Jaipargas for Glentel Inc., Bell Canada and BCE Nexxia

Nancy Tourgis for Issi Inc.

HEARD: December 21, 2015 & December 22, 2015

SUPPLEMENTARY WRITTEN SUBMISSIONS: December 30, 2015, January 6, 2016 and January 8, 2016

ENDORSEMENT

[1] The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

[2] On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

[3] These are the reasons.

[4] The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

[5] The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

[6] The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

[7] The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner,

[1] Capitalized terms not defined herein have the same meaning as set out in the Plan.

CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

[8] The Monitor also supports the motion.

[9] The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

[10] In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

[11] By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

[12] The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

[13] The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

[14] Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

[15] The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

[16] The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

[17] In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

[18] The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 – Breach of paragraph 19A of the Amended and Restated Order

[19] First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

[20] Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for

> the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

[21] The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> "A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order…[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation."

[22] The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;
>
> (a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and
>
> (b) a fair and reasonable balancing of interests.

[23] Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP – it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

[24] The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 – Breach of paragraph 55 of the Claim Procedure Order

[25] Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

[26] The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

[27] The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

[28] In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

[29] In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

[30] Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[31] Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

[32] Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

[33] Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

[34] The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

[35] Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

[36] The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

[37] With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

[38] Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

[39] The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

[40] The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

[41] If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

[42] Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

[43] The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or 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, or 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 shareholders of the company, to be summoned in such manner as the court directs.

[44] Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.).

[45] Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd.*, Re, 2009 NSSC 163, 55 C.B.R. (5th) 205).

[46] Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

[47] Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

[48] Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

[49] Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of

the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

[50] The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List], affirmed 2008 ONCA 587, (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

[51] Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

[52] With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

[53] The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

[54] As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

[55] At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

[56] Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

[57] The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

[58] Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

[59] The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

[60] With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

[61] Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

[62] In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp*., Re, 2013 ONSC 823, 2013 CarswellOnt 3043 [Commercial List]. Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

[63] In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,

> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.

Likewise, the Claims Procedure Order, as amended, clearly provides that:

> (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
>
> (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
>
> (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.

There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order…

[64] With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc.*, Re, 2003 ABQB 745, 20 Alta. L.R. (4th) 264, aff'd 2004 ABCA 31, 346 A.R. 28, where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

[65] Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

[66] Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[67] In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

[68] Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

[69] As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

[70] Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Re Quintette Coal Ltd*. (1992), 13 C.B.R. (3d) 146 (B.C.S.C.); *Re Dairy Corp. of Canada Ltd*., [1934] O.R. 436 (Ont. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co*. (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Re Northland Properties Ltd*. (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at p. 182, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re BlueStar Battery Systems International Corp*. (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

[71] As explained below, the Plan cannot meet the required criteria.

[72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to

release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

[73] The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

[74] The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

[75] The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

[76] Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

[77] However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

[78] Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

[79] This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

[80] Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having

any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be

considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

[87] Accordingly, the Plan is not accepted for filing and this motion is dismissed.

[88] The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

[89] At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

_____

Regional Senior Justice G.B. Morawetz

Date: January 15, 2016

Tab 28

See para. 98

COURT OF APPEAL FOR ONTARIO

CITATION: Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570
DATE: 20150807
DOCKET: C58636

Doherty, Gillese and Lauwers JJ.A.

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 or Arrangement of Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

BETWEEN

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Applicants

and

The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security

Respondents

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Heard: February 3, 2015

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

Gillese J.A.:

OVERVIEW

[1] The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

[2] The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

[3] Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

[4] During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on

wind up of each plan (the "**wind up deemed trust**"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

[5] The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("**PPSA**").

[6] Sections 57(3) and (4) of the PBA read as follows:

> 57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[7] The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person

> who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

[8] The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[9] For the reasons that follow, I would dismiss the appeal.

THE CAST OF CHARACTERS

[10] Grant Forest Products Inc. ("**GFPI**") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

[11] GFPI and related companies (the "**Applicants**") brought an application for protection from creditors under the CCAA (the **CCAA Proceeding**"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "**Remaining Applicants**" in the CCAA Proceeding.

[12] Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "**Administrator**"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

[13] Stonecrest Capital Inc. was appointed the chief restructuring organization (the "**CRO**") by court order dated June 25, 2009.

[14] Ernst & Young Inc. was appointed the monitor (the "**Monitor**") by court order dated June 25, 2009.

[15] The "**First Lien Lenders**" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

[16] The "**Second Lien Lenders**" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

[17] The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "**Second Lien Lenders' Agent**").

[18] The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

[19] West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "**West Face**"), are parties to the **Second Lien Credit Agreement** with the Remaining Applicants. The Second Lien Lenders (including

West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

[20] Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("**USSC**") in USSC's unrelated proceedings under the CCAA (the "**Intervener**") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

[21] By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Re Grant Forest Products Inc.*, 2015 ONCA 192. Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

BACKGROUND IN BRIEF

Sale of the Applicants' Assets

[22] On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

[23] The court gave that protection by order dated June 25, 2009 (the "**Initial Order**"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

[24] In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

[25] GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

[26] GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("**Georgia Pacific**"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan, which was the pension plan associated with the assets it had purchased.

[27] Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17,

2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

[28] Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

[29] The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

[30] A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

[31] As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "**Remaining Funds**").

The Pension Plans

[32] GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI – Timmins Plant (the "**Salaried Plan**") and (2) the Pension Plan for Executive Employees of GFPI (the "**Executive Plan**") (together, the "**Plans**").

[33] Both of the Plans are defined benefit pension plans under the PBA.

[34] The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business".

[35] On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

[36] A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

[37] The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "**Superintendent's Wind Up Orders**"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

[38] As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

[39] GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "**Pension Motion**"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

[40] When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "**Reserve Funds**").

[41] The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

[42] On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the

Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans.[1]

[43] It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

[44] On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

[45] On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

[46] By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

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[1] Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

[47] The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

[48] On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

[49] On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

[50] When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

[51] By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

[52] West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

[53] By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada

Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "**Bankruptcy Motion**").

[54] On October 22, 2012, it was submitted[2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "**Motions")**, however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

[55] The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

[56] The Supreme Court released its decision in *Indalex on* February 1, 2013.

[57] On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

[58] A further oral hearing on the Motions took place on July 23, 2013.

[2] The record is unclear as to which party or parties made this submission.

The Transition Order

[59] The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "**Transition Order**"). Among other things, in the Transition Order, the court ordered that:

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

[60] In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

[61] The Superintendent then sought and obtained leave to appeal to this court.

THE DECISION BELOW

[62] In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the

assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

[63] The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

[64] The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

[65] In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

[66] The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

[67] The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts

priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

[68] The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

[69] The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

[70] The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

[71] West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

[72] Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A SUMMARY OF THE PARTIES' POSITIONS ON APPEAL

The Superintendent

[73] The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

[74] The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

[75] The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

[76] The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

[77] First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required

payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

[78] Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

[79] Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

[80] Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

[81] Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

[82] The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

[83] West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts

that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

[84] West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

[85] Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

[86] However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;

2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;

3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and

4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

[87] The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

THE ISSUES

[88] The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

[89] The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

[90] West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

[91] In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

[92] To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions*: Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69, at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

[93] With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining

Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

[94] To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?
2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and
3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

THE STANDARD OF REVIEW

[95] The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, at para. 29.

[96] I would not accept this submission for two reasons.

[97] First, in articulating this standard of review, *Resurgence* purported to follow *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93. However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

[98] Second, the applicable standard of review has been established by two decisions of this court: *Re Air Canada* (2003), 66 O.R. (3d) 257 and *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108. In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco*, at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

[99] The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

[100] Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?

[101] The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

[102] I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

[103] It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The

CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

[104] *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

[105] It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced

because there would have been even fewer funds available to satisfy their claims.

[106] The CCAA judge was also aware that in March 2012 – some three months before the Pension Motion was brought – counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

[107] Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

[108] That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

[109] In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?

[110] In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[111] At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

[112] In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA – that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> … The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow

> the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco,* at paras. 62-63). [Citation excluded.]
>
> …
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

[113] Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

[114] The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and

4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

[115] Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

[116] Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

[117] In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

[118] As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

[119] The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts

are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

[120] I would not accept either submission.

Federal Paramountcy

[121] In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

[122] As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

[123] Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

[124] As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

[125] In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

[126] There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

[127] The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

[128] A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the

application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

[129] Both the facts and the issues in *Indalex* differ from those of the present case.

[130] There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made – the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

[131] Second, the BIA played no part in *Indalex.* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding.[3]

[132] The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP

[3] See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

[133] As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[134] Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

[135] It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

[136] I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an

> insolvent company GFPI was not obliged to make the payments … .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

[137] I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

[138] Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going – the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order

permitted, but did not require, GFPI to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

[139] Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps – such as those suggested by the CCAA judge – to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

[140] I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

[141] In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to

address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A CONCLUDING COMMENT

[142] In my view, this case illustrates the value that a CCAA proceeding – rather than a bankruptcy proceeding – offers for pension plan beneficiaries. Three examples demonstrate this.

[143] First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

[144] Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

[145] Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which

the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

[146] I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

DISPOSITION

[147] Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

[148] If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

Released: August 7, 2015 "DD"

"E.E. Gillese J.A."
"I agree Doherty J.A."
"I agree P. Lauwers J.A."

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

SERVICE

1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the “Initial Order”), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor’s Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. (“SCI”) in its capacity as Chief Restructuring Organization (the “CRO”), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the “Pension Plans”) or their respective trustees or to the Pension Administrator.

6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

Tab 29

See para. 41

Resurgence Asset Management LLC v. Canadian Airlines Corporation, 2000 ABCA 149

Date: 20000529
Docket: 00-18816

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN IN CHAMBERS

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED;
AND IN THE MATTER OF THE BUSINESS CORPORATIONS ACT (ALBERTA) S.A. 1981, c.B-15., AS AMENDED, Section 185
AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION and CANADIAN AIRLINES INTERNATIONAL LTD.

BETWEEN:

RESURGENCE ASSET MANAGEMENT LLC

Applicant

- and -

CANADIAN AIRLINES CORPORATION
and CANADIAN AIRLINES INTERNATIONAL LTD.

Respondents

[Note: An erratum was filed on June 5, 2000; the corrections have been made to the text and the erratum is appended to this judgment.]

APPLICATION FOR LEAVE TO APPEAL THE ORDER
OF THE HONOURABLE MADAM JUSTICE M. S. PAPERNY
DATED THE 12th DAY OF MAY, 2000

MEMORANDUM OF DECISION

COUNSEL:

D. Haigh, Q.C.
D. Nishimura
For the Applicant

A. L.Friend, Q.C.
H. M. Kay
For the Respondents

S. Dunphy (for Air Canada)

A. J. McConnell (for Bank of Nova Scotia Trust Company of New York, Montreal Trust Co. of Canada)

P. T. McCarthy, Q.C.(for Price Waterhouse Coopers)

MEMORANDUM OF DECISION OF THE
HONOURABLE MR. JUSTICE WITTMANN

INTRODUCTION

[1] This is an application for leave to appeal the decision of Paperny, J. made on May 12, 2000, pursuant to the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36, as amended (***CCAA***). The applicant, Resurgence Asset Management LLC (Resurgence), is an unsecured creditor by virtue of its holding 58.2 per cent of U.S. $100,000,000.00 unsecured notes issued by Canadian Airlines Corporation (CAC)

[2] CAC and Canadian Airlines International Ltd. (CAIL) (collectively Canadian) commenced proceedings under the ***CCAA*** on March 24, 2000.

[3] A proposed Plan of Compromise and Arrangement (the Plan) has been filed in this matter regarding CAC and CAIL, pursuant to the CCAA.

[4] The decision of Paperny, J. May 12, 2000 (the Decision) ordered, among other things, that the classification of creditors not be fragmented to exclude Air Canada as a separate class from Resurgence in terms of the unsecured creditors; that Air Canada should be entitled to vote on the Plan pursuant to s. 6 of the ***CCAA*** at the creditors' meeting to be held May 26, 2000; that there be no separation of unsecured creditors of CAC from unsecured creditors of CAIL for voting purposes; and that votes in respect of claims assigned to Air Canada, be recorded and tabulated separately, for the purpose of consideration in the application for court approval of the Plan (the Fairness Hearing).

LEAVE TO APPEAL UNDER THE *CCAA*

[5] The section of the ***CCAA*** governing appeals to this Court is as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[6] The criterion to be applied in an application for leave to appeal pursuant to the ***CCAA*** is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: ***Re Multitech Warehouse District*** (1995), 32 Alta. L.R. (3d) 62 at 63 (C.A.); ***Luscar Ltd. v. Smoky River Coal Ltd.***, [1999] A.J. No. 185 at para. 22 (C.A.); ***Re Blue Range Resource Corporation***, [1999] A.J. No. 975; ***Re Blue Range Resource Corporation***, [2000] A.J. No. 4;***Re Blue Range Resource Corporation***,

[2000] A.J. No. 31.

[7] Subsumed in the general criterion are four applicable elements which originated in ***Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*** (1988), 19 C.P.C. (3d) at 396 (B.C.C.A.), and were adopted in ***Med Finance Company S.A. v. Bank of Montreal*** (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in ***Power Consolidated*** as follows at p.397:

> (1) whether the point on appeal is of significance to the practice;
> (2) whether the point raised is of significance to the action itself;
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

FACTS

[8] On or about October 19, 1999, Air Canada announced its intention to make a bid for CAC and to proceed to complete a merger subject to a restructuring of Canadian's debt. On or about November 5, 1999, following a ruling by the Quebec Superior Court, a competing offer by Airline Industry Revitalization Co. Inc. was withdrawn and Air Canada indicated that it would proceed with its offer for CAC.

[9] On or about November 11, 1999, Air Canada caused the incorporation of 853350 Alberta Ltd. (853350), for the sole purpose of acquiring the majority of the shares of CAC. At the time of incorporation, Air Canada held 10 per cent of the shares of 853350. Paul Farrar, among others, holds the remaining 90 per cent of the shares of 853350.

[10] On or about November 11, 1999, Air Canada, through 853350, offered to purchase the outstanding shares of CAC at a price of $2.00 per share for a total of $92,000,000.00 for all of the issued and outstanding voting and non-voting shares of CAC.

[11] On or about January 4, 2000, Air Canada and 853350 acquired 82 per cent of CAC's outstanding common shares for approximately $75,000,000.00 plus the preferred shares of CAIL for a purchase price of $59,000,000.00. Air Canada then replaced the Board of Directors of CAC with its own nominees.

[12] Substantially all of the aircraft making up the fleet of Canadian are held by Air Canada through lease arrangements with various lessors or other aircraft financial agencies. These arrangements were the result of negotiations with lessors, jointly conducted by Air Canada and

Canadian.

[13] In general, these arrangements include the following:

> (i) the leases have been renegotiated to reflect contemporary fair market value (or below) based on two independent desk top valuations; and
>
> (ii) the present value of the difference between the financial terms under the previous lease arrangements and the renegotiated fair market value terms was characterized as "unsecured deficiency," reflected in a Promissory Note payable to the lessor from Canadian and assigned by the lessor to Air Canada.

[14] In the result, Air Canada has acquired or is in the process of acquiring all but eight of the deficiency claims of aircraft lessors or financiers listed in Schedule "B" to the Plan in the total amount of $253,506.944.00. Air Canada intends to vote those claims as an unsecured creditor under the Plan.

[15] The executory contracts claims listed in Schedule "B" to the Plan total $110,677,000.00, of which $108,907,000.00 is the claim of Loyalty Management Group Canada Inc. (Loyalty), an entity with a long term contract with Canadian to purchase air miles. The claim is subject to an agreement of settlement between Loyalty, Canadian and Air Canada. Air Canada was assigned the Loyalty unsecured claim.

[16] In the Plan, all unsecured creditors of both CAC and CAI are grouped in the same class for voting purposes.

[17] Pursuant to the Plan, unsecured creditors will receive a payment of $0.12 on the dollar for each $1.00 of their claim unless the total amount of unsecured claims exceeds $800 million, in which case, they will receive less. Air Canada will fund this Pro Rata Cash Amount. As a result of the assignments of the deficiency amounts in favour of Air Canada, if the Plan is approved, Air Canada will notionally be paying a substantial proportion of the Pro Rata Cash Amount to itself.

[18] The Plan further contemplates Air Canada becoming the 100 per cent owner of Canadian through 853350.

[19] On April 7, 2000, an Order was granted by Paperny, J., directing that the Plan be filed by the Petitioners; establishing a claims dispute process; authorizing the calling of meetings for affected creditors to vote on the Plan to be held on May 26, 2000; authorizing the Petitioners to make application for an Order sanctioning the Plan on June 5, 2000; and providing other directions.

[20] The April 7, 2000 Order established three classes of creditors: (a) the holders of Canadian Airlines Corporation 10 per cent Senior Secured Notes due 2005 (the Secured Noteholders); (b) the secured creditors of the Petitioners affected by the Plan (the Affected Secured Creditors); and (c) the unsecured creditors affected by the Plan (the Affected Unsecured Creditors).

[21] On April 25, 2000, the Petitioners filed and served the Plan, in accordance with the Order of April 7, 2000. By Notice of Motion dated April 27, 2000, Resurgence brought an application, among other things, seeking "directions as to the classification and voting rights of the creditors . . . (and) the quantum of the 'deficiency claims' assigned to Air Canada." Resurgence sought to have Air Canada excluded from voting as an unsecured creditor unless segregated into a separate class. Resurgence also sought to have the holders of the unsecured notes vote as a separate class.

[22] The result of the April 27, 2000 motion by Resurgence is the Decision.

THE DECISION

[23] In the Decision, the supervising chambers judge referred to her order of April 14, 2000, wherein she approved transactions involving the re-negotiation of the aircraft leases. She referred to "about $200,000,000.00 worth of concessions for CAIL" as "concessions or deficiency claims" which were quantified and reflected in promissory notes which were assigned to Air Canada in exchange for its guarantee of the aircraft leases. The monitor approved of the method of quantifying the claims and Paperny, J. approved the transactions, reserving the issue of classification and voting to her May 12 Decision.

[24] The Plan provides for one class of unsecured creditor. The unsecured class is composed of a number of types of unsecured claims including executory contracts (e.g. Air Canada from Loyalty) unsecured notes (e.g. Resurgence), aircraft leases (e.g. Air Canada from lessors), litigation claims, real estate leases and the deficiencies, if any, of the senior secured noteholders.

[25] In seeking to have Air Canada vote the promissory notes in a separate class Resurgence argued several factors before Paperny, J., as set out at pp. 4-5 of the Decision as follows:

> 1. The Air Canada appointed board caused Canadian to enter into these ***CCAA*** proceedings under which Air Canada stands to gain substantial benefits in its own operations and in the merged operations and ownership contemplated after the compromise of debts under the plan.
>
> 2. Air Canada is providing the fund of money to be distributed to the Affected Unsecured Creditors and will, therefore, end up paying itself a portion of that money if it is included in the Affected Unsecured

> Creditors' class and permitted to vote.
>
> 3. Air Canada gave no real consideration in acquiring the deficiency claims and manufactured them only to secure a 'yes' vote.

[26] She then recited the argument made by Air Canada and Canadian to the effect that the legal rights associated with Air Canada's unsecured claims are the same as those associated with the other affected unsecured claimants, and that the matters raised by Resurgence relating to classification are really matters of fairness more appropriately dealt with in a Fairness Hearing scheduled to be held June 5, 2000.

[27] After observing that the ***CCAA*** offers no guidance with respect to the classification of claims, beyond identifying secured and unsecured categories and the possibility of classes within each category, and that the process has developed in case law, Paperny, J. embarked on a detailed analysis and consideration of the case law in this area including ***Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.); ***Sovereign Life Assurance Co. v. Dodd***, [1892] 2 Q.B. 573 (C.A.); ***Re Fairview Industries Ltd.*** (1991), 11 C.B.R. (3d) 71 (N.S.S.C.T.D.); ***Re Northland Properties*** (1989), 73 C.B.R. (N.S.) 195; ***Savage v. Amoco Acquisition Corp.*** (1988), 68 C.B.R. 154 (Alta. C.A.); ***Re Woodward's Ltd.*** (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*** (1991), 86 D.L.R. (4th) 621 at 626 (Ont. Gen. Div.); ***Re NsC Diesel Power Inc.*** (1990), 79 C.B.R. (N.S.) 1 (N.S.S.C.T.D.); ***Re Wellington Bldg. Corp.***, [1934] O.R. 653, 16 C.B.R. 48 (Ont. S.C.). Paperny, J. also referred to an oft-cited article "Reorganization under the Companies Creditors Arrangement Act" by S. E. Edwards (1947), 25 Can. Bar Rev. 587. She concluded her legal analysis at pp.12-13 by setting forth the principles she found to be applicable in assessing commonality of interest as an appropriate test for the classification of creditors:

> 1. Commonality of interest should be viewed on the basis of the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests the creditor holds qua creditor in relationship to the debtor company, prior to and under the plan as well as on liquidation;
>
> 3. The commonality of these interests are to be viewed purposively, bearing in mind the object of the ***CCAA***, namely to facilitate reorganizations if at all possible;
>
> 4. In placing a broad and purposive interpretation on the ***CCAA***, the court should be careful to resist classification approaches which would potentially jeopardize potentially viable plans.

> 5. Absent bad faith, the motivations of the creditors to approve or disapprove are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

THE STANDARD OF REVIEW AND LEAVE APPLICATIONS

[28] The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the ***CCAA***. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in ***UTI Energy Corp. v. Fracmaster Ltd.*** (2000), 244 A.R. 93 where she stated for the Court at p.95:

> . . . . this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

In another recent ***CCAA*** case from this Court, ***Re Smoky River Coal Ltd.*** (1999) 237 A.R. 326, Hunt, J.A., speaking for the unanimous Court, extensively reviewed the history and purpose of the ***CCAA***, and observed at p.341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 ***CCAA***) suggests that Parliament, mindful that ***CCAA*** cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.

[29] The standard of review of this Court, in reviewing the ***CCAA*** decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

STATUTORY PROVISIONS

[30] The ***CCAA*** includes provisions defining secured creditor, unsecured creditor, refers to classes of them, and provides for court approval of a plan of compromise or arrangement in the

following sections:

> 2. INTERPRETATION
> . . .
> "secured creditor" means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds;
> . . .
> "Unsecured creditor" means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issue under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds.
>
> COMPROMISES AND ARRANGEMENTS
> 4. 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 a manner as the court directs.
>
> 5. 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 courts directs.
> . . .
> 6. Where a majority in number representing two-thirds in value of the

> creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> > (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
> >
> > (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the ***Bankruptcy and Insolvency Act*** or is in the course of being wound up under the ***Winding-up and Restructuring Act***, on the trustee in bankruptcy or liquidator and contributories of the company.

CLASSES OF CREDITORS

[31] It is apparent from a review of the foregoing sections that division into classes of creditors within the unsecured and secured categories may, in any given case, materially affect the outcome of the vote referenced in section 6. Compliance with section 6 triggers the ability of the court to approve or sanction the Plan and to bind the parties referenced in s. 6(a) and 6(b) of the ***CCAA***. In argument before me, it was conceded by the applicant that Resurgence would not have the ability to ensure approval of the Plan by casting its vote if Air Canada were to be excised from the unsecured creditor category into a separate class. Conversely, counsel for Resurgence candidly admitted that Resurgence would effectively have a veto of the Plan if Air Canada were segregated into a separate class of unsecured creditor.

APPLICATION OF THE CRITERIA FOR LEAVE TO APPEAL

[32] The four elements of the general criterion are set out in paragraph [7]. The first and second elements are satisfied in this case. The points raised on appeal are of significance to the action. If Resurgence succeeds, it obtains a veto. If it does not succeed, and it votes as a member of the unsecured creditors class with Air Canada, Air Canada can control the vote of the unsecured creditors.

[33] In terms of the points on appeal being of significance to the practice, it may be that an appellate court's views in this province on the classification of unsecured creditors issue is desirable, there being no appellate authority from this Court on this issue. Although I have doubt as to the significance of this element of the general criterion in the context of the facts of this

case, I am prepared for the purposes of this application to treat this element as having being satisfied.

[34] The third element is whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous. In my view, the proper interpretation of this element is not a mutually exclusive application of an appeal being either meritorious or frivolous. Rather, the appeal must be *prima facie* meritorious; if it is not *prima facie* meritorious, this element is not satisfied.

[35] I find that the appeal on the points raised from the Decision is not *prima facie* meritorious. In the plain ordinary meaning of the words of this element, on first impression, there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "*prima facie*" meritorious.

[36] I have carefully reviewed all of the cases referred to by the supervising chambers judge and the principles she derived from them. In my view, she made no error in law.

[37] In the exercise of her discretion, she decided neither to allow the applicant's motion to excise Air Canada from the unsecured creditors class nor to prohibit Air Canada from voting. She also declined, on the facts established before her, to separate creditors of CAC from creditors of CAIL for voting purposes. She did, however, order that Air Canada's vote be recorded and tabulated and indicated that this will be considered at the Fairness Hearing.

[38] It was strenuously argued before me by the applicant, that deferring classification and voting issues to the Fairness Hearing was an error of law or principle in and of itself.

[39] The argument was put in terms that if, on a proper classification of unsecured creditors, Air Canada was removed from the unsecured class, and Resurgence vetoed the Plan, the matter of a Fairness Hearing would never arise. While that may be true, it does not follow that there is any error in law in what the supervising judge did. She concluded that the separate tabulation of the votes will allow the voice of the unsecured creditors to be heard, while, at the same time, permit, rather than rule out the possibility, that the Plan might proceed. This approach is consistent with the purpose of the ***CCAA*** as articulated in many of the authorities in this country.

[40] The supervising chambers judge also refused to exclude Air Canada from voting on the basis that the legal rights attached to the notes held by Air Canada were valid. Resurgence argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated secured creditor. Paperny, J. held that this was an issue of fairness, as was the fact that Air Canada was really voting on its own reorganization. She did not err in principle. She expressly acknowledged the authorities that, on different facts, either

allowed different classes or excluded a vote. See, for example, ***Re Woodward's Ltd.*** (1993), 84 B.C.L.R. (2d) 206 (B.C.S.C.); ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 166 (B.C.S.C.); ***Re NsC Diesel Power Inc.*** (1990), 79 C.B.R. (N.S.) 1 (N.S.S.C.T.D.).

[41] The fourth element of the general criterion is whether the appeal will unduly hinder the progress of the action. In other words, will the delay involved in prosecuting, hearing and deciding the appeal be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction? The approach of the supervising judge to the issues raised by the applicant is that its concerns will be seriously addressed at the Fairness Hearing scheduled for June 5, 2000, pursuant to s.6 of the ***CCAA***, provided the creditors vote to adopt the Plan.

[42] This element has at its root the purpose of the ***CCAA***; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in ***Re Pacific National Lease Holding Corp.*** (1992) 15 C.B.R. (3d) 265 (B.C.C.A.) are particularly apt where he stated as follows at p.272:

> Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
>
> Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

[43] In that case, it appears that McFarlane, J.A. was satisfied that the first three elements of the criteria had been met, i.e. that there "may be an arguable case for the petitioners to present to a panel of this court on discrete [sic] questions of law".

[44] It was argued before me that an appeal would give rise to an uncertainly of process and a lack of confidence in it; that the creditors, or some of them, may be inclined to withdraw support for the Plan that would otherwise be forthcoming, but for the delay. None of the parties tendered affidavit evidence on this issue.

[45] Nowhere in any of the authorities has the issue of onus in meeting the elements the general criterion been prominent. I am of the view that the onus is on the applicant. That onus would include the applicant producing at least some evidence on the fourth element to shift the onus to the respondents, even though it involves proving a negative, i.e. that there will not be any material adverse impact as the result of the delay occasioned by an appeal. That evidence is lacking in this case. It is lacking on both sides but the respondents do not have an initial onus in this regard. Therefore, I find that the fourth element has not been established by the applicant.

[46] The last step in a proper analysis in the context of a leave application is to ascribe appropriate weight to each of the elements of the general criterion and decide over all whether the test has been met. In most cases, the last two elements will be more important, and ought to be ascribed more weight than the first two elements. The last two elements here have not been met while the first two arguably have. In the result, I am satisfied that the applicant has not met the threshold for leave to appeal on the basis of the authorities, and I am therefore denying the application.

CONCLUSION

[47] The application for leave to appeal the Decision is dismissed on the basis that there is no *prima facie* meritorious case and that the granting of leave would likely unduly hinder the progress of the action.

APPLICATION HEARD on May 18, 2000

MEMORANDUM FILED at Calgary, Alberta
this 29th day of May, 2000

WITTMANN J.A.

ERRATUM OF THE MEMORANDUM OF DECISION

In the Style of Cause, in the lines “Application for Leave to Appeal . . . Dated the 18th day of May, 2000" the date has been changed to read “Dated the 12th day of May, 2000".

Court of Appeal File No. M53250
Court File No. CV-21-00658423-00CL

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 OR ARRANGEMENT OF JUSTENERGY GROUP INC. ET AL.
Applicant

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTIES

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