C A N A D A | **S U P E R I O R C O U R T**

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36)

No: 500-11-042345-120

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE AND ARRANGEMENT OF:

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
and
AERO TECHNICAL US, INC.

Insolvent Debtors/Petitioners

and

FTI CONSULTING CANADA INC.

Monitor

ET AL.

PETITIONERS' BRIEF OF ARGUMENTS IN SUPPORT OF THEIR MOTION FOR AN ORDER AUTHORIZING THE ASSIGNMENT OF THE AIR CANADA CONTRACT AND FOR A VESTING ORDER

I. OVERVIEW

1. Aveos Fleet Performance Inc. ("**Aveos**" or the "**Company**") is requesting that this Court approve and issue the necessary vesting order in respect of an agreement executed by Aveos and Lufthansa Technik AG ("**LHT**) (the "**LHT Agreement**") for the assignment of the Engine Maintenance Services Agreement dated May 30, 2012 between Aveos and Air Canada (the "**AC Contract**").

2. The International Association of Machinists & Aerospace Workers ("**IAMAW**"), MTU Aero Engines GMBH ("**MTU**") and the Government of British Columbia ("**BC Government**") seek standing to contest said Motion and will ask the Court to set aside the LHT Agreement in favour of a lesser and rejected offer put forward by MTU (the "**MTU Offer**"). The Third Party Secured Lenders, by their Administrative Agent, Credit

Suisse (the "**Secured Lenders**"), oppose the position of the IAMAW and MTU and support the position of the Company.

3. The proposed assignment of the AC Contract is made as part of a sale process authorized by the Court on April 20, 2012 (the "**Divestiture Process**"), which was conducted by the Chief Restructuring Officer ("**CRO**") and under the oversight by the Monitor.

4. As appears from the Monitor's Thirteenth Report to the Court, the Monitor fully supports the Company's *Motion for an Order Authorizing the Sale of Certain Assets of the Petitioners and for a Vesting Order (Air Canada Contract),* (the "**Motion**").

5. The Company's Motion seeking approval of the LHT Agreement and the corresponding Vesting Orders is based on Section 36 of the *Companies' Creditors Arrangement Act* ("**CCAA**"). The assignment of a contract is a "disposition" within the meaning of this provision. Section 36 of the CCAA enumerates the principal factors to be considered by a Court in deciding whether to authorize a proposed sale of assets:

   (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
   (b) whether the monitor approved the process leading to the proposed sale or disposition;
   (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
   (d) the extent to which the creditors were consulted;
   (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
   (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

6. Air Canada does not oppose the Motion or the proposed assignment of the AC Contract. Aveos does not request the Court to apply Section 11.3 of the CCAA as Aveos and Air Canada have an agreement that authorizes the assignment of the AC Contract to LHT until August 23, 2012.

II. PETITIONERS' POSITION

7. Aveos, with the support of the Secured Lenders, contends that:

   (a) the Court approved Divestiture Process has been conducted fairly and with integrity, in conformity with the principles set out in sub-section 36(3) of the CCAA, and the principles enunciated in the Ontario Court of Appeal decision in *Royal Bank v. Soundair Corp.* [1991] 7 C.B.R. (3d) 1 ("***Soundair***") **(Tab 1)**, which

have been adopted by this Court, and has resulted in a superior transaction that has value substantially in excess of the MTU Offer;

(b) both the MTU Offer and LHT Agreement were set to expire on August 15, 2012. The expiry date of the LHT Agreement and the termination date of the AC Contract were extended, by LHT and Air Canada respectively, to August 23, 2012 in Court at the request of Hon. Jean-Yves Lalonde at the hearing of August 14, 2012. The need to present a Motion to authorize the assignment of the AC Contract and to obtain Court approval on or before such expiry dates, has previously been clearly explained by the CRO and the Monitor before the Court on July 26, 2012 and in the Monitor's Eleventh Report dated July 25, 2012 (at para. 9) and in the CRO's Fifth Report dated July 25, 2012 (at paras. 10 – 15);

(c) the delay or postponement of the approval of the LHT Agreement will result in a loss of the entire value of the AC Contract because it automatically terminates if not assigned on August 23, 2012, which loss will prejudice all creditors of the estate, most particularly the Secured Lenders, who have the primary economic interest;

(d) neither MTU nor IAMAW nor the BC Government have standing to oppose the LHT Agreement. MTU is a "bitter bidder" with no present economic interest in the assets of Aveos and no present economic interest in the outcome;

(e) IAMAW is asserting that the offer proposed by MTU should be preferred because it carries the potential of creating approximately 100 jobs in Vancouver where a subsidiary of MTU is said to have a facility also unionized with a local branch of IAMAW. As will be demonstrated at the hearing, these potential employment opportunities are unlikely to be filled by former Aveos employees, for numerous reasons. In any event, while potential job creation was a factor considered by Aveos is assessing the various offers, in this case, the potential job opportunities did not outweigh the very significant differential in the purchase price offered by MTU.

(f) IAMAW has no standing, inasmuch as its position in opposing the sale is to speak for prospective employees of MTU rather than former Aveos employees. Prospective employees of a third party purchaser do not have any stakeholder interest in the estate;

(g) IAMAW, in its capacity as the Union representing the former Aveos employees, has been recognized as a key party to the success of the Divestiture Process and has fully participated to the Divestiture Process with respect to the three main divisions of Aveos (Airframes, CMC and EMC) and was given every opportunity to assist prospective purchasers to present their best bids to the Company as contemplated by the Divestiture Process.

III. APPLICABLE LEGAL PRINCIPLES

8. The factors set out in sub-section 36(3) of the CCAA largely overlap with the criteria established in *Soundair*, which was decided before the enactment of sub-section 36(3) of the CCAA and which has been applied in the context of sale approvals in CCAA

proceedings. *Soundair* summarized the factors a Court should consider when assessing whether to approve a transaction to sell assets:

(a) Whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) The interests of all parties;

(c) The efficacy and integrity of the process by which offers are obtained; and

(d) Whether there has been unfairness in the working out of the process.

- *Re Terrace Bay Pulp Inc*., 2012 CarswellOnt 9470 at para. 44 (**Tab 2**)

3.1 Transparency and Integrity of the Divestiture Process

9. The *Soundair* factors focus first and foremost on the "integrity of the process" which is integral to the administration of a Divestiture Process under the CCAA.

10. The Divestiture Process was conceived, prepared, approved and executed to meet the particular complexities of the Aveos operations in relation to the market: the divisions were diverse, in multiple locations and would be of potential interest to local, national or international players.

11. As such, the CRO proposed a Divestiture Process, supported by the Monitor and approved by the Court, that provided for broad market exposure and open discussions, negotiations and competition to maximize value. The terms of the Divestiture Process were well publicized and understood by all parties. The terms also afforded the flexibility to Aveos and the CRO to adjust timelines and make changes as required at any time during the process.

12. Indeed, section 6 of the Divestiture Process provides as follows:

> Reservation of rights
>
> Aveos may, at any time: (a) reject any Bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the CCAA, the DP, or any other orders applicable to Aveos, or (iii) contrary to the best interests of Aveos, and its stakeholders as determined by Aveos; (b) impose additional terms and conditions and otherwise seek to modify the DP without further notice, including amending the Aveos business listing in Schedule A and extending any time period or deadlines; (c) withdraw from sale any Aveos Business and make subsequent attempts to market the same; and (d) reject all Bids.
>
> The DP does not, and shall not be interpreted to, create any contractual or other legal relationship between Aveos and any Potential Bidder, Phase 1 Qualified Bidder or Phase 2 Qualified Bidder, other than as specifically set forth

> in definitive agreements that may be signed with Aveos, and subject to paragraph 4.10 below. (emphasis added)

13. MTU submitted its Phase 2 Bid to the CRO on August 7, 2012, whereby it acknowledged that it had reviewed and accepted in full the terms and conditions of the Divestiture Process, the whole as provided by Section 2.3.6(ii) of Schedule B to the Divestiture Process.

14. Both MTU and LHT qualified as Phase 2 Qualified Bidders after the first round and both requested more time to submit a bid in Phase 2.

15. The Divestiture Process provides:

> **4. PHASE 2: NEGOTIATION OF BIDS**
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> 4.1. Aveos will negotiate with the Phase 2 Qualified Bidders to finalize the terms of their Bids. This process may involve discussions between each Phase 2 Qualified Bidder and customers, the IAMAW, regulatory authorities and other interested parties. Eight calendar days is the time period allocated for such discussions. Two additional days will be set aside for face to face negotiations between Aveos and Phase 2 Qualified Bidders, pursuant to a final private and confidential closed auction to negotiate, finalize and select the Accepted Bids.
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> 4.2 Upon a final Phase 2 Qualified Bid being executed by a Bidder on terms acceptable to Aveos, Aveos may accept such Bid subject to (i) approval by the Monitor and (ii) Court authorization and the issuance of a Vesting Order and such Phase 2 Qualified Bid shall constitute an Accepted Bid.
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> (emphasis added)

16. The Divestiture Process always contemplated that Phase 2 offers would be improved after their initial submission. Both MTU and LHT were duly advised of the fact that the date to submit Phase 2 Bids was August 7, 2012. Both MTU and LHT accepted this process and both parties submitted said Phase 2 Bids on August 7, 2012. As appears from paragraph 9 of the Monitor's Eleventh Report to the Court dated July 25, 2012, the deadline for the completion of the final private auction was August 10, 2012. Both MTU and LHT increased their initial offers submitted on August 7, 2012. The accepted bid was received on August 9, 2012. It was also always clear, as appears from paragraph 15 of the Fifth Report of the CRO to the Court, that the Company would seek approval for the assignment of the AC Contract on or before August 15, 2012. The foregoing is entirely in conformity with the Divestiture Process approved by the Court and both the Monitor and the CRO were fully transparent with respect thereto.

17. Moreover, there was no illegality or non-compliance whatsoever by the CRO or the Monitor with the Divestiture Process authorized by the Court.

18. To the contrary, evidence of the transparency, consideration, care and diligence with which the CRO and the Monitor have implemented the Divestiture Process will be submitted. At every hearing before this Court, reports were filed by the Monitor and the CRO to disclose and update the past and upcoming steps of the Divestiture Process, the challenges being faced, the interests being considered and the progress being made.

Reports of the CRO

- First Report to the Court of the CRO (para. 30);
- Second Report to the Court of the CRO (paras. 35-38; 43);
- Third Report to the Court of the CRO (paras. 11-12; 24-28; 33);
- Fourth Report to the Court of the CRO (paras. 24; 30);
- Fifth Report to the Court of the CRO (paras. 5-15); and
- Sixth Report to the Court of the CRO (para. 19).

Reports of the Monitor

- Monitor's Third Report to the Court (paras. 17-20);
- Monitor's Seventh Report to the Court (para. 24);
- Monitor's Eighth Report to the Court (para. 19); and
- Monitor's Eleventh Report to the Court (para. 9).

19. Moreover, counsel for the IAMAW were present at every hearing held in these proceedings, and the BC Government was duly served with every Motion, Notice, CRO Report and Monitor's Report filed, Court Orders and Minutes of Hearing, all of which documentation is also available on the Monitor's website. MTU was never a party to these proceedings and is not a stakeholder, but was kept fully abreast of all developments and worked closely with the CRO and the Monitor throughout the process.

20. In *Re AbitibiBowater Inc.,* the Court held that if a sale process leading to the proposed sale is fair, transparent and efficient, then "a court will not lightly interfere with the exercise of [the Debtor's and Monitor's] commercial and business judgment in the context of an asset sale."

- *Re Abitibi Bowater Inc.*, 2010 QCCS 1742, at para. 71 **(Tab 3)**.

21. Similarly, in *Re Grant Forest Products Inc.,* the Court found "once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be

honoured, excepting extraordinary circumstances." In fact, the Court held that it simply did not have jurisdiction to provide relief which "is the product of the marketing process that was not only approved by [the] Court, but not objected to by any party when it was initiated."

- *Re Grant Forest Products Inc.,* 2010 ONSC 1846 (O.S.J. (Comm. List)) at paras. 29 and 72 **(Tab 4)**

22. Gascon, j.s.c. (as he was then) warned against the dangers involved in retroactively second-guessing a transaction which was arrived at in compliance with the dictates of a Court-approved divestiture process, simply because a bidder or other party is dissatisfied:

- *Re Boutiques San Francisco Inc.*, [2004] R.J.Q. 965, J.E. 2004-714 at paras. 16 – 21 **(Tab 5)**

> [16] …Bien sûr, cette offre acceptée ne vaut que sur approbation du Tribunal, mais le point de départ demeure avant tout une offre acceptée, soit un engagement ferme pris de part et d'autre.
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> [17] L'ignorer bafouerait totalement une règle de droit importante, soit le respect des engagements et de la parole donnée, et ce, quant à des gestes posés une fois la protection de la *Loi sur les arrangements avec les créanciers des compagnies* (*LACC*) accordée au Groupe BSF.
>
> [18] Ce serait enfin envoyer un message fort dangereux pour tout processus similaire ultérieur, et il est fort probable qu'il y en aura, puisque tous les intéressés seraient alors portés à ne pas prendre au sérieux un appel d'offres futur au motif que son résultat ne signifie rien et que tout se joue réellement une fois les offres reçues et ouvertes. Le Tribunal réfère notamment à cet égard aux décisions *Cameron* v. *Bank of Nova Scotia* et *Bank of Montreal* v. *Maitland.*
>
> [19] Le Tribunal estime que cela ne pourrait mener qu'à des situations où les débitrices risqueraient fort d'être les grandes perdantes dans toute démarche future du genre. Sans compter que ce serait là encourager des jeux de coulisses et des manœuvres qui entacheraient sérieusement la crédibilité du processus que les ordonnances du Tribunal visent justement à autoriser et à encadrer.
>
> [20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la *LACC* est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.

> [21] En l'espèce, on cherche en vain ce qui peut être qualifié de manque de transparence, de manque d'intégrité ou de manque d'équité dans la démarche suivie. Le processus choisi a donné une opportunité égale à La Senza et à Boutique Jacob, dont les deux se sont prévalues. Aucun élément du processus suivi ne justifie qu'il soit mis de côté. Quitte à le répéter, il était raisonnable, suffisant, efficace et équitable. À ce sujet, le Tribunal s'appuie entre autres sur la décision rendue *Dans l'affaire de la proposition de Interprovincial Paving Inc.* et sur celle rendue dans l'affaire *Katz.*

23. Courts have recognized the unfairness in re-opening a Divestiture Process for consideration of late or alternative bids.

- *Re Shape Foods Inc.*, 2009 MBQB 171 at para. 44 **(Tab 6)**

> "To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard – this would be an intolerable situation."

24. Potential purchasers must have confidence in the efficacy and integrity of a court-approved Divestiture Process. Moreover, parties do not become interested parties "merely due to their status of unsuccessful purchasers."

- *Re Shape Foods Inc.*, 2009 MBQB 171 at para. 44 **(Tab 6)**

25. Even in circumstances where a late bid offers a higher purchase price than the selected successful bid, courts have found it inappropriate to re-open a Divestiture Process. The Court has held that to do otherwise would foster uncertainty in the bid process which would actually discourage bids from prospective purchasers and lessen the objective of obtaining the highest possible price in the marketplace. The test remains whether or not the court-appointed officer acted properly, seeking a result that was in the best interest of all stakeholders.

- *Re 1730960 Ontario Ltd.*, 2009 CarswellOnt 4235, 55 C.B.R. (5th) 265 (S.C.J. [Commercial List]), at para. 23 **(Tab 7)**

- *Re Terrace Bay Pulp Inc.,* 2012 CarswellOnt 9470 (S.C.J.) (Commercial List) **(Tab 2)**

26. The Courts will not substitute their own appreciation of the impugned business decisions for that of the Monitor or court-appointed officer. The Court's discretion, as wide as it is, ought to be exercised with due consideration for the "business judgement rule," and notions of equity and reasonableness. The fact that the process pursuant to which the impugned transaction was concluded was previously ratified by the Court is also significant.

- *Re White Birch Paper Holdings Company*, 2011 QCCS 7304, at para. 67-83 **(Tab 8)**

> [73] Le rôle et l'opinion du Contrôleur et l'approbation du processus proposé par la Débitrice ne peut non plus être écarté à la légère. En l'absence d'une démonstration claire et non-équivoque d'une mauvaise interprétation des faits de sa part, le Tribunal doit faire preuve de grande prudence avant de mettre son opinion et ses conclusions de côté et d'y substituer sa propre décision.

- *Re AbitibiBowater Inc. et al*., 2009 QCCS 6460, at para. 59 **(Tab 9)**.

> [59] The balance of interests clearly favours approval. The Monitor supports and recommends the approval sought. The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholder.

- *Royal Bank v. Soundair Corp*. (1991), 7 C.B.R. (3d) 1, para. 21 **(Tab 1)**, citing *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 ; see also *Bank of Montreal v. Dedicated National Pharmacies Inc.* (2011), 83 C.B.R. (3d) 155, para. 29 **(Tab 10)**

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such business judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the receiver both in the perception of receivers and in the perception of any others who might have the occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court appointed receivers.

27. The productions demanded in the subpoenae *duces tecum* that have been served by MTU, and copied to the Service List, illustrate clearly the reason why a Court does not look behind the business judgment of the court officers, and the dangers inherent in doing so. It is not the role of the Court to re-examine every bid that was delivered and every communication that took place in the bidding process. The Court is not conducting its own auction, or sitting on appeal of the business decisions of the CRO and the Monitor, particularly at the instance of the unsuccessful bidder in that process. The process itself is undermined if specific negotiations that have been conducted on a

confidential basis can become open for scrutiny and with hindsight once the successful bidder has been selected.

28. In the case at bar, no one, including the IAMAW, objected to the Divestiture Process when it was proposed.

> ➢ *Re White Birch Paper Holdings Co*. 2010 QCCS 4915 (S.C.) at para. 40, **(Tab 11)** leave refused 2010 QCCA 1950 **(Tab 12)**
>
> [40] The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures…

29. Should MTU allege that it was somehow placed at a disadvantage in comparison to LHT due to representations that Air Canada would have made to MTU when discussing the prospect of conducting business with each other, this consideration is not relevant in the Court's analysis. The interests of third parties and the compatibility of one bidder's bid with any such third party as compared to that of another bidder forms part of what makes a bid competitive and viable.

> ➢ *Bank of Montreal v. Dedicated National Pharmacies Inc*. [2011] O.J. No. 3563, 2011 ONSC 4634 at para. 36 **(Tab 10)**
>
> [36] The receiver gave consideration to marketing the business again as it had done after the initial sale process order of Campbell J. The receiver's view was that there was a significant risk that offers from other bidders in a remarketing process would be lower than the price achieved and that extensive discussions would be required, without any assurance of success, with OATC and the other lessors on the terms of an assignment of the licences. The receiver has no assurances in its discussions with OATC that the concessions given by OATC would be offered by OATC to another prospective purchaser. The receiver is of the view that from a timing and recovery point of view, the new agreement with Centric/Haviland will better maximize recoveries for stakeholders. I accept that view as being sound and am in no position on the evidence before me to quarrel with it.

3.2 Effort to Obtain the Best Price

30. Another criterion set out by the Courts is whether or not reasonable efforts were made to obtain the best price. The LHT Agreement is far superior to the MTU Offer that was rejected.

31. In the effort to obtain the best price for the AC Contract, the CRO and the Monitor acted at all times in accordance with the Divestiture Process approved by the Court.

32. The CRO, in consultation with the Monitor, undertook a detailed review and comparative analysis of both offers received. The CRO considered all aspects of every

offer received, and worked closely with the bidders in an effort to obtain the best outcome for as many stakeholders in the process as possible. The CRO worked diligently to balance the interests of all stakeholders as much as reasonable in the unfortunate circumstances of insolvency. After exhaustive efforts, the CRO and the Monitor obtained the superior offer of LHT. Although given every opportunity to improve its bid, MTU confirmed it had submitted its last and final bid.

33. The market for the AC Contract was sufficiently canvassed and parties who may have an interest were given every reasonable opportunity to consider the opportunity and make an offer.

34. The LHT transaction, which is supported by the Monitor, involves consideration far in excess of the amounts offered by MTU in its competing bid.

35. The CRO and the Monitor have taken all reasonable steps to obtain the best price, have followed the Divestiture Process, and have not acted improvidently. It is submitted that there are no grounds for approving a transaction for far less money that would result in far lower recovery for the creditors.

3.3 Interests of the Parties

3.3.1 The Creditors

36. It is well established that the primary interest is that of the creditors of the debtor. An examination of the Divestiture Process, applying the *Soundair* test, is primarily to be conducted from the perspective of those for whose benefit the Divestiture Process has been conducted.

- *Soundair, supra* at paras. 39 and 41. **(Tab 1)**

37. Credit Suisse is Administrative Agent for the senior Secured Lenders of Aveos and has been consulted throughout the process. The senior Secured Lenders are owed in excess of $175 million by Aveos and, as such, are the primary financial stakeholders in Aveos. At this stage in the Divestiture Process, it is clear that the Secured Lenders will not be paid in full out of the asset of Aveos. The Secured Lenders support the approval of the LHT Agreement.

38. The delay or denial of approval, or the re-opening or variation of the Divestiture Process will highly prejudice the financial stakeholders of Aveos, and will favour the interests of the union over the interests of creditors, who will be deprived of all of the value of the AC Contract if it is not assigned before it expires on August 23, 2012.

39. The deadline for dealing with the AC Contract was well publicized and well known to the IAMAW and other stakeholders, and it was made clear that the timeline for approval of a transaction would be short. However, IAMAW indicated, even before the Motion for

Approval had been served, that it would nonetheless oppose any sale to anyone but MTU.

40. If the AC Contract expires without having been assigned, the value associated with the AC Contract will be entirely lost.

41. Furthermore, the offer submitted by MTU also expired on August 15, 2012. A condition of the MTU bid was the purchase of certain tools and equipment that have been included in the Maynards liquidation sale that has been approved by the Court and became final on August 15, 2012. Aveos had an agreement with Maynards that enabled Aveos to pull tools and equipment out of the liquidation sale, but this agreement expired on August 15, 2012. Hence, the last minute courtroom manoeuvres by MTU to materially change the playing field by altering a core element of its bid cannot be tolerated.

- *CCFL Subordinated Debt Fund and Co. v. Med-Chem Health Care Ltd.*, (1999), 8 C.B.R. (4th) 171(Ont. Gen.Div. [Comm. List], at para. 18 **(Tab 13)**

> [18] Furthermore, although not decisive to the process, I do not believe the Court should entertain offers tabled at the eleventh hour. In my view, such a course of conduct plays havoc with the process. There was, in all the circumstances, time sufficient…to have engaged the Receiver in some form of auction which should not be countenanced at the courthouse door.

42. Consequently, the MTU Offer is not acceptable, even if it was to be extended.

3.3.2 The Debtor and the Purchaser

43. LHT has spent considerable time and resources negotiating and finalizing a transaction with Aveos, and has relied upon the process as approved by the Court. Aveos has also expended considerable time and resources, in insolvent circumstances where it has limited access to resources, to negotiate the best and highest price for the assets, taking into consideration the interests of all stakeholders.

44. These interests cannot be overlooked:

- *Soundair, supra, at para. 40* **(Tab 1)**

> [40] … In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account.

3.3.3 Former Employees

45. As disclosed in the Sixth CRO Report to the Court and the Addendum thereto, Aveos never performed shop depot engine maintenance in British Columbia. The CRO had been advised that if any engine jobs are to be made available by MTU, they would largely be in British Columbia. As such, making engine jobs available in British Columbia is not of assistance to former Aveos employees. The CRO had been advised by a representative of IAMAW at a meeting that no former employees of the Aveos engines maintenance division have an interest in moving to British Columbia from Montreal to fill such positions. The potential creation of new jobs at MTU is not tantamount to the preservation of jobs for former employees of Aveos. The LHT Agreement contemplates approximately the same number of jobs in Montreal as the MTU Offer. That is the factual information that was made available by IAMAW to the CRO and the Monitor at the time, even if MTU may now allege different intents to seek support from IAMAW in its bitter bidder dispute.

3.3.4 IAMAW

46. The role of the IAMAW and its importance is specifically recognized by the Divestiture Process, which reads in part as follows:

> Schedule F
>
> Key Commercial Stakeholders
>
> While each Phase 1 Qualified Bidders will have a different commercial and strategic objective for the acquisition of one or more parts of the Aveos Business, Aveos encourages these parties to work with Air Canada, other Aveos customers and the IAMAW early in the process to determine what commercial arrangements can be made post-closing.
>
> The CRO has worked with both Air Canada and the IAMAW to identify points of contact as well as processes that will help facilitate Phase 1 Qualified Bidders working with these parties, as may be required.
>
> In order to facilitate an expedient and efficient process, Aveos has also encouraged both Air Canada and the IAMAW to work, as may be required, with multiple parties on parallel tracks to negotiate a suitable commercial relationship subject to the successful completion of a Transaction.
>
> Phase 1 Qualified Bidders should contact the CRO, who will in turn coordinate an introduction to these stakeholders.

See also :

- First Report to the Court of the CRO at par. 15(c) and 26;
- Second Report to the Court of the CRO at par. 35, 37-38;
- Third Report to the Court of the CRO at par. 33;
- Fourth Report to the Court of the CRO at par. 24; and

- Fifth Report to the Court of the CRO at par. 24.

47. The IAMAW was involved throughout the Divestiture Process to assist prospective purchasers to present their best offers for acceptance by the Company, the whole as contemplated by the Divestiture Process. The Company has acknowledged and indeed commended the efforts of the IAMAW and of its advisors in working with all parties who have come forward with respect to both the CMC and EMC divisions. This does not mean, in any way, that the IAMAW's support of a "bitter bidder" should override the decision of the Company, the recommendation of the Monitor, the position of the senior Secured Lenders or the terms of the Divestiture Process.

48. IAMAW's true intentions and motivations in the context of the Motion currently before this Court were inadvertently betrayed in its "demand letter" of August 10, 2012, wherein the IAMAW forewarned, prior to fully appreciating the facts at hand, that it would object to any sale to any party other than MTU. By doing so, the IAMAW revealed that its contestation would be devoid of any basis in fact and in law, as it was never intended to be predicated on the only lawful (albeit clearly unfounded in this case) basis upon which it could seek relief, i.e. unfairness in the process or improvident conduct on the part of the Monitor. The process followed in the matter at hand was conducted by the same people, applying the same process and procedures, and having the same objectives as the numerous other divestitures that were approved to date.

3.4 No Unfairness in Working Out the Process

49. The process followed by the CRO in entering the LHT Agreement was carefully, fairly and equitably implemented. The CRO, with the assistance of the Monitor, made diligent and sufficient efforts to get the best price that it could for the AC Contract. The CRO and LHT followed the Divestiture Process which was fair to all persons who indicated an interest in bidding on the AC Contract, extending available timelines to accommodate bidders, and ensuring that parties such as the union and Air Canada had the opportunity to communicate with the bidders.

50. There will be no probative evidence with respect to any unfairness in the Divestiture Process.

IV. ABSENCE OF STANDING OF MTU

51. It is clear that MTU has no standing to seek the relief in question in the context of the present proceedings. MTU is merely a disgruntled bidder who, after having had ample opportunity and time to prepare, submit, review and reevaluate its offer, submitted an offer that was not nearly as competitive and favourable as the LHT Agreement. MTU has already indicated that the last bid it submitted would be its last, even if additional time were to be granted.

52. In fact, as MTU counsel stated in open Court at the request of Hon. Jean-Yves Lalonde at the hearing of August 14, 2012, the MTU Offer is now for an amount of $4,000,000. The MTU offer, until then, was for a non-severable total amount of $5,200,000 that included $4,000,000 for the AC Contract and $1,200,000 for certain tooling needed by MTU to be able to perform under the AC Contract..

53. It is trite law that unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder. Unsuccessful bidders have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved in the sale and of the debtor's stakeholders. This holding has been recently reiterated by Gascon, j.s.c. (as he was then) in *Re Abitibi Bowater*:

> - *Re AbitibiBowater Inc. et al.*, 2010 QCCS 1742, J.E. 2010-962, paras. 82 – 83 **(Tab 3)**
>
> [82] …[t]he Ontario Court of Appeal has ruled, a decade ago, that a bitter bidder simply does not have a right that is finally disposed of by an order approving the sale of a debtor's assets. As such, it has no legal interest in a sale approval motion.
>
> [83] For the Ontario Court of Appeal, the purpose of such a motion is to consider the best interests of the parties who have a direct interest in the proceeds of the sale, that is, the creditors. An unsuccessful bidder's interest is merely commercial.

54. This holding has been adopted by Mongeon, j.s.c. of this Court in *Re White Birch Paper Holding Co*:

> - *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, J.E. 2010-2002, paras. 55-56 **(Tab 11)**
>
> [55] I will make no comment as to the standing of the "bitter bidder." Sixth Avenue may have standing as a stakeholder while it may not have any, as a disgruntled bidder.
>
> [56] I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c., in *AbitibiBowater*, in his decision of May 3, 2010 where, in no unclear terms he did not think that, as such, a bitter bidder should be allowed a second strike at the proverbial can.

55. This ruling of Mongeon, j.s.c., was upheld by the Court of Appeal of Quebec: *Re White Birch Paper Holding Co.,* 2010 QCCA 1950, J.E. 2010-2047 **(Tab 12)**.

56. The urgency with which Aveos' Motion must be adjudicated is a crucial factor, whereas MTU's contestation is frivolous and dilatory, and will rid the LHT Agreement—which expires by its terms, and must be completed, on or before August 23, 2012—of any effect. The delays that the contestation itself aim to cause are such that that they will render any ultimate judgment of this Court ineffectual. Such tactics are contrary to the

policy reasons for which the Courts across Canada have overwhelmingly refused to grant standing to bitter bidders.

> ➢ *Skyepharma PLC v Hyal Pharmaceutical Corp.*, 15 C.B.R. (4th) 298, paras. 25-32 **(Tab 14)**
>
> [30] There is sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete Court approved sales…When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands of a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

57. Granting MTU's requests will not only provide it with an opportunity to have a second (or third) proverbial "kick at the can," but will moreover enable it to do so with the benefit of having had access to erstwhile confidential information regarding the terms of LHT's accepted offer. This would clearly defeat the integrity of the process.

58. MTU is most ill-placed to be invoking any shortcoming in the transparency and fairness of the process leading to the rejection of its final bid, considering that it enjoyed constant, open and unimpeded access to all information and documents requested, to the CRO, the CRO's team and the Monitor.

> ➢ *Re AbitibiBowater Inc. et al.*, 2010 QCCS 1742, J.E. 2010-962, paras. 41 – 43 **(Tab 3)**
>
> [41] Moreover, Arctic Beluga willingly and actively participated in these phases of the bidding process. The fact that it now seeks to nevertheless challenge this process as being unfair is rather awkward. Its active participation certainly does not assist its position on the contestation of the sale approval.
>
> […]
>
> [43]…It was allowed every possible chance to improve its offer…However, it failed to do enough to convince the Petitioners and the Monitor that its bid was, in the end, the best one available.
>
> ➢ *Skyepharma PLC v Hyal Pharmaceutical Corp.*, 15 C.B.R. (4th) 298, paras. 25-32 **(Tab 14)**
>
> [25] There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the

> receiver and the court are to ensure that the sales are in the best interest of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra*.
>
> [26] Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

59. The timing and logistical elements of the LHT Agreement are of paramount importance, and the mere existence of MTU's contestation will serve to completely derail the contemplated transaction, which is precisely the type of situation the Courts have sought to avoid by denying standing to bitter bidders:

- *Re AbitibiBowater Inc. et al*., 2010 QCCS 1742, J.E. 2010-962, paras. 87 – 88 **(Tab 3)**

> [87] Arctic Beluga's contestation did, in the end, delay the sale approval and no doubt brought a level of uncertainty in a process where the interested parties had a definite interest in finalizing the deal without further hurdles.
>
> [88] From that perspective, Arctic Beluga's contestation proved to be, at the very least, a good example of the "à propos" of the policy reasons that seem to support the strong line of cases cited before that question the standing of bitter bidder in these debates.

60. MTU's proceedings are tantamount to petitioning the Court for judicial review of purely business decisions taken in good faith by the Company under the direction of the CRO and with the supervision of the Monitor.

- *Re AbitibiBowater Inc. et al*., 2010 QCCS 1742, J.E. 2010-962, paras. 82 – 83 **(Tab 3)**

> [70] That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.
>
> [71] A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should.

V. ABSENCE OF STANDING AND JUDICIAL INTEREST OF THE IAMAW

61. The fact that the IAMAW has participated in the CCAA proceedings in its capacity as the central labour union for aerospace workers and on behalf of former Aveos employees does not confer any standing for the purposes of the Motion it purports to contest.

62. The IAMAW opposes the proposed sale on the grounds that the bid by MTU will provide jobs in British Columbia. However, those jobs are unlikely to go to existing or former employees of Aveos, as opposed to future new employees of its subsidiary MTU Canada Ltd., who are in no way stakeholders of the Aveos estate.

63. In this opposition, IAMAW therefore does not speak for the former employees of Aveos, who are stakeholders in these proceedings, but purports to speak for potential new employees of MTU, who are not now currently members of IAMAW. These are not stakeholders contemplated by sub-section 36(3) of the CCAA.

64. In purporting to act on behalf of the unknown individuals who would potentially fill employment opportunities under an MTU operation in British Columbia, the IAMAW is pleading on behalf of another ("*plaide au nom d'autrui*"), contrary to the provisions of Article 59 of the *Code of Civil Procedure*. The IAMAW in this context also does not have the requisite judicial interest to plead as it purports to do in the matter at hand, contrary to Article 59 of the *Code of Civil Procedure*.

65. Indeed, the bargaining unit certified to negotiate on behalf of the Aveos employees has no relation whatsoever to the bargaining unit certified to deal with MTU Canada, just as it has no relation to the potential employees of MTU. The jurisprudence in matters of labour relations has properly established the clear juridical distinction between various bargaining units, even those operating under the same umbrella organization or central labour union:

> - *Fonderie Saguenay ltée.* v. *Syndicat des employés de Fonderie Saguenay ltée (CSN),* 2006 QCCS 1180, paras. 27-29 **(Tab 15)**
>
> [28] Le pouvoir de représentation d'une association de salariés est limité aux salariés de l'unité d'accréditation.
>
> > « L'accréditation investit le syndicat d'un pouvoir de représentation qui en fait le représentant collectif et exclusif de tous les salariés compris dans l'unité de négociation, qu'il soit ou non ses membres. »
>
> [29] Dans le cadre d'une injonction interlocutoire, le syndicat n'est pas habileté à revendiquer des droits pour des personnes qui sont étrangères au conflit de travail et que ne sont pas les salariés qu'il représente. (emphasis in original)

- *Bell Canada v. Syndicat canadien des communications, de l'énergie et du papier (SCEP)-Techniciens et employés auxiliaires*, Tribunal d'Arbitrage, no. QNB-01-06, January 11, 2011 **(Tab 16),** at paras. 25 and 62-93.

> 1) L'objection fondée sur l'absence d'intérêt du syndicat de Bell.
>
> [25] La procureure patronale soutient qu'en vertu des articles 55 et 59 du Code de procédure civile, tout requérant en justice doit avoir un intérêt suffisant dans la cause qu'il soumet et ne peut plaider pour autrui.
>
> […]
>
> [62] Autrement dit, Bell et Expertech sont deux entreprises indépendantes l'une de l'autre et leurs employés sont membres de deux unités de négociation distinctes.
>
> [63] Bref, le mémoire d'entente stipule d'une part que Bell et Expertech sont deux entreprises distinctes , autonomes et indépendantes de l'autre, et d'autre part que les deux syndicats affiliés au SCEP – l'un accrédité pour représenter les employés de Bell et l'autre pour représenter ceux d'Expertech – sont également distincts, autonomes et indépendants l'un de l'autre.
>
> […]
>
> [93] Par conséquent, en l'absence de dispositions à l'effet contraire, telle une promesse de porte-fort, inexistantes en l'espèce, chaque employeur et chaque syndicat sont autonomes et ne peuvent plaider que pour eux-mêmes.

66. Potential future employees who are not now employees of Aveos have no legal or proprietary right in the assets of Aveos. They do not have an interest sufficiently connected with the sale process so as to warrant standing in the sale proceedings to object to the Motion.

67. Conversely, creditors of the estate for amounts that remain unpaid to them stand to benefit substantially more with the acceptance of the much higher LHT Agreement than with the rejected MTU bid.

68. Even if the IAMAW were to attempt to plead on behalf of the bargaining unit (local) comprised of former Aveos employees, the non-contradicted evidence before the Court will be that the only information available to the CRO and the Monitor at the time of their decision was that, with the exception of a limited number of jobs in Montreal (in respect of which the LHT and MTU bids appeared to be approximately equal) the MTU, even if accepted, would not create jobs for ex-Aveos EMC employees. While it is possible that IAMAW members would fill these positions, these members are unlikely to be former Aveos employees with a stake in the Aveos restructuring process.

69. Moreover, even if the IAMAW could plead on behalf of existing or potential MTU employees, its concerns must still be analysed through the prism of the legislative criteria governing sales processes and the tests applied by the Courts, and weighed against the interests of the other stakeholders.

> ➢ *Re Ivac*o *Inc*., (2004) 3 C.B.R. (5th) 33 **(Tab 17)**
>
> [13] Thus, counsel for the Union argued further, the Court should accede to the position of QIT even though it might result in a failure to maximize the value of the IRM assets through the CAA proceeding. In my view, the Union's quite proper concern for the welfare of the workers cannot justify trumping the concern of creditors that they be treated fairly….

70. In *CCFL Subordinated Debt Fund and Co. v. Med-Chem Health Care Ltd.,* the union representing the employees of the debtor opposed a petition for approval of a sale transaction recommended by the Receiver in favour of an offer that would provide for continued employment of the employees of the debtor. It was argued by the union that the Receiver had acted improvidently in recommending the transaction that resulted in the termination of jobs. Justice Gans rejected the position of the union:

> ➢ *CCFL Subordinated Debt Fund and Co. v. Med-Chem Health Care Ltd.*, (1999), 8 C.B.R. (4th) 171(Ont. Gen.Div. [Comm. List]*,* at para. 14 **(Tab 13)**
>
> [14] I do not intend to review the offer of Teachers. I believe the decision of *Soundair* and those other judges of this court make it clear that the Receiver's view of the business matters are not be second-guessed or placed under a microscope. There is nothing before me to suggest that the CML deal is improvident. It is equal to or, as was stated by the Receiver, better than the proposed Teachers' deal. In my view, such an assertion brings any further inquiry into a comparison of the deals to a halt.

71. In *Re Tiger Brand Knitting Co*., [2005] O.J. No. 1259 **(Tab 18)**, the Court reiterated the principle according to which the interests of one stakeholder, in that case the labour union, ought not to trump the collective interests of other stakeholders. In that case, the Monitor sought an extension of the stay of proceedings in order to permit it time to present to the court an offer for the sale of the business and assets of the debtor. The union sought a condition that the purchaser be required to provide an opportunity for jobs for those employees represented by the union. The Monitor objected to those conditions being attached to its process. The court refused the union's request, holding that to do so would undermine the fairness of the sale process, and favour the interests of the union over other stakeholders.

72. In *Textron Financial Canada Ltd. v. Beta Brands Ltd*., 27 C.B.R. (5^{th}) 1 **(Tab 19)**, the union's concerns and the welfare of the employees were similarly analysed against the backdrop of the competing interests of all stakeholders and the *Soundair* criteria.

73. In the case at bar, the Divestiture Process did not include any condition that a purchaser was required to provide jobs to former employees of Aveos in order to be named the successful bidder. The IAMAW did not ask for such a condition at the time the Divestiture Process was approved. There is no basis now for altering the process at the last moment to impose such a condition. To do so would undermine the fairness and integrity of the Divestiture Process ratified by the Honourable Mark Schrager, j.s.c. on April 20, 2012 and applied consistently since by the Court.

74. The AC Contract was marketed and the LHT Agreement was negotiated in a fair, transparent and commercially reasonable manner, consistent with the Divestiture Process. The LHT Agreement is the superior offer obtained in the robust, fair and transparent Divestiture Process.

VI. ABSENCE OF STANDING AND OF JUDICIAL INTEREST OF THE GOVERNMENT OF BRITISH COLUMBIA

75. The BC Government has advised Aveos of its intention to contest the Motion on the eve of its initial presentation. Its standing is also vehemently contested by Aveos, with the support of the Secured Lenders and the Monitor.

76. The BC Government contestation is ostensibly predicated on the potential jobs to be created by an MTU-run operation. As set forth hereinabove, this consideration is but one of the myriad factors that were analyzed by the Monitor and the CRO and which, in turn, are to be considered by this Court as per *Soundair* and *White Birch Paper Holdings*.

77. The indirect benefit which the Province of British Columbia potentially stands to gain from a sale to MTU is not only negligible, but pales in comparison to the comparative advantage of the LHT Agreement as regards the interests of the Aveos stakeholders.

78. Even if the BC Government were to somehow demonstrate that it has a judicial interest, it is clear that neither the Monitor nor the CRO have acted improvidently in selecting the LHT Agreement.

VII. CONCLUSION

79. The Transaction is consistent with the *Soundair* principles and satisfies the requirements of sub-section 36(3) of the CCAA.

80. The Divesture Process was approved by the Court, with no objection from any party. The CRO and the Monitor fully complied with all aspects of the Court-approved Divestiture Process.

81. Ample opportunity was provided to prospective purchasers, including MTU, to participate in the Divestiture Process. All bidders were invited to consult extensively with the IAMAW in the context of their bids, and stakeholders, including the IAMAW

were consulted with regularly by the CRO with respect to the status of the Divestiture Process.

82. The concerns and interests of the general body of stakeholders, including the constituents represented by the IAMAW were taken into account by the CRO in the process.

83. The proposed transaction will provide by far the best financial recovery to stakeholders and is in the overall best interests of the estate.

84. The consideration to be received for the assets is reasonable and fair.

85. The Monitor is fully supportive of the approval of the LHT Agreement.

86. The Divestiture Process was both fair and transparent and there is no evidence of any unfairness in its conduct.

87. It would be unfair and objectionable to re-open the Divestiture Process at this stage for consideration of any alternative bids. To do so would offend the integrity of the Court-approved Divestiture Process and cause irreparable prejudice to Aveos and its stakeholders.

Montréal, August 17, 2012

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