COURT FILE NUMBER	2001-05630
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY, LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC and DOMINION FINCO INC.
PARTY FILING THIS DOCUMENT	ARCTIC CANADIAN DIAMOND COMPANY LTD.
DOCUMENT	**BENCH BRIEF OF ARCTIC CANADIAN DIAMOND COMPANY LTD.** **November 9, 2021 Hearing**
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Justice Eidsvik
JS
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PART I – OVERVIEW

1. In December 2020, this Court approved the sale of most of the Applicants' assets to Arctic Canadian Diamond Company Ltd. or ACDC. In exchange, ACDC paid approximately US$450 million, including granting US$18.5 million in additional debt to the First Lien Lenders. ACDC bought most of DDM's assets—e.g. all of its causes of action and lawsuits—free and clear. Some assets, like more than $50 million in cash collateral, were subject to the liens of the First Lien Lenders. But irrespective of the security on them, these assets were vested in ACDC.

2. The application here seeks to ignore the vesting of these assets that ACDC paid for—and release all value from them. The Monitor is seeking approval for a transaction negotiated in secret between the First Lien Lenders and DDMI (defined below). Although omitted from the Monitor's Sixteenth Report, it appears that they have been negotiating this deal for at least four months—the Monitor was informed in June—but despite the expropriation of ACDC's assets, no one told ACDC. The Monitor, despite its contractual reporting obligations, did not report to or notify ACDC. No one invited ACDC to be part of the negotiations. No one was at the table with any incentive to see if there was any value for ACDC. Unsurprisingly, the deal reached found exactly enough value to fully satisfy the First Lien Lenders. And not one dollar more.

3. This was not the deal that the First Lien Lenders or the Monitor made with ACDC in December 2020. As part of ACDC's conditions for purchasing the assets, the First Lien Lenders agreed that the Debtors' residual interest in the Diavik diamond mine joint venture and certain related assets would be subject to a realization process. ACDC contributed US$1 million in cash, held-back in the sale, to fund a realization and marketing process and the parties expressly agreed it would be run by an independent third-party. The Monitor agreed to be that party and report to ACDC on the realization process.

4. Instead, the First Lien Lenders are rewriting the deal. They are keeping their consideration, like the US$18.5 million in new debt granted by ACDC. But they evade their agreement for DDM's residual Diavik assets to be marketed. As a result, they get a recovery in excess of 126% on their funded debt and a quick exit. DDMI gets title to valuable assets already conveyed to ACDC, DDM's residual Diavik assets, and gets out of a threatening lawsuit. All the losses are borne by ACDC.

5. The *Companies' Creditors Arrangement Act* is designed to prevent deals like this. Section 36 and the *Soundair* principles (outlined below) put the onus on the moving party—which should be the First Lien Lenders here, but is instead the Monitor—to meet the onus of showing that this is not an improvident sale. But there is no proof here. This is not a case of a flawed process; there is a complete absence of process. There is no market testing. There is no valuation. The Monitor cannot even independently verify some of the information it was provided. The only assessment of value is the First Lien Lenders' negotiation that the asset was worth exactly the value of their outstanding contingent debt. This would never be accepted in a section 36 credit bid. And it should not be here.

6. The Monitor's rationale for not testing the market is that it ran a process over a year ago. But this process is obsolete. It was run from April through September 2020, at the height of the global COVID-19 pandemic. The diamond market has recovered significantly since then. But more importantly, in December 2020, the Monitor, the First Lien Lenders and ACDC all agreed together that a marketing process would be run. ACDC contributed US$1 million. But instead of being used to run a marketing process, almost half of this amount was paid to counsel for the First Lien Lenders. Given their agreement to run a process, the First Lien Lenders and the Monitor are now estopped from claiming that a new process would be pointless.

7. Moreover, the proposed transaction purports to sell assets that the Applicants cannot sell, because they sold them already—to ACDC in December 2020. A lawsuit commenced in British Columbia against DDMI is the primary example. The language of the sale documents is clear: all such claims were assigned to, and vested in, ACDC. Even though this was the only material claim existing at the time, no efforts were made by DDM to exclude the transfer. And although the First Lien Lenders now accuse ACDC of tactically claiming this lawsuit for the first time to block the proposed transaction, this is not true. In February 2021, in an agreement with the First Lien Lenders, ACDC disclosed that it owned the BC lawsuit. The First Lien Lenders had no objection then. Their concern is newfound.

8. In their brief, the First Lien Lenders accuse ACDC of "hijacking" the process and attempting to "derail" the only deal in town.[1] These transportation metaphors aside, their journey started at least in June. They have presented no evidence at all, including why they decided not to invite ACDC aboard for good faith negotiations or why they have set an artificial timetable for this transaction. Instead, they present arrival at the proposed transaction as a *faît accompli*, bargaining away the rights and assets of ACDC for their own benefit.

9. ACDC is willing to negotiate in good faith. ACDC's shareholders have offered to provide $500,000 in additional funding for a real marketing and realization process for the assets. But ACDC must be at the table.

10. ACDC asks this Court to direct the Monitor that (i) the proposed AVO Transaction is not appropriate; (ii) it should take the necessary appropriate steps to maximize recovery from the Diavik Realization Assets (as defined below) and Tax Attributes (as defined below) within a reasonable period of time including by obtaining qualified appraisals, engaging in consensual negotiations, and soliciting interest from prospective bidders.

PART II – FACTS

A. The AVO Transaction

11. The AVO Transaction relates to the entitlement to certain interests in respect of the Diavik diamond mining project located 300 kilometers from Yellowknife, Northwest Territories. The primary stakeholders of those interests are:

(a) The Monitor/DDM. Dominion Diamond Mines ULC ("**DDM**"), a debtor in these proceedings owns a 40% beneficial interest in the Diavik mine (the "**Diavik Joint Venture Interest**") pursuant to a joint venture agreement with DDMI (defined below) (the "**Diavik JVA**"). DDM's controlling mind is now FTI Consulting Canada, Inc., the Court-appointed monitor of the Applicants, pursuant to an order of this Court dated January 27, 2021 that expanded the Monitor's powers and

[1] Bench Brief of Credit Suisse AG dated October 12, 2021, paras 32 and 61(h).

authorized the Monitor to run a realization process for these assets (the "**EMP Order**");

(b) DDMI. Diavik Diamond Mines (2012) Inc. ("**DDMI**"), the owner of the remaining 60% interest in the Diavik mine through the Diavik JVA;

(c) First Lien Lenders. the Applicants' senior secured first lien lender syndicate (the "**First Lien Lenders**", and the agent to those lenders, the "**Agent**"), issuers of letters of credit ("**LCs**") that were posted to secure DDM's obligations for reclamation activities regarding the Diavik mine owing to the Government of Northwest Territories; and

(d) ACDC. Arctic Canadian Diamond Company Ltd. ("**ACDC**"), the purchaser of substantially all of DDM's and the other Applicants' assets (including those that are the subject matter of the AVO Transaction before the Court), except for the Diavik Joint Venture Interest, but including all of DDM's interest in the Diavik Realization Assets.

12. The Monitor seeks approval of an agreement between DDM (through the Monitor) and DDMI (the "**AVO Agreement**"), which proposes that DDMI purchase, among other things: (i) DDM's receipt of realizations and recoveries (*i.e.*, diamond production) arising from its 40% interest in the Diavik joint venture (the "**Dominion Production**"); and (ii) $51 million in cash held as collateral for the First Lien Lenders' LCs (the "**Cash Collateral**").[2] The original filed AVO Agreement also proposed, as a condition precedent to DDMI's obligations thereunder, that DDM provide a discontinuance of a civil claim that it filed against DDMI in the Supreme Court of British Columbia, Vancouver Registry, No. S206419 (the "**BC Civil Claim**"), thereby releasing DDMI from that claim.[3] After ACDC filed its materials objecting to the AVO Transaction, the terms of the Sale Order attached to the AVO Agreement suddenly evolved to provide a court-ordered release of the BC Civil Action.[4]

[2] AVO Agreement, ss 1.1 and 2.1, Appendix B to the Sixteenth Report.
[3] AVO Agreement, ss 7.5 and 9.2(e), Appendix B to the Sixteenth Report.
[4] Supplemental Report to the Sixteenth Report dated October 19, 2021 (the "Supplemental Report"), para 25 and Exhibit "K".

13. In exchange, and in satisfaction of the purchase price under the AVO Agreement, DDMI would assume certain of DDM's liabilities, including the reclamation obligations that are secured by the First Lien Lenders' LCs and the Cover Payments (described below).[5] DDMI would not pay the purchase price with any cash or other assets.

14. ACDC opposes the approval of the AVO Transaction because ACDC has already purchased the Dominion Production, the Cash Collateral and the BC Civil Claim, and those assets were vested by this Court in ACDC for its own use and benefit, free and clear of all encumbrances, other than certain Permitted Encumbrances (described below).[6]

B. ACDC Owns the Dominion Production, the Cash Collateral and the BC Claim

15. ACDC purchased the Dominion Production, the Cash Collateral and the BC Civil Claim under and asset purchase agreement dated December 6, 2020 (the "**ACDC APA**") between the Applicants' second lien lenders (the "**Bidders**") and certain of the Applicants, including DDM (the "**Sellers**"), free and clear of all encumbrances except for Permitted Liens (described below).[7] The ACDC APA emerged out of these insolvency proceedings following a sale and solicitation process that was approved by this Court (the "**SISP**").[8]

i. ACDC purchased the Dominion Production and Cash Collateral

16. ACDC acquired the Dominion Production and Cash Collateral under the ACDC APA. These assets are included in the "**Diavik Realization Assets**", which include:

> …**all of Sellers' rights and interests in relation to the receipt of realizations and recoveries** from or in respect of the Diavik Joint Venture Interest (including, without limitation, **all receivables, diamond production entitlements, claims, sales proceeds, cash and other collateral** given for the benefit of the First Lien Lenders or other persons, and **other assets realized or realizable by or on behalf of Sellers**) [emphasis added][9]

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[5] AVO Agreement, s 3.2, Appendix B to the Sixteenth Report.
[6] 2020 Vesting Order, para 13, Exhibit F to the Affidavit of Kristal Kaye sworn October 13, 2021 (the "**Kaye Affidavit**").
[7] Kaye Affidavit, para 17.
[8] Kaye Affidavit, para 17.
[9] ACDC APA, s 3.1(b), p 22, Exhibit D to the Kaye Affidavit.

17. As the above language makes clear, the parties to the ACDC APA intended to, and did, assign the Applicants' right, title and interest in all of the assets composing the realizations and recoveries arising out of DDM's 40% interest in the Diavik Joint Venture and the cash collateral given for the benefit of the 1L Lenders.

18. The intent to include all diamond production received by DDM from DDMI in the Acquired Assets was evident from the record before this Court, when the ACDC APA was approved. It was memorialized in an email, filed by DDMI's counsel in opposition to the 2020 Vesting Order, dated December 6, 2020 from the Monitor's counsel to DDMI's counsel stating that it was the position of each of DDM, the First Lien Lenders and the Bidders that "it is only Dominion's share of diamonds that are transferred to it by DDMI, that would then be acquired by **[**ACDC**]**."[10] In submissions made to this Court by DDM's counsel, the Court was advised "If DDMI has to deliver diamonds to Dominion, then they're purchased assets and the purchaser is purchasing it free and clear of DDMI's security."[11]

19. The Monitor has acknowledged that the Dominion Production and Cash Collateral were sold to ACDC, subject to the security held by the First Lien Lenders.[12]

ii. ACDC purchased the BC Civil Claim

20. ACDC acquired the BC Civil Claim. Under the ACDC APA, the Acquired Assets include "all rights, options, Claims or **causes of action** of any Seller or other applicant against any party arising out of events occurring prior to the Closing, **including and, for the avoidance of doubt**, arising out of events occurring prior to the Filing Date, and including … (ii) **any and all causes of action under applicable Law**" [emphasis added].[13]

21. The term "Claims" is defined in the ACDC APA as follows:

> "Claims" means any and all claims, charges, lawsuits, demands, directions, Orders, suits, inquires made, hearings, judgments,

[10] See para 27 of Kaye Affidavit and Exhibit H attached thereto.
[11] Transcript of December 11, 2020 Hearing, Appendix D of the Sixteenth Report, lines 22-28, p 11.
[12] Sixteenth Report, para 56.
[13] ACDC APA, s 3.1(n), p 23, Exhibit D to the Kaye Affidavit.

> warnings, investigations, notices of violation, notice of noncompliance, litigation, proceedings, arbitration, or other disputes, whether civil, criminal, administrative, regulator or otherwise.[14]

22. The Applicants intended to, and did, assign the BC Civil Claim to ACDC.[15] Additionally, the First Lien Lenders have acknowledged that the BC Civil Claim is owned by ACDC since, at latest, the date of the closing of the ACDC Transaction on February 3, 2021. This ownership was memorialized in a first lien credit agreement between ACDC and the First Lien Lenders dated February 3, 2021 where ACDC listed the BC Civil Claim as "material litigation" of ACDC in its disclosure schedules.[16] Until this application, the First Lien Lenders have never objected to this transfer.

23. The Monitor has stated that it takes no position on ownership of the BC Civil Claim and has asked the Court for advice and direction as to whether the Monitor, on behalf of DDM, can provide DDMI a discontinuance and release of the BC Civil Claim. Notably, the Monitor has not asked for or recommended an Order releasing the BC Civil Claim—the proponents for such an Court-ordered release are the Agent and DDMI.[17]

iii. The Permitted Encumbrances are limited to the Cash Collateral and Dominion Production

24. ACDC purchased the Dominion Production and the Cash Collateral free and clear of all claims and encumbrances, except only for "Permitted Encumbrances." Permitted encumbrances for the Diavik Realization Assets, which includes the Dominion Production and the Cash Collateral, include encumbrances held by the First Lien Lenders over these assets.[18] In contrast, there is no corresponding Permitted Encumbrances with respect to the BC Civil Claim or any other Claims acquired by ACDC.

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[14] ACDC APA, s 1.1, p 4, Exhibit D to the Kaye Affidavit.
[15] Kaye Affidavit, para 29.
[16] Kaye Affidavit, para 29; First Lien Credit Agreement, Schedule 3.06, Exhibit J to the Kaye Affidavit.
[17] Sixteenth Report, paras 64-65; see also Amended Application of the Monitor, paras. 1(b) and 1(c).
[18] Kaye Affidavit, para 22; ACDC APA, s 1.1, p 16, Exhibit D to the Kaye Affidavit.

iv. The Court approved the ACDC APA and vested the Cash Collateral, Dominion Production and BC Civil Claim in ACDC

25. On December 11, 2020, this Court granted a vesting order (the "**2020 Vesting Order**"), which approved the ACDC APA "in its entirety".[19] The 2020 Vesting Order vested all of the Sellers' right, title and interest in and to the Dominion Production, the Cash Collateral and the BC Civil Claim in the name of ACDC free and clear from all claims and encumbrances (excluding the Permitted Encumbrances).[20] The Court also declared that ACDC is entitled to enjoy these assets for its "own use and benefit without any interference of or by any Person claiming by, through or against the Applicants."[21]

26. As the Monitor noted in its Eleventh Report, the purchase price that ACDC paid for those assets, "represent the highest and best offer in respect of the Acquired Assets and are fair and reasonable in the circumstances."[22]

C. ACDC has *bona fide* and justifiable concerns about the AVO Transaction

27. ACDC has *bona fide* concerns about the AVO Transaction. As is clear from the language in the ACDC APA, ACDC has already acquired the Dominion Production, the Cash Collateral and the BC Civil Claim. The AVO Transaction is an attempt to expropriate these assets.

28. ACDC believes that there is significant value in the Diavik Realization Assets beyond the contingent claims of the First Lien Lenders under their LCs, especially if there is a meaningful attempt to determine the appropriate amount of the cash calls and Cover Payments.[23]

29. As part of the expropriation of ACDC's assets, the AVO Agreement provides, as a condition precedent to DDMI's obligations thereunder, that DDM (by the Monitor) must deliver to DDMI "an executed and fileable discontinuance of the Civil Claim [DDM] filed against [DDMI] in the Supreme Court of British Columbia, Vancouver Registry, No. S206419, which

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[19] 2020 Vesting Order, para 3, Exhibit F to the Kaye Affidavit.
[20] 2020 Vesting Order, para 4, Exhibit F to the Kaye Affidavit.
[21] 2020 Vesting Order, para 13, Exhibit F to the Kaye Affidavit.
[22] Eleventh Report, para 29, Exhibit G to the Kaye Affidavit.
[23] Kaye Affidavit, para 38.

shall be releasable on Closing."[24] This discontinuance is with respect to the BC Civil Claim. DDM cannot deliver such a discontinuance because ACDC purchased the BC Civil Claim pursuant to the ACDC APA, which was approved by this Court. Neither DDM, nor its creditors, retained any interest in the BC Civil Claim.

D. The Monitor's Realization Obligations

30. ACDC had a reasonable expectation that it would be consulted in good faith before any transaction impacting its ownership interest in the Diavik Realization Assets was finalized.

31. As part of the ACDC Transaction, ACDC provided US$1 million of funding for the purpose of maximizing the realization of the Diavik Realization Assets.[25] The Bidders and the Agent agreed to a mutual support agreement dated December 4, 2020 (the **"MSA**"). The terms of the MSA provided that they (i) shall agree to a mechanism for the pursuit of the realization and recovery of the Diavik assets that was to be run by an independent official;[26] (ii) they would cooperate and negotiate in good faith when implementing such a realization process;[27] and (iii) that the costs for this process were to be funded initially by the DDM's payment at closing of the ACDC Transaction of US$1,000,000 from the ACDC Transaction proceeds at ACDC's direction.[28] The funding for the Diavik Realization Account was retained by DDM as "cash on hand" at ACDC's direction pursuant to the MSA.[29]

32. In addition, when this Court granted the EMP Order, expanding the Monitor's powers, it authorized the Monitor to take further steps to market and sell the Applicants' remaining assets following the closing of the ACDC Transaction.[30] But those additional powers were not unlimited, and the EMP Order stated that the Monitor's exercise of those powers were

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[24] AVO Agreement, ss 7.5 and 9.2(e), Appendix B to the Sixteenth Report.
[25] Kaye Affidavit, para 43.
[26] ACDC APA, Schedule B "First Lien Lender MSA", s 6, Exhibit D to the Kaye Affidavit.
[27] ACDC APA, Schedule B "First Lien Lender MSA", s 5(a), Exhibit D to the Kaye Affidavit.
[28] ACDC APA, Schedule B "First Lien Lender MSA", s 6, Exhibit D to the Kaye Affidavit.
[29] ACDC APA, s. 7.1(a)(iv), Exhibit D to the Kaye Affidavit.
[30] 30 EMP Order, paras 4(f) and 4(k), Exhibit N to the Kaye Affidavit.

specifically "in each case subject to the terms of the [ACDC] APA and the obligations thereunder".[31]

33. In accordance with the EMP Order, ACDC, the Agent and the Monitor entered into a transition services agreement dated February 3, 2021 (the "**TSA**").[32] The Monitor agreed under the TSA to fulfil three separate obligations:

(a) First, to undertake a monetization and marketing process i.e. undertake activities related to the "full realization and recovery of the Diavik Realization Assets."[33]

(b) Second, the Monitor agreed to a reporting obligation i.e. to provide each of ACDC and the Agent with information and monthly written reports with respect to the status of those realization activities (subject to commercially reasonable confidentiality agreements);[34] and,

(c) Third, to respond in good faith to any reasonable request from ACDC with respect to the transition of the Acquired Assets (which includes the Cash Collateral, Dominion Production and BC Civil Claim, as such terms are used in the AVO Agreement).[35]

E. The RVO Transaction

34. The Monitor also seeks approval of the term sheet proposed by Washington Diamond Investments Holdings II, LLC ("**Washington**") to the Monitor (the "**RVO Term Sheet**"), whereby Washington will make a payment in exchange for the "cleansing" of liabilities of certain entities within the Applicants' corporate group through a reverse vesting order in order to maximize the Tax Attributes (as defined in the RVO Term Sheet) for the benefit of Washington and its affiliates (the "**RVO Transaction**").

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[31] EMP Order, paras 4 and 10, Exhibit N to the Kaye Affidavit.
[32] TSA, Exhibit O to the Kaye Affidavit.
[33] TSA, s 1.02(a), Exhibit O to the Kaye Affidavit.
[34] TSA, s 1.02(b), Exhibit O to Kaye Affidavit.
[35] TSA, s 1.02(c), Exhibit O to the Kaye Affidavit.

35. The RVO Transaction is a related party transaction: Washington and its affiliates are equity owners, either directly or indirectly, of the entities that are subject to the cleansing of liabilities contemplated under the RVO Term Sheet. The RVO Transaction stands to benefit this related party with minimal scrutiny from ACDC and the Applicants' other stakeholders.

36. The Monitor did not conduct a stand-alone marketing process for the Tax Attributes underlying the RVO Transaction. Although the Monitor states in the Sixteenth Report that it marketed the Tax Attributes as part of the SISP,[36] such process was premised on a minimum bid in excess of US$126.1 million and it is very unlikely that any party interested in the Tax Attributes would have participated or been eligible to participate as a "Qualified Bidder" (as such term was used in the SISP). ACDC has requested information with respect to the valuation of the Tax Attributes, but most of this information remains outstanding.[37] The RVO Transaction should not be approved unless and until a fair and transparent marketing process with respect to the Tax Attributes is conducted.

F. ACDC was, and continues to be, shut out

37. The events leading up to the Monitor's application have not treated ACDC in a fair or evenhanded manner. ACDC first learned that the AVO Transaction and the RVO Transaction had been negotiated and settled only eleven days after the Support Agreement had been entered into.[38] Although the AVO Transaction clearly seeks to convey ACDC assets to DDMI, the application sought to jam ACDC: ACDC only received the Monitor's application materials on October 6, 2021, a mere six business days before the original scheduled hearing date and in advance of the Thanksgiving long weekend.[39] The reason given for the transaction proceeding on October 15, 2021 was that the AVO had to close by *November 15* and steps to take in the RVO by *December 31*.

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[36] Sixteenth Report, para. 69(b); see also Supplemental Report, Exhibit H, para 6.
[37] Kaye Affidavit, para 29; Letter to the Monitor dated October 11, 2021, Exhibit B to the Kaye Affidavit.
[38] Kaye Affidavit, para 52.
[39] Kaye Affidavit, para 60.

38. These challenges are exacerbated by the Monitor's and the First Lien Lenders' decision to entirely exclude ACDC from the process. The First Lien Lenders and DDMI negotiated and settled the AVO Transaction without ACDC's participation or its input, and they provided no notice that they were contemplating a wholesale seizure of ACDC's property until after the relevant agreements were final.

39. The Monitor's Eleventh Report implied in its chronology that, for the Monitor, the first step of significance after the February 2021 closing of the ACDC APA (and entry into the TSA) was the September 16 signing of the Support Agreement by DDMI and the First Lien Lenders.[40] Instead, although not disclosed in its report, the Monitor conceded it has been aware of the private negotiations between the Agent and DDMI since June 29, 2021.[41]

40. But, to this day, ACDC has no information about the negotiations leading up to the AVO Transaction or the transaction documents. Neither DDMI nor the First Lien Lenders have filed any evidence to support the transaction they brokered. And the Monitor refuses to discuss what it learned since June 29, 2021; it claims privilege over "the Monitor's discussions and negotiations of the AVO Transaction documents" and all "specific of any negotiations or drafting of the transaction documents."[42] In light of this non-disclosure, it should be inferred that the Monitor was actively aware of the negotiations and their progress since June 29, 2021. For reasons unknown to ACDC—despite its reporting obligations under the TSA—the Monitor did not inform ACDC .

41. ACDC has fulfilled its commitments under the TSA, and it continues to make good faith efforts to obtain further information to assess the proposed transactions.[43] It asked the Monitor for reasonable information to assess the merits of the AVO Transaction and RVO Transaction, but most of those requests remain unanswered. ACDC is simply unable to properly assess the

[40] Sixteenth Report, paras 16-18.
[41] Letter to Torys dated October 13, 2021, para 2(b), Supplemental Report, Appendix C.
[42] Letter to Torys dated October 13, 2021, paras 2(a) and 2(c), Supplemental Report, Appendix C; Letter to Torys dated October 19, 2021, para 1, Supplemental Report, Appendix G.
[43] Kaye Affidavit, paras 51 and 61.

many substantive issues raised by the AVO Transaction and the RVO Transaction.[44] It remains in the dark.

PART III – ISSUES

42. The issues to be addressed on this Application are:

A. Have the Agent and DDMI met their obligations of good faith and/or are they estopped from pursuing the AVO Agreement without a full and fair marketing process?;

B. Should the Court vest out ACDC's Ownership Interest in the Cash Collateral and Diamond Production?;

C. Does ACDC own the BC Civil Claim?;

D. Should the Court authorize a Discontinuance of the BC Civil Claim or Order a Release of the BC Civil Claim?;

E. Have the Requirements of Soundair and Section 36 of the CCAA been satisfied for either of the AVO Transaction or RVO Transaction?;

PART IV – ARGUMENT

A. Estoppel and breach of the duty of good faith preclude approval of the AVO Transaction

43. The Agent and DDMI have not met their good faith obligations and are estopped from proceeding with the AVO Transaction. The Application for approval of the AVO Agreement must be reviewed in the context of agreements and Orders of this Court governing the assets that are being conveyed under the AVO Agreement. The parties to the Support Agreement are asking this Court to grant extraordinary relief, including the vesting of assets owned by a third party and a court-ordered release of claims. There are various contractual obligations underlying the relief being sought and neither the Agent nor DDMI have acted in good faith in the process leading up to the AVO Agreement and are estopped from pursuing the relief they are seeking from this Court.

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[44] Kaye Affidavit, para 55.

i. The Duty of Good Faith

44. Each of the parties appearing in these proceedings must act in good faith: section 18.6 of the CCAA provides that all interested persons in any proceeding "shall act in good faith." [45]

45. Under the MSA, the Bidders and the Agent expressly agreed to settle a mechanism for a process for the realization of DDM's remaining interest in the Diavik Diamond Mine, which was to be run by a "duly authorized independent official." ACDC funded this realization process with US$1 million in cash;[46] this cash would otherwise have been acquired by ACDC. The Agent agreed to cooperate with the Bidders and negotiate in good faith with the Bidders in respect to the implementation of this realization process.[47]

46. According to the Sixteenth Report, the funds deposited into the Diavik Realization Account have been exhausted, without any steps having been taken to market or realize the residual assets. Almost 50% of the funds allocated for the marketing process appear to have been paid or allocated for payment to counsel for the Agent, which has accrued professional fees of $435,000 from February 5 to September 24 and is projected to incur additional Professional Fees of $77,000 by March 4, 2022.[48] During the time period since the Monitor was made aware of the private negotiations between the Agent and DDMI, the Agent was paid approximately $192,328 in professional fees out of the Diavik Realization Account—it is unknown whether the negotiations started before that point.[49]

47. The Support Agreement is a privately negotiated deal between the Agent and DDMI, without any prior consultation with ACDC or notice to ACDC. The Support Agreement was not negotiated by a "duly authorized independent official" as required under the MSA and contemplated by the TSA and the EMP Order, but was presented to the Monitor following discussions between DDMI and the Agent.[50] The Agent was at all times aware that it was

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[45] Companies' Creditors Arrangement Act, R.S.C., 1985, c-C36, s. 18.6.
[46] Kaye Affidavit, para 43.
[47] ACDC APA, Schedule B "First Lien Lender MSA", s 5(a), Exhibit D to the Kaye Affidavit.
[48] Sixteenth Report, para 77.
[49] Supplemental Report, Appendix H, para 5.
[50] Sixteenth Report, para 38.

bargaining with assets that were vested in ACDC by this Court—or that, in the least, it would require vesting out of those assets—but did not contact ACDC to advise them of its deal or seek ACDC's input on the transaction. The Agent was also aware that the costs of these private negotiations were being paid out of funds that ACDC had allocated to the Diavik Realization Account for the express purpose of funding a full and fair marketing process to be run by the Monitor. It now asks this Court to approve their deal without any prior consultation with ACDC and rely on the exhaustion of the funds in the Diavik Realization Account to argue that it is not feasible to adequately market these assets.[51]

48. ACDC had a reasonable expectation that the Monitor would be leading the realization process or, at least, that ACDC would be consulted before the Agent entered into negotiations for a binding Support Agreement which would destroy any value in assets they had purchased only nine months before.

49. In the context of a CCAA proceeding, the duty of good faith has been described as a duty to be forthright and candid in dealing with other stakeholders. Justice Romaine of the Alberta Court of Queen's Bench adopted the following description of bad faith (or the lack of good faith) in a CCAA proceeding:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.[52]

50. Silence may itself be a breach of the duty of good faith. The Supreme Court in *Callow* held that silence is a breach of good faith where it knowingly misleads a counterparty.[53] That is exactly what the Agent did here. It knew of the obligation for an independent official to run a process and it knew that ACDC reasonably expected the Monitor to be doing so. It has been engaged in negotiations with DDMI since at least June. It had four months to inform ACDC. It chose not to do so. In the course of its private negotiations, it was paid its legal fees out of the

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[51] Bench Brief of Credit Suisse AG dated October 12, 2021, para. 25; Bench Brief of DDMI dated October 12, 2021, para 98.
[52] *Re Bellatrix Exploration*, 2020 ABQB 809, para 105, leave to appeal refused, 2021 ABCA 85.
[53] *C.M. Callow Inc. v Zollinger*, 2020 SCC 45, para 90.

Diavik Realization Account, exhausting almost 50% of the funding set aside to run a marketing and sales process.

ii. Due Diligence

51. In *Callidus,*[54] the Supreme Court noted that while the meaning of the term good faith is well-known in the context of a CCAA proceeding, that another baseline consideration in assessing a party's conduct is whether the stakeholder has acted with "due diligence":

> Consistent with the CCAA regime generally, **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** [citations omitted] 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** [citations omitted]. [55]

52. In engaging in private negotiations, without notice to ACDC, bypassing the role of the Monitor, DDMI and the Agent have failed to act in good faith and with due diligence. The Court should not condone these activities by approving the AVO Agreement.

a. Sitting on Rights and Gaining an Advantage

53. The private negotiations between DDMI and the Agent have been ongoing since at least June (and perhaps earlier). They have waited to bring their private deal forward until all of the money set aside by ACDC to fund a realization process for these same assets has been exhausted[56] without any marketing process ever having been undertaken. Almost half of the funds set aside for this purpose have been paid to counsel for one of the parties to the Support Agreement.[57] They now ask this Court to approve their private deal without any process to assess the value being paid by DDMI and complain that there is no money left to support a marketing process.[58] They have not acted with due diligence in pursuing their private transaction

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[54] *9354-9186 Quebec inc v Callidus Capital Corp*, 2020 SCC 10 ["*Callidus*"] [emphasis added].
[55] *Callidus*, para 51 [emphasis added].
[56] Sixteenth Report, para 51(i).
[57] Sixteenth Report, para. 77(c).
[58] Bench Brief of Credit Suisse AG dated October 12, 2021, para. 25; Bench Brief of DDMI dated October 12, 2021, para. 98.

and seek to gain an advantage over ACDC by preventing a full and fair process to test the value and merits of their private transaction.

b. Negotiation and Compromise

54. Due diligence requires negotiation and compromise. And it requires that parties not lay in the weeds. But this is exactly what the Agent did here. First cutting a deal with ACDC. And then undermining that very deal eight months after it closed.

55. If the AVO Transaction is approved:

(a) The First Lien Lenders will obtain full repayment of the indebtedness of DDM plus additional secured claims against ACDC in the amount of $18.5 million, resulting in approximately 126% recovery on the funded debt of the First Lien Lenders.

(b) DDMI is obtaining DDM's 40% interest in the Diavik JV, all of the Cash Collateral and Diamond Production already sold to ACDC and a release of the BC Civil Claim which has already been assigned to ACDC.

(c) But ACDC has its assets expropriated and/or released.

(d) The only compromise being made is by ACDC. Yet this is the very party that was not invited to the negotiations.

56. Nor has DDMI acted in good faith or with due diligence in demanding a discontinuance or court-ordered release of the BC Civil Claim (and all other claims against it) as a condition of its private deal with the Agent. The record in these proceedings is replete with examples of DDM and the Agent raising serious concerns with respect to DDMI's conduct[59] and the claims in the BC Civil Claim reflect these complaints. The Monitor is expressly not asking the Court to authorize the discontinuance or release of the BC Civil Claim. Rather, DDMI has demanded it

[59] Kaye Affidavit, paras 34 and 35 and Exhibits L and M.

as a term of its private deal with the Agent,[60] but refused to negotiate, or even discuss such requirement, with ACDC.

c. Equal Footing

57. ACDC was not consulted about the negotiations leading up to the Support Agreement or given the opportunity to take any steps to protect its interests under the ACDC APA and the 2020 Vesting Order. ACDC's efforts to obtain information to assess the AVO Agreement and the merits of the transaction have been met with claims of privilege[61] and refusal to share information which was available to the Agent and DDMI in their negotiation of the Support Agreement.[62] ACDC is not on an equal footing with the Agent and DDMI, notwithstanding its clear interest in the assets and rights that are subject to the Support Agreement and AVO Agreement.

iii. The Agent and the Monitor are estopped from pursuing the transaction reflected in the Support Agreement without prior consultation with ACDC

58. Under the TSA, the Monitor, the Agent and ACDC agreed to a process for the realization of DDM's remaining interest in the Diavik JV. The Monitor, on behalf of DDM, agreed to undertake the Diavik Realization Activities, which included all reasonable steps that are necessary and desirable for the full realization and recovery of the Diavik Realization Assets, as determined by the Monitor, acting reasonably, and with the consent of the Agent. DDM, through the Monitor, agreed to provide reports to ACDC on the Realization Activities.[63] As a result of this agreement, both the Monitor and the Agent are estopped from: (i) supporting a privately negotiated realization transaction; or (ii) claiming that a further realization or marketing process is futile.

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[60] Bench Brief of Credit Suisse AG dated October 12, 2021, para. 61(c).
[61] Letter to Torys dated October 13, 2021, paras 2(a) and 2(c), Supplemental Report, Appendix C; Letter to Torys dated October 19, 2021, para 1, Supplemental Report, Appendix H.
[62] Kaye Affidavit, paras 54-57 and 61.
[63] TSA, s 1.02(c), Exhibit O to the Kaye Affidavit.

59. A party will be estopped from a course of conduct where there has been reliance on a representation or conduct made by that party and detriment to the relying party. The elements of estoppel by representation are well known:

> (1) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made;
>
> (2) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and
>
> (3) detriment to such person as a consequence of the act or omission.[64]

60. The Agent made express representations to the Bidders that the process for realization of the Diavik Realization Assets (the "**Diavik Realization Process**") would be run by an "independent official" and that the Agent would cooperate and negotiate with the Bidders in good faith. Under the EMP Order, the Monitor was authorized to conduct a process to conduct, supervise and direct the realization and recovery of the Applicants' Property or other assets or interests, expressly subject to ACDC's rights under the ACDC APA.[65] Under the TSA, the Monitor agreed to run that very process: each of the Agent, ACDC and DDM (through the Monitor) agreed that the Monitor would undertake the Diavik Realization Activities and DDM (through the Monitor) agreed to provide reports on that process to ACDC.

61. ACDC reasonably relied on these representations: they were made by a court-officer empowered by a court order to do so. It agreed to fund the Diavik Realization Account with US$1 million in cash held back from the Acquired Assets[66] and agreed to allow the Monitor to run an independent the Diavik Realization Process.

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[64] *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co*, 1970 CanLII 3 (SCC), [1970] S.C.R. 932, pp 939-40. See also: *Fram Elgin Mills 90 Inc. v Romandale Farms Limited*, 2021 ONCA 201.
[65] EMP Order, para 10(a), Exhibit N to the Kaye Affidavit.
[66] Kaye Affidavit, para 43.

62. This reliance turned out significantly to its detriment. First, the money set aside for the realization process was used instead to fund the Agent (and the Monitor) negotiating a deal to expropriate its assets, without notice to, or consent of, ACDC. Second, since February 2021, ACDC took no steps to independently realize on its interest in the Diavik Realization Assets, or come to this Court to seek a separate process to market the relevant assets, on the reliance that the Monitor was doing just this.

63. The Agent has negotiated, through the Support Agreement, a private deal that is contrary to their representations, and the Monitor, through bringing this application, have approved of the same. They are estopped from doing so.

B. Ownership of the Cash Collateral and Dominion Production

64. Both ACDC and the Monitor agree that ACDC owns the Cash Collateral and the Dominion Production, subject to the liens of the First Lien Lenders.[67]

65. The AVO Agreement purports to transfer DDM's "right, title and interest" in the Acquired Assets, including the Cash Collateral and Dominion Production.[68] In addition, the AVO Agreement is conditional on the issuance of a Sale Order (as such term is defined in the AVO Agreement) vesting the Acquired Assets in DDMI, free and clear, including the vesting of any Claim or Encumbrance of ACDC relating to the Diavik Realization Assets.[69] As described below, DDM has no right, title or interest in the assets that have already been sold to ACDC. In short, DDM cannot sell what it does not own.

66. DDMI has referenced statements made by counsel for DDM at the hearing of the application to grant the 2020 Vesting Order to support an argument that all that ACDC acquired was a right to collect "receivables" and that ACDC has no property interest in diamonds delivered to DDM.[70] This is wrong and is inconsistent with the position of the Monitor.

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[67] Sixteenth Report, para 56.
[68] AVO Agreement, s 2.1, Appendix B to the Sixteenth Report.
[69] AVO Agreement, s 1.1, Appendix B to the Sixteenth Report.
[70] Bench Brief of DDMI dated October 12, 2021, para. 71.

Although the term "receivable" was made in multiple submissions in support of the 2020 Vesting Order, it was clear that counsel for DDM was referring to actual diamonds received from DDMI, and not cash proceeds or residual recoveries from the sale of such diamonds. Indeed, Mr. Rubin, counsel for DDM, clearly explained what was meant by "receivables" (i.e., actual diamonds received by DDM after release by DDMI) when he said:

> 21 MR. RUBIN: … the issue today is simply again, coming back to its most basic, the purchaser is simply buying a receivable. **If DDMI has to deliver diamonds to Dominion, then they're purchased assets and the purchaser is purchasing it free and clear of DDMI's security**. If DDMI does not have to deliver diamonds pursuant to your order or pursuant to a different order from the Court of Appeal, well then they don't have to deliver diamonds and there's no receivable that the purchaser will be purchasing. It is no more complicated than that.[71] [emphasis added]

67. Further, Mr. Rubin advised this Court that this statement (i.e., that ACDC was purchasing any diamond received by DDM once released by DDMI), was consistent with the email from the Monitor which was attached to Mr. Croese's affidavit, which also stated: "the APA does not convey any of DDM's interest in the Diavik JV. Essentially, what is being conveyed by DDM to the Purchaser is all receivables that DDM receives out of the Diavik JV. In other words, it is only DDM's share of diamonds that are transferred to it by DDMI, that would then be acquired by the Purchaser".[72] DDMI is attempting to portray the right to ownership of any diamonds actually received by DDM as a mere right to collect the proceeds and asserting that such right is an unsecured claim. This is not how the word "receivable" was used in the submissions made to this Court and is not consistent with the plain meaning of the words in the ACDC APA.

68. In the face of contrary submissions made to this Court, DDMI now asserts that "The Diavik Realization Assets: (i) are a receivables claim rather than a proprietary interest."[73] There

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[71] Transcript of December 11, 2020 Hearing, Appendix D of the Sixteenth Report, lines 22-28, p 11.
[72] Transcript of December 11, 2020 Hearing, Appendix D of the Sixteenth Report, lines 13-19, p 13; Affidavit of Thomas Croese, Exhibit H of the Kaye Affidavit.
[73] Bench Brief of DDMI dated October 12, 2021, para 71.

is no support for this proposition in the record before this Court or in the terms of the ACDC APA.

69. The Monitor and ACDC both agree that ACDC owns the Cash Collateral and Dominion Production (subject to the liens of the First Lien Lenders). DDM has no "right, title or interest" in these assets to be conveyed under the AVO Agreement. To the extent that DDMI seeks to obtain title to the Cash Collateral and Dominion Production under the Sale Order (as such term is defined in the AVO Agreement), a vesting order can give no better title to a purchaser than the selling debtor's title to such assets.

70. *Quicksilver Resources*, a decision of Justice C.M. Jones of this Court, is on point. In that case, the question arose of whether the debtor had previously disposed of assets in 2011 that then, after the debtor entered *CCAA* proceedings, the purchaser claimed vested in it as a result of a court-approved asset purchase agreement within the *CCAA* proceedings. The purchaser argued that the assets vested in it under the court-approved asset purchase agreement, regardless of any third-party title or previous conveyances. It argued that it was important to provide purchasers with "certainty and security," otherwise "CCAA proceedings would be impaired and it would be more difficult to arrive at an arrangement fair to all stakeholders"; therefore, it asserted that expropriating a third-party's title to assets and transferring that title by court order to a new purchaser "is a fair price to pay to achieve that objective."[74]

71. Justice Jones disagreed with the purchaser. Because of the increased use of CCAA orders to vest off third-party claims, it was "important to consider to what extent such orders can be used to abrogate such a third-party's claim to title to the assets."[75] He held that the purchaser's assertions that a third-party's previously conveyed title could be vested out is not "desirable from a policy perspective" for four reasons. Not only would this approach reward the lack of due diligence, but it would "undermine certainty and security by vesting with the Court far-reaching powers to restructure economic relationships and expectations in ways never contemplated by

[74] *Re Quicksilver Resources Canada Inc*, 2018 ABQB 653, para 55 ["*Quicksilver*"]
[75] *Quicksilver*, para 54.

parties to commercial arrangements." Equally, if not more importantly, it would be fundamentally unfair: allowing the vesting out of third-party's title would "be inconsistent with the fairness intended by the CCAA because a non-party to proceedings may find its property summarily expropriated."[76]

72. The considerations enumerated by Justice Jones in *Quicksilver* apply equally here. Except that it would be even further contrary to the principles of fairness, certainty and security to allow the Court to vest out an asset already conveyed under a Court-approved transaction in the *same* CCAA proceedings. Debtors cannot sell and then resell the same assets.

73. In addition to the limitations on the Court's jurisdiction to vest assets owned by a third-party, Courts have consistently held that a vesting order cannot be used to remedy title defects in the assets that are conveyed. In *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*,[77] the Ontario Court of Appeal held that a vesting order could not be used to enhance a purchaser's interest in an acquired asset beyond the interest held by the debtor company, and that the purchaser could not rely on the terms of a vesting order to take title to an asset in which the debtor itself held no interest:

> 57 On appeal, HGC argues that the vesting order, by its terms, vested the RESOP Contract in Truestar, free and clear of all encumbrances, leaving to creditors the proceeds generated by the sale transaction. In support of its argument, HGC relies on *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [citations omitted]….
>
> 58 I would reject HGC's argument that the effect of the vesting order was to vest the RESOP Contract in Truestar. The premise of this argument is that the RESOP Contract had not terminated automatically on the date of Greenview Power's bankruptcy, a premise that has already been rejected. **There was, in short, nothing left of the RESOP Contract to vest in Truestar**.[78]

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[76] *Re Quicksilver Resources Canada Inc*, 2018 ABQB 653, para. 56.
[77] *Hutchingame Growth Capital Corporation v Independent Electricity System Operator,* 2020 ONCA 430 ["*Hutchingame*"].
[78] *Hutchingame*, paras 57-8 [emphasis added]. See also: *Yukon (Government of) v Yukon Zinc*, 2021 YKCA 2.

74. ACDC owns the Cash Collateral and the Dominion Production. ACDC is not a party to the Support Agreement or the AVO Agreement and was not consulted about this transaction before these agreements were settled. DDMI seeks to obtain title to ACDC's assets through an agreement which, on its face, only transfers DDM's right, title and interest in the subject assets. DDM has no right, title or interest in any of the assets that have already been conveyed to ACDC. The Court should not grant a vesting order expropriating ACDC's assets in these circumstances.

C. ACDC Owns the BC Civil Claim and other "Claims" to be Released under the AVO Agreement

75. The Monitor has not put forward any position on who owns the BC Civil Claim or other Claims and has referred this issue to the Court for directions and advice. Nor has the Monitor asked for or recommended that the Court exercise the extraordinary jurisdiction to release claims against DDMI.[79] DDMI and the First Lien Lenders are the exclusive proponents for this extraordinary relief.

i. The ACDC APA is unambiguous: the BC Civil Claim was assigned to ACDC

76. ACDC's ownership of the BC Civil Claims (and any other Claims to be released under the AVO Agreement) is governed by the terms of the ACDC APA.

77. The test for interpreting contracts is trite law: "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."[80]

78. But the text of a contract controls its terms. While the surrounding circumstances will be considering in interpreting the terms of a contract "they must never be allowed to overwhelm the words of the agreement"; the interpretation of a written contract must always be "grounded in the text."[81] Because of the paramount importance of the text, "being the very language agreed upon

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[79] Sixteenth Report, paras 64-65; Amended Application of the Monitor, paras. 1(b) and 1(c).
[80] *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53, para 47 ["*Sattva*"].
[81] *Sattva*, 2014 SCC 53, para 57 (internal citations omitted).

by the parties to govern their legal obligations, in cases of conflict the words will always prevail over the context."[82]

79. The ACDC APA is not ambiguous. All "Claims" (as defined in the ACDC APA) were assigned to ACDC under the ACDC APA and the 2020 Vesting Order. "Claims" include a *claim, lawsuit, suit, litigation, proceeding* or *"other disputes, whether civil…or otherwise.*" The BC Civil Claim falls into all of these categories. It would be hard to find a more quintessential Claim than an existing piece of civil litigation.

80. Moreover, there is an express list of Excluded Assets in the ACDC APA. The BC Civil Claim is not listed as an Excluded Asset, which would have been necessary to exclude the BC Civil Claim from the assigned assets. There are no Permitted Encumbrances with respect to Claims under the ACDC APA.

81. The surrounding circumstances also make it clear that Claims includes the BC Civil Claim and, therefore, it was conveyed to ACDC. The BC Civil Claim was the only outstanding material lawsuit of DDM at the time of negotiation of the ACDC APA.[83] The ACDC APA has a carefully drafted definition of Claims and section 3.1(n) states for the avoidance of doubt, the Acquired Assets include "any and all causes of action under applicable Law". The inclusion of the broad definition of Claims and expansive language in section 3.1(n) of the ACDC APA would be given no meaning or effect if BC Civil Claim was an Excluded Asset.

ii. There is no implied term contradicting the plain meaning of "Claim"

82. The Agent and DDMI state that the BC Civil Claim is excluded by implication on the basis that: (i) the term "Excluded Liabilities" expressly excludes any obligation on ACDC to "pay, perform or otherwise discharge...any all Liabilities of any Seller in respect of the Diavik Joint Venture Agreement, the Diavik Joint Venture, the Diavik Joint Venture Interest, the Diavik

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[82] Geoff G. Hall, *Canadian Contractual Interpretation Law*, 4th ed., para 2.32.3.6 (2020).
[83] Kaye Affidavit, para 28.

Diamond Mine and the Diavik Realization Assets"; and (ii) if ACDC was not assuming liabilities they cannot acquire related rights/assets.[84]

83. There is a presumption against implying terms in a contract. The parties are presumed to have expressed all of the terms that they intended.[85] The standard is a high one, "it must be clear that both intended the actual term in question, such as one party ending the contract" because, as the Court of Appeal held "nothing is more dangerous than courts constructing contracts which the parties did not make."[86] Given the clear language of "Claims," the test cannot be met here.

84. In any event, the implied exclusion argument misses the point entirely: ACDC did not acquire the Diavik Joint Venture Agreement and ACDC did not assume any obligations with respect to that Agreement. There is no corresponding exclusion from Acquired Assets for the BC Civil Claim, and there is no basis to read the ACDC APA as requiring that there be a corresponding "asset" and "liability" between Excluded Assets and Excluded Liabilities.

85. For instance, ACDC clearly acquired the Diavik Realization Assets—but pursuant to section 3.4(g) of the ACDC APA, ACDC has no liability with respect to the Diavik Realization Assets. The parties carefully negotiated the assets to be acquired or excluded, and the liabilities to be assumed or excluded. All Claims, including the BC Civil Claim, were acquired by ACDC and there is no provision in the ACDC APA that lists the BC Civil Claim as an Excluded Asset.

86. The Agent also states at paragraph 40 of its Brief that ACDC has no "interest" in the BC Civil Claim and has no means of obtaining necessary documents and evidence to pursue the BC Civil Claim. This is wrong. All Claims of the Applicants were conveyed to ACDC pursuant to the ACDC APA and the 2020 Vesting Order. The law is clear that causes of action can be assigned in an insolvency proceeding and the Purchaser gets the benefit of such claims.[87] The Agent supported the approval of the ACDC APA and the granting of the 2020 Vesting Order

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[84] Bench Brief of DDMI dated October 12, 2021, para 57; Bench Brief of Credit Suisse AG dated October 12, 2021, paras 37-39.
[85] *Benfield Corporate Risk Canada Ltd. v Beaufort International Insurance Inc.*, 2013 ABCA 200, para 112 ["*Benfield*"].
[86] *Benfield*, 2013 ABCA 200, para 110.
[87] *Ford Credit Canada Ltd v Welcome Ford Sales*, 2013 ABQB 495; *Easy Loan Corporation v Base Mortgage & Investments Ltd* 2020 ABQB 568.

before this Court and never challenged the authority of the Court to assign Claims, as such term is used in the ACDC APA. It cannot now lie in its mouth to attack the court-approved APA, which it supported.

87. The Agent's factual foundation is also wrong. ACDC does have the ability to pursue and prosecute the BC Civil Claim. Key personnel involved with the BC Civil Claim are now employees of ACDC, including Ms. Kristal Kaye, the former CFO of DDM. In addition, ACDC has a right to seek such documents and assistance as it needs to pursue the BC Civil Claim under:

(a) the Further Assurances provision of the ACDC APA, which requires DDM (or the Monitor under the EMP Order) to "use commercially reasonable efforts to execute and deliver such documents and instruments of conveyance and transfer as [ACDC] may reasonably request in order to consummate more effectively the purchase and sale of the Acquired Assets"[88] and

(b) section 1.02(c) of TSA, which requires the Monitor to respond in good faith to any reasonable request from the ACDC for access to any additional services that are necessary for the transition of the Acquired Assets, at a price agreed upon by the parties acting reasonably.

There is no basis to say that ACDC is incapable of pursuing the BC Civil Claim.

iii. There is no absurdity in ACDC's position

88. The Agent also claims that a finding that ACDC owns the BC Civil Claim would create an absurd result: that ACDC would have acquired a claim against the Diavik Realization Assets in priority to DDMI and the First Lien Lenders.[89] This is also incorrect. The BC Civil Claim is a claim in damages against DDMI. It is not a claim against the Diavik Realization Assets. Any recovery that ACDC obtains against DDMI does not impact the existing security interests of either the First Lien Lenders or DDMI in any way.

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[88] APA, s 4.4, Exhibit D of the Kaye Affidavit.
[89] Bench Brief of Credit Suisse AG dated October 12, 2021, para 41.

89. However, it would be an absurd result if section 3.1(n) of the ACDC APA, which purported to convey "all rights, options, Claims or causes of action of any Seller or other applicant against any party arising out of events occurring prior to the Closing, including and, for the avoidance of doubt, arising out of events occurring prior to the Filing Date, and including … any and all causes of action under applicable Law"[90] was interpreted to exclude specific Claims not identified in the ACDC APA which the First Lien Lenders want to later set aside as part of a separately negotiated deal with DDMI. This result is even more absurd in light of the fact that the BC Civil Claim was DDM's only material cause of action at the time.

iv. Post-contractual conduct is consistent with BC Civil Claims being assigned

90. The only evidence before this Court regarding ownership of the BC Civil Claim is the affidavit of Kristal Kaye. ACDC has disclosed its ownership of the BC Civil Claim in its own lending documents with the same group of parties that comprise the First Lien Lenders. In the event that this Court determines that there is any ambiguity in the interpretation of the ACDC APA (which we deny), this Court is entitled to examine post-contract conduct of the parties to determine which competing interpretation of the contract is correct. Such conduct will be especially persuasive if it involves the acts of both parties, is unequivocal in nature and proximate to the time of the execution of the contract.[91] Here the disclosure in the lending document was contemporaneous with the closing of the ACDC APA, showing a consistent intention to include the BC Civil Claim. Until this proceeding, the First Lien Lenders never took a contrary position.

91. Instead, the Agent and DDMI rely heavily on submissions made before this Court at the hearing for the 2020 Vesting Order. They allege that the submissions show that DDM did not intend to transfer the BC Civil Claim because the ACDC Transaction would not prejudice DDMI. It is unclear how statements about the subjective interpretations of parties can be relevant to the interpretative exercise.[92] Moreover, these statements are taken out of context; they

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[90] APA, s 3.1(n), Exhibit D of the Kaye Affidavit.
[91] *Shewchuk v Blackmont Inc*, 2016 ONCA 912 ["*Blackmont*"].
[92] *Sattva*, 2014 SCC 53, para 59.

have nothing to do with the BC Civil Action and are not relevant to an interpretation of the ACDC APA. Indeed, the Agent concedes the point that the quotes were not about the BC Civil Claim, but that further meaning should be divined through analogy; "this statement was made in the context of the discussion of the receivables from the diamonds, not the Action, but it applies equally to any other receivable that could fall within the definition of Diavik Realization Assets."[93] There is nothing on the record to show that DDMI expressed any concerns about the assignment of the BC Civil Claim or took the position that it would be prejudiced by the assignment of the BC Civil Claim. Indeed, there could be no prejudice to DDMI from the transfer. The potential threat to DDMI arose from the BC Civil Claim existing, irrespective of in whose hands the claim was held.

92. This proceeding is unusual. The parties to the contract either take the position that the BC Civil Proceeding is a Claim (ACDC, the purchaser)) or take no position (DDM, the vendor as represented by the Monitor). The intentions or subjective understandings of the First Lien Lenders or DDMI are not relevant to the interpretation of the contract. But even if they were, it is clear that they are nothing more than litigation positioning. In February 2021, the First Lien Lenders executed a new lending facility that included disclosure of the assignment of the BC Civil Claim to ACDC. It raised no objection to the assignment until this application made it convenient to do so.

v. When the ACDC APA used the defined term "Claims", it means "Claims"

93. In the alternative, the Agent and DDMI argue that if ACDC did acquire the BC Civil Claim, that it was assigned to ACDC not as a Claim but as a Diavik Realization Asset, and therefore is subject to the liens of the First Lien Lenders. They rely on the principle that where two terms of a contract may conflict, the Court should endeavor to give them a harmonious interpretation.[94] DDMI submits that if the BC Civil Claim was assigned to DDMI, the Court should interpret the word "claims" in the defined term Diavik Realization Assets to mean the same thing as the defined word Claims in the ACDC APA, thus picking up any causes of action.

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[93] Bench Brief of Credit Suisse AG dated October 12, 2021, para 43.
[94] Bench Brief of Credit Suisse AG dated October 12, 2021, para 57.

But there is no conflict between section 3.1(n) (transferring all *Claims* to ACDC) and sections 3.1(b) (transferring the Diavik Realization Assets to ACDC) of the ACDC APA. Section 3.1(b) expressly uses the uncapitalized term "claims", and not the defined term "Claims" with a capital C. The term "claims" appears ten times in the ACDC. The defined term Claims appears nineteen times in the ACDC APA (separate and apart from its use in the additional defined term Aboriginal Claims). It is clear that the parties intended to use, and did use, the expansive defined term Claims where they meant to do so. The Applicants and ACDC could have, but intentionally did not, use the defined term Claims, which includes all causes of action, in section 3.1(b).

vi. Conclusion: contractual interpretation

94. In short, ACDC owns the BC Civil Claim. It was vested in ACDC by the 2020 Vesting Order, which provides that ACDC is to have enjoyment of such Claims without interference of or by any Person claiming by, through or against the debtors.

95. If the First Lien Lenders and DDMI wanted to bargain for the discontinuance of the claim, they needed to negotiate for the consent of ACDC. They did not. Presented now with a motion that seeks to expropriate its assets for no consideration, ACDC does not consent.

D. The Discontinuance of the BC Civil Claim is not a Third-Party Release and the Discontinuance/Release should not be Granted

96. The AVO Agreement calls for an executed discontinuance of the BC Civil Claim and the amended form of Sale Order attached to the Amended Application of the Monitor includes a court-ordered release in favour of DDMI.

97. Notably, the Monitor has not recommended that the Court grant a court-ordered release of DDMI nor approve the discontinuance of the BC Civil Claim. The Agent and DDMI, the sole proponents of the release, rely heavily on case law related to the courts' authority to grant third-party releases in CCAA proceedings to support their argument that the discontinuance and releases contemplated by AVO Agreement and revised Sale Order should be authorized. The case law cited by the Agent and DDMI is not applicable.

98. Neither the discontinuance of the BC Civil Claim nor the court-ordered release set out in the amended Sale Order are a third-party release as such term is used in the cases cited. The leading authority for a court-ordered third-party release is *Metcalfe v Mansfield Alternative Investment II Corp*.[95] In *Metcalfe* the Ontario Court of Appeal framed the nature of the releases under consideration as follows:

> can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company?[96]

99. In *Metcalf*, the third-party releases imposed an obligation on creditors of the debtor company to give releases to third-parties other than the debtor and its directors.[97] A third-party release involves claims that creditors of the CCAA applicant may have against third-parties, which in turn could claim over against the CCAA Applicant for contribution or indemnity, thereby increasing claims against the CCAA Estate.[98]

100. The discontinuance of the BC Civil Claim is not a third-party release. It is the release of an asset of the estate *i.e.* a claim commenced by DDM (a CCAA Applicant) against DDMI, which has validly been assigned to ACDC for good consideration, in a transaction approved by this Court. The proposed discontinuance does not require the creditors of DDM to release claims against any third-parties. Rather, it requires ACDC to release a claim commenced by DDM (the Applicant) that was validly assigned to it under the ACDC APA and vested in ACDC by the 2020 Vesting Order. DDMI has no claim over against DDM for contribution of indemnity; the opposite, as DDMI is potentially liable to ACDC (as assignee of DDM) for significant sums.

101. Even if this Court were to determine that the discontinuance of the BC Civil Claim falls within the ambit of the third-party release law, the discontinuance does not meet the criteria for the Court to order the discontinuance to be executed. In ordering third-party releases, Courts have noted that it is extraordinary relief which should only be granted where the release is

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[95] *Metcalfe v Mansfield Alternative Investment II Corp*, 2008 ONCA 587 [*"Metcalfe"*]
[96] *Metcalfe*, para 3 [emphasis added].
[97] *Metcalfe*, para 41.
[98] *Re Nortel Networks*, 2010 ONSC 1708, para 81 ["*Nortel*"].

fundamental to the restructuring proceeding[99] and that a third-party release should not be granted where there is no corresponding benefit granted to the party whose claim is being released. In *Nelson Education*, the Ontario Superior Court refused to approve a third-party release where the releasing parties were getting nothing in return:

> The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release... Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release.[100]

102. ACDC, as owner of the BC Civil Claim, is receiving no benefit for the loss of its interest in the BC Civil Claim. Indeed, if the AVO Transaction is approved, ACDC is losing its right that it paid for—title and interest in the Cash Collateral and Dominion Production—without consideration. There is no basis on which the First Lien Lenders and DDMI can assert that ACDC is getting a benefit from the discontinuance of the BC Civil Claim. Notably, the Monitor has not recommended that the BC Civil Claim be discontinued, nor has it asked this Court to grant a third-party release.

103. It is particularly egregious in this case. The consideration ACDC paid for assets, like the BC Civil Claim, included assuming $70 million of First Lien Lenders' debt and giving them another $18.5 million in debt. Under the guise of the "third-party release," the First Lien Lenders are trying to unwind and rewrite the deal that this Court approved last December: the First Lien Lenders get to keep that consideration (the assumed and new debt), but use one of the purchased assets (the BC Civil Claim) to eliminate their LC liability. The result? DDMI no longer has a claim against it. The First Lien Lenders get a 126% recovery. ACDC loses an asset that it bought in a Court-approved sale in February 2021 that this Court would extinguish a mere nine months later.

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[99] *Re CanWest Global Communications Corp.*, 2010 ONSC 4209, para 28.
[100] *Re Nelson Education Limited*, 2015 ONSC 5557, para 50 ("Nelson Education"); see also: *Nortel*, para 82.

104. Nor should the Court take notice of the statements made in the Agent's Brief (at paragraph 61(c)) that DDMI will not proceed with the AVO Transaction without the discontinuance of the BC Civil Claim. The Agent's Brief states that "DDMI has made it clear that it will not proceed with the AVO Transaction if the Action is not discontinued or released."[101] There is no evidence to support this statement. If this was DDMI's position, it was obligated to say so, on the record, through a sworn affidavit that is open to cross-examination. Otherwise, it is a bald, self-serving statement, adduced through hearsay and shielded from scrutiny.

105. Courts have held that a condition precedent in a transaction document is not a proper reason for the Court to grant a release in any event. In *Green Relief*, the Ontario Court of Justice stated:

> The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.[102]

106. Finally, an important factor in the Court's analysis as to whether to approve a third-party release is the recommendation of the court's officer as to the appropriateness of granting such extraordinary relief. As noted by the Ontario Superior Court of Justice in *Nortel*, when determining whether to grant a court-ordered release, it is appropriate to "give significant weight" to the position of the Monitor.[103] The Monitor has not recommended that this Court authorize the discontinuance of the BC Civil Claim or grant the release set out in the Amended Sale Order. If the Monitor believed that the discontinuance or release was appropriate, it would have set out its recommendation in its Report. It has intentionally not done so.

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[101] Bench Brief of Credit Suisse AG dated October 12, 2021, para. 61(c).
[102] *Re Green Relief Inc.*, 2020 ONSC 6837, para 52.
[103] *Nortel*, para 78; see also *Re Dura Automotive Systems*, 2011 CarswellOnt 19247, para 7.

107. If DDMI requires the release of the claim to strike a deal, it should negotiate with ACDC, the owner of the claim. It did not. Instead it decided to negotiate in secret with the First Lien Lenders.

E. The Processes Underlying the AVO Transaction and the RVO Transaction Fails to meet the *Soundair* test

108. The Monitor is requesting that this Court approve the AVO Transaction and the RVO Transaction with virtually no evidence on the record that those transactions are fair and reasonable in the circumstances. The Monitor has acknowledged that it has not taken any steps to test the market for these assets since the SISP was completed.[104] The Monitor's reliance on a process run over a year ago cannot withstand scrutiny.

109. ACDC provided US$1 million of funding under the ACDC APA to run a realization process.[105] The First Lien Lenders, the Monitor and ACDC each understood that this funding was to be used in order for the Monitor to maximize recoveries flowing from the Diavik Realization Assets. Instead, the Monitor accepted the AVO Transaction, which was privately and opaquely negotiated between the First Lien Lenders and DDMI, without any effort to canvass the market since the SISP ended one full year ago. According to the Sixteenth Report, almost half of the money provided by ACDC to fund a marketing process was instead used to pay the fees of the Agent's counsel, with approximately $192,328 in professional fees paid to the Agent's counsel out of the Diavik Realization Account since the Monitor was advised of the negotiations between the Agent and DDMI.[106]

110. The Monitor also accepted the RVO Agreement before the Tax Attributes were marketed on a stand-alone basis, relying only on the SISP that ended one full year ago. ACDC notes that in order to be a Qualified Bidder under the SISP, a bid had to provide at least equivalent cash consideration as the Stalking Horse Offer (US$126.1 million) plus the Break Fee plus additional

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[104] Sixteenth Report, paras 51(c) and 70; see also Letter to Torys dated October 13, 2021, Supplemental Report, Appendix C, paras 2(e) and 3(a).
[105] Kaye Affidavit, para 43.
[106] Letter to Torys dated October 19, 2021, Supplemental Report, Appendix H, para 5.

consideration of at least US$1 million. As such, it is very unlikely that a purchaser interested in Tax Attributes would have participated in the SISP or had any hope of submitting a Qualified Bid. The prior SISP provides no meaningful basis for assessing the value of the RVO Transaction.

111. Despite this lack of a marketing and solicitation process, the Monitor has provided no independent appraisals or valuations in support of the value that those transactions assign to their respective assets and has confirmed to ACDC's counsel that no valuations of any kind were prepared for either transaction.[107] Without more information, the Monitor's conclusions as to the fairness or reasonability of these transactions are merely bald assertions, and this Court should treat them as such.

112. The jurisprudence provides this Court with clear guidance as to how it should determine whether the Monitor acted properly when it entered into these transactions—this is the *Soundair* test.[108] The *Soundair* test requires this Court to consider the following factors in determining whether to approve the AVO Transaction and the RVO Transaction: (i) whether the Monitor has made a sufficient effort to get the best price and has not acted improvidently; (ii) the interests of all parties; (iii) the efficacy and the integrity of the process by which the offers were obtained; and (iv) whether there has been unfairness in working out the process.[109]

113. The Monitor has failed to satisfy these factors because it failed to canvas the market, failed to value the assets and failed to act fairly towards ACDC.

i. The Monitor has not canvassed the market

114. The Monitor has made no attempt to cavass the market for the assets underlying the AVO Transaction for over a year. It has never marketed the RVO Transaction on a standalone basis. Nor has the Monitor provided a reasonable explanation for its failure to do so.

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[107] Letter to Torys dated October 13, 2021, Supplemental Report, Appendix C, paras 2(d) and 3(c).
[108] *Royal Bank of Canada v Soundair Corp.*, [1991] O.J. No. 1137 (ONCA), para 16 ["*Soundair*"].
[109] *Soundair*, para 16.

115. Although the Monitor indicates that the funds set aside for the express purpose of running a marketing process are exhausted, it does not explain why almost 50% of such funding was paid to counsel for the Agent nor whether any of the funds in the Diavik Realization Account were used to fund the Agent's private negotiations with DDMI.

116. The Monitor tries to justify its position because the assets underlying the AVO Transaction were subject to the SISP, that process commenced on June 15, 2020 and concluded on September 15, 2020[110] —a *full year* before the Monitor and DDMI settled the AVO Agreement. The Monitor concedes it has made no renewed efforts to canvass the diamond market for those assets.[111]

117. But the diamond market is dramatically different than it was over one year ago.[112] The SISP occurred during the height of the COVID-19 pandemic when the diamond market (alongside the world economy) was plagued with uncertainty. The Monitor provides no reason for its speculative claim that "given that there were no bids" for the Diavik Realization Assets during that SISP, "it is unlikely that the First Lien Lenders would receive full recovery of the amounts owed to them."[113] This is a hypothesis, not a market-tested conclusion. A hypothesis that the Monitor itself did not agree with even in December 2020, when it agreed to the reserve of US$1 million of funding from ACDC for renewed marketing efforts. Surely the Monitor did not agree to accept these funds if it saw the process as futile.

118. Courts consistently refuse to approve sale transactions in the insolvency context when the underlying assets are not properly canvassed. Indeed, this is a key factor of the *Soundair* test: "the efficacy and the integrity of the process by which the offers are obtained."[114] This requirement regularly plays a central role in courts' assessments of the propriety of sale transactions.

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[110] Sixteenth Report, para 5.
[111] Sixteenth Report, para 51(c).
[112] Kaye Affidavit, para 6.
[113] Sixteenth Report, para 51(f).
[114] *Soundair*, para 16.

119. For example, the British Columbia Supreme Court refused to approve the sale of a debtor's assets in a receivership because "…there was insufficient time allowed for the marketing of the defendants' [property] so as to create a proper climate to generate offers more closely akin to the fair market value of the property."[115] The Ontario Superior Court of Justice took a similar approach, holding that:

> [The receiver] used [an] extremely short time frame for the sale of assets of both companies. There appears to be little justification for this, which is compounded by the fact that the receiver had no advice as to the value of the [assets]... **I am not persuaded that there was sufficient exposure of the [assets] to the market place**.[116]

120. Both of those cases involved marketing and sales processes that finished approximately one month before the hearing date. The courts' conclusions are amplified in the present circumstances by the full year that has elapsed since the SISP took place and the dramatic change in market conditions.

121. Likewise, there has been no marketing or solicitation process for the Tax Assets (as defined in the RVO Term Sheet) underlying the RVO Transaction since the SISP, and it is very unlikely that such process would have attracted bidders interested in the Tax Attributes given the requirements for a Qualified Bid. The Monitor provides no rational basis for its conclusion that the consideration provided by Washington "represents the highest and best recovery available to DDM's creditors."[117]

122. At the time of closing the ACDC APA, ACDC believed that there may be significant value in the Diavik Realization Assets and it funded the Monitor with US$1 million to realize on that value.[118] ACDC continues to believe that there may be significant value in the Diavik Realization Assets, beyond what the AVO Transaction suggests, and it has confirmed that its current shareholders, who are current second lien lenders to DDM, will fund the Monitor with an

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[115] *Azura v Hemlock*, 2006 BCSC 824, para 28.
[116] *Canrock Ventures LLC v. Ambercore Software Inc.*, 2011 ONSC 1138, para 19.
[117] Sixteenth Report, para 69(a).
[118] Kaye Affidavit, paras 7 and 36.

additional $500,000 to run a renewed marketing process.[119] This Court should not approve any transaction in respect of those assets until they are properly canvassed in the market.

ii. The Monitor has provided no valuations in support of the AVO Transaction or the RVO Transaction

123. The first factor of the *Soundair* test requires this Court to assess "whether [the Monitor] has made a sufficient effort to get the best price."[120] The Monitor has put nothing on the record that allows this Court to make such a determination in respect of either the AVO Transaction or the RVO Transaction. It has conceded that it did not prepare any valuations of the assets.[121]

124. In support of the AVO Transaction, the Monitor only describes that it has reviewed "certain confidential documents" that were provided to it by DDMI, but the Monitor has put into evidence neither those documents nor a summary of their contents or conclusions.[122] It cannot rely on documents that it neither identifies, provides to ACDC to analyze or rebut nor presents to the Court.

125. The Monitor has also failed to provide a valuation of the First Lien Lenders' LCs, the assumption of which amounts forms an integral part of the purchase price under the AVO Agreement.[123] No funds have been advanced under the LC's. They are contingent obligations and the actual liability under the LC's depends on: (i) the risk of the LC's being drawn; and (ii) the actual amounts owing for the reclamation costs that the LC's secure. The Sixteenth Report uses the full face value of the LCs of $105 million in calculating its "illustrative purchase price" for the AVO Agreement,[124] but that does not necessarily reflect the LCs' fair market value or any analysis of the contingent nature of these instruments.

126. Additionally, the actual amount of money owing by DDM to DDMI for cash calls and Cover Payments (as defined in the Diavik JVA) has historically been contested between DDM

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[119] Kaye Affidavit, para 59.
[120] *Soundair*, para 16 [emphasis added].
[121] Letter to Torys dated October 13, 2021, Supplemental Report, Appendix C, paras 2(d) and 3(c).
[122] Sixteenth Report, para 51(d).
[123] Letter to Torys dated October 19, 2021, Supplemental Report, Appendix H, para 3.
[124] Sixteenth Report, para 44(h).

and DDMI. The First Lien Lenders have equally challenged these amounts. The affidavit of Kristal Kaye raises serious issues with respect to the calculation of the Cover Payments and the valuation of the diamonds held by DDMI as collateral for such amounts.[125] The release of those disputed claims is being used to partially fund the purchase price under the AVO Agreement, and the ongoing costs associated with disputing these claims is one of the grounds upon which the Monitor has indicated it supports the AVO Agreement.[126] The Monitor has acknowledged that it has not assessed the *bona fides* of the quantum of the cash calls or Cover Payments, and has refused to share a copy of the opinion prepared by its counsel addressing the validity of the security held by DDMI under the Diavik JV Agreement.[127] It cannot both rely on the opinion and refuse to produce it on the grounds of privilege.

127. The Cover Payments are a key element of the Monitor's calculation of the illustrative purchase price for the AVO Agreement, representing almost 84% of the value attributed to the transaction.[128] The Monitor includes the full amount of the alleged Cover Payments in calculating its "illustrative purchase price" for the AVO Agreement,[129] but that does not take into account either the diamond collateral held by DDMI (estimated to be $178.2 million using DICAN values)[130] or any analysis of the *bona fides* of the amounts claimed.

128. Ms. Kaye has also raised concerns with DDMI refusing to sell a significant amount of the diamonds they are holding back for purposes of collateralization of amounts outstanding for Cover Payments despite a high demand for rough diamonds and a bullish market recovery, which could result in the diamond collateral being undervalued by anywhere from 20% to 50% (depending on when the valuation was actually performed).[131] The Monitor has determined that the current shortfall owing to DDMI for Cover Payments is $64.8 million, based on outstanding Cover Payments of approximately $243.0 million and the "**DICAN value of diamond collateral**

[125] Kaye Affidavit, paras 33-36.
[126] Sixteenth Report, para 65.
[127] Letter to Torys dated October 19, 2021, Supplemental Report, Appendix H, para 2.
[128] Sixteenth Report, para 44(h).
[129] Sixteenth Report, para 44(h).
[130] Sixteenth Report, para 35.
[131] Kaye Affidavit, para 36.

held by DDMI of approximately $178.2 million".[132] The market value of the diamond collateral held by DDMI has not been tested. A 20% to 50% differential from the DICAN values relied on by DDMI and the Monitor could result in an actual shortfall of approximately $29 million (at 20%) to a surplus of approximately $24 million (at 50%).

129. ACDC believes that there is significant value in the Diavik Realization Assets beyond the contingent debt owed to the First Lien Lenders, especially if the quantum of the cash calls and Cover Payments were to be determined in a hearing with a full evidentiary briefing.[133] Indeed, the First Lien Lenders have themselves described the "unilateral and excessive control which DDMI exercises over cash calls," citing concerns about DDMI "manipulating cash calls to ensure that all DDM's share of production from the Diavik Mine is retained for its own benefit."[134]

130. DDMI's management of the Diavik Joint Venture and allegations regarding improper cash calls are central to the dispute in the BC Civil Claim (which DDMI is seeking a release of under the AVO Agreement), yet the Monitor simply accepts DDMI's assumptions and estimates as to the quantum of the cash calls and Cover Payments. With respect to the Illustrative Cover Payment Forecast the Monitor has prepared in support of the AVO Transaction, it concedes it "cannot verify that these assumptions and estimates are correct, and actual results may vary materially."[135] These unsubstantiated amounts must be tested before this Court approves the AVO Transaction. Without testing, it cannot be said to be fair.

131. With respect to the RVO Transaction, the Monitor's review falls even shorter: it does not provide any evidence to support its conclusion that US$1.5 million reflects the Tax Attributes' fair and reasonable value and acknowledges that no valuation of the Tax Attributes was undertaken.[136]

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[132] Sixteenth Report, para 35.
[133] Kaye Affidavit, para 36.
[134] Bench Brief of the Agent dated October 28, 2020, para 48(a), Exhibit K to the Kaye Affidavit.
[135] Sixteenth Report, para 51(e).
[136] Sixteenth Report, para 69; Letter to Torys dated October 13, 2021, Supplemental Report, Appendix C, para 3(c).

132. This Court should not be tasked with relying on assertions of value without credible evidence to support them; especially when ACDC has had insufficient time and information to test those values. The British Columbia Supreme Court came to this conclusion in *Farm Credit Canada v Gidda*[137] when the receiver's report provided insufficient and contradictory evidence as to the appraisal values of the property that was the subject to a sale agreement.[138] The Court, in refusing to approve the transaction, held that:

> It remains the case that **evidence about the appraisals of the properties in question is an important consideration for the Court** if it is to accurately assess any potential offers. The complete lack of evidence as to these more current opinions of value is significant. Simply, as a matter of fairness, I do not accept counsel's submissions on what could be a very important and disputed fact.[139]

133. The lack of a valuation of the Acquired Assets or meaningful review of the claims being released under the AVO Transaction is of increased concern given that the AVO Agreement, in some respects, is akin to a credit bid.

134. DDMI is releasing its cash call/Cover Payment claims in partial satisfaction of the purchase price. As noted by authors of *Credit Bidding — Recent Canadian and US Themes*: "Monitors are under growing scrutiny (particularly in large complex cases with multiple stakeholder interests that may be in conflict) to be an impartial officer of the court that promotes a fair balancing of the interests of the broad stakeholder constituency. This scrutiny should be all the more intense in the context of a credit bid."[140] This concern was also reflected in the decision of Justice D.M. Brown (as he then was) in refusing to approve a transaction which involved a credit bid component and where no valuation had been performed by the Receiver:

> neither 9-Ball nor Fuller Landau filed any valuation of the assets of TLS in support of the request to approve the proposed Agreement. Fuller Landau did not explain why it had decided not to secure valuations, even valuations from liquidators. As a result, I am left

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[137] *Farm Credit Canada v. Gidda*, 2015 BCSC 2188 ["*Farm Credit*"].
[138] *Farm Credit*, para 25.
[139] *Farm Credit*, para 27 [emphasis added].
[140] Pamela Huff et al, 2010 Annual Review of Insolvency Law, "Credit Bidding – Recent Canadian and U.S. Themes", pp 6-7.

> to assess the reasonableness of the proposed purchase price without the benefit of any independent valuations, and the book values of certain assets placed in evidence were not supported by extracts from the financial records of TLS or any comment from the company's accountant about their reasonableness. Although Fuller Landau exposed the assets of TLS to the market, the sale process was short in duration and almost cursory in nature. Accordingly, I lack the evidentiary basis to assess whether the proposed Receiver acted to get the best price and did not act improvidently.[141]

iii. The process was unfair to ACDC

135. The fourth factor in the *Soundair* test is "whether there has been unfairness in working out the process."[142] The process leading to the AVO Transaction was unfair to ACDC by design.

136. As the preceding discussion illustrates, ACDC's interests did not factor into the negotiation process at all. The First Lien Lenders rejected their commitments under the MSA and ignored the Court Orders in this proceeding mandating that the process would be run by the Monitor and any actions taken would be subject to the ACDC APA. They instead opted to negotiate a private side deal with DDMI and maximize their recovery under the AVO Transaction, leaving ACDC with no recovery for the assets being expropriated under the AVO Transaction.

137. The First Lien Lenders' incentives are clear: their exposure is limited to their liability under their LCs. They got exactly that amount out of the AVO Transaction through DDMI's assumption of those obligations.[143] Nothing more, and nothing less. ACDC was the fulcrum party: every additional dollar of Cash Collateral released would redound to ACDC's benefit. But there was no one at the table to bargain for ACDC because the table was kept secret.

138. It was a fundamental tenet of the process put in place under the EMP Order and the TSA that the Monitor, as an independent official, would market these assets and would take all of the

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[141] *9-Ball Interests Inc. v Traditional Life Sciences Inc.*, 2012 ONSC 2788, paras 31 and 33.
[142] *Soundair*, para 16.
[143] Sixteenth Report, para 44(h).

steps that a Court Officer would do in a transparent process, including canvassing the market and engaging interested parties in good faith negotiations. The First Lien Lenders stepped in and now say that their deal is the only deal in town. They will receive a significant windfall if the AVO Transaction is approved, recovering 126% of their funded debt as a result of the additional secured claims they hold against ACDC.

139. The Monitor accepted the First Lien Lenders' deal without scrutiny, and without considering ACDC's interests. This is grossly unfair, and the AVO Transaction fails this fourth branch of the *Soundair* test.

PART V – CONCLUSION

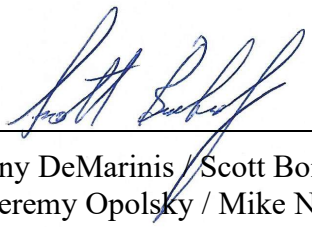
140. Neither the AVO Agreement nor the RVO Agreement should be approved based on the record before the Court. ACDC realizes that the Monitor has limited resources and it has facilitated a good faith offer from DDJ and Brigade to provide additional interim financing to permit the Monitor to pursue a thorough realization process. There are serious issues with respect to the marketing process run by the Monitor with respect to both transactions, and a lack of valuation evidence to support the merits of either transaction. The transaction proponents have the onus of meeting the section 36 of the CCAA and *Soundair* standards. They cannot here.

141. The First Lien Lenders are accusing ACDC of trying to "derail" or "torpedo" the AVO Transaction by taking steps to protect its proprietary claims in assets conveyed to it by an Order of this Court. But it was the choice of the First Lien Lenders to not consult—or even notify—ACDC of their private negotiations with DDMI. It was their choice to negotiate a deal that benefited only their interests at the expense of ACDC. The AVO Transaction was negotiated in a manner that disregarded Orders of this Court and contractual commitments and the Court should not condone this activity by granting the requested Order.

PART VI – RELIEF SOUGHT

142. ACDC asks this Court to direct the Monitor that (i) the proposed AVO Transaction is not appropriate; (ii) it should take the necessary appropriate steps to maximize recovery from the Diavik Realization Assets and Tax Attributes within a reasonable period of time including by obtaining qualified appraisals, engaging in consensual negotiations, and soliciting interest from prospective bidders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on October 25, 2021 at Calgary, Alberta.



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