

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO
GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

FACTUM OF ALLEN-VANGUARD CORPORATION

(Motion Regarding Extension and Scope of Stay, returnable February 11, 2014)

January 31, 2014

LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Ronald G. Slaght, Q.C. (12741A)

Tel: (416) 865-2929
Fax: (416) 865-2862
Email: rslaght@litigate.com

Eli S. Lederman (47189L)

Tel: (416) 865-3555
Fax: (416) 865-2872
Email: elederman@litigate.com

Ian MacLeod (60511F)

Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for Allen-Vanguard Corporation

TO: THE SERVICE LIST

TABLE OF CONTENTS

| | Page No. |
|---|----------|
| PART I - OVERVIEW | 1 |
| PART II - SUMMARY OF FACTS | 4 |
| 1. The CCAA Proceedings..... | 4 |
| 2. The Allen-Vanguard Proceedings..... | 6 |
| (i) Background | 6 |
| (ii) The Actions | 8 |
| 3. The Offeree Shareholders Have Refused to Take Any Steps in the Allen-Vanguard Proceedings | 11 |
| (i) The First Stay Extension and Allen-Vanguard's Motion | 13 |
| (ii) The Ottawa Court Determined that the Stay Does Not Apply to the Non-Debtor Parties..... | 14 |
| (iii) Growthworks Resisted Allen-Vanguard's Attempts to Continue the Litigation.. | 15 |
| (iv) The Second Stay Extension and Claims Process Order | 16 |
| 4. Growthworks Will Suffer No Prejudice if the Allen-Vanguard Proceedings Continue | 17 |
| 5. The Stay will Cause Prejudice to Allen-Vanguard | 19 |
| PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES | 20 |
| I. THE STAY OF PROCEEDINGS SHOULD NOT APPLY TO THE ALLEN-VANGUARD PROCEEDINGS | 20 |
| (i) The Test for Imposing a Stay of Proceedings | 20 |
| (ii) The Test for Extending a Stay of Proceedings..... | 21 |
| (iii) Growthworks Has Not Satisfied Its Burden to Extend the Stay to the Allen-Vanguard Proceedings | 22 |
| II. IN THE ALTERNATIVE, THE STAY SHOULD NOT BE EXTENDED TO THE NON-DEBTOR PARTIES..... | 25 |
| (i) The Stay of Proceedings Can Only Extend to Non-Debtor Parties if a Continuance of the Proceedings Causes an Injustice to the Debtor Company | 25 |
| (ii) The Stay of Proceedings Should Not Extend to the Non-Debtor Parties | 27 |
| PART IV - ORDER REQUESTED | 29 |

PART I - OVERVIEW

1. Allen-Vanguard Corporation (“Allen-Vanguard”) seeks an Order confirming that the stay of proceedings imposed by the Initial Order of the Honourable Mr. Justice Newbould, dated October 1, 2013 (the “Initial Order”) and any extensions made thereto, shall not apply to the continuation of three inter-related actions commenced in Ottawa with Court File Nos. 08-CV-43188, 08-CV-43544 and 08-CV-41899 (the “Allen-Vanguard Proceedings”).

2. The Allen-Vanguard Proceedings relate to Allen-Vanguard’s acquisition of Med-Eng Systems Inc. (“MES”) in 2007 for approximately \$650 million. Allen-Vanguard has made a claim against Growthworks Canadian Fund Ltd. (“Growthworks”) and the other former majority shareholders of MES (collectively referred to as the “Offeree Shareholders”) for indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of \$650 million, of which \$40 million would be distributed to Allen-Vanguard out of an escrow fund.

3. Growthworks and the other Offeree Shareholders have made a parallel claim for a declaration that they are entitled to be paid the \$40 million plus accrued interest that remains held in escrow (the “Indemnification Escrow Amount”).

4. This is not a motion to lift the stay made in the CCAA proceedings, but rather to confirm that the stay imposed by the Initial Order will not be extended to apply to the Allen-Vanguard Proceedings.

5. Growthworks has failed to satisfy its burden of establishing that the stay of proceedings imposed by the Initial Order should extend to the Allen-Vanguard Proceedings. On the contrary,

Growthworks will suffer no prejudice if the Allen-Vanguard Proceedings continue while it pursues its restructuring.

6. Indeed, the uncontradicted evidence before the Court is that the Allen-Vanguard Proceedings are:

- (a) unrelated to Growthworks' Application made under the CCAA;
- (b) will have no effect on Growthworks' ability to continue its business;
- (c) will not interfere with the restructuring of Growthworks; and
- (d) will not distract Growthworks from the restructuring process.

7. The law is clear that a stay of proceedings is intended to restrain conduct that would seriously impair a debtor company's ability to continue in business or concentrate on restructuring. However, that principle applies only to cases in which the debtor has satisfied the Court with sufficient evidence that its ability to restructure would be hampered if the stay is not granted or extended.

8. Growthworks has adduced no evidence to suggest that its ability to restructure would be compromised in any way if the Allen-Vanguard Proceedings continue in the interim. Growthworks failed to identify or even make reference to the Allen-Vanguard Proceedings in its Application to the Court for the Initial Order or in its subsequent motion to extend the stay of proceedings. This is not an oversight. It is a recognition by Growthworks that these CCAA proceedings have absolutely nothing to do with the Allen-Vanguard Proceedings.

9. The only evidence before the Court on this motion is that the continuation of the Allen-Vanguard Proceedings will have no impact on Growthworks' restructuring efforts.

10. Further, there is no basis and no evidence to support the stay of proceedings applying to any of the non-debtor parties. The interests of Growthworks are identical to those of the other Offeree Shareholders in the Allen-Vanguard Proceedings and Growthworks will suffer no prejudice if the Allen-Vanguard Proceedings continue against the non-debtor parties. Any suggestion to the contrary is an attempt by Growthworks to use the CCAA process to gain an unfair advantage in the Allen-Vanguard Proceedings.

11. A final Judgment against the Offeree Shareholders is not imminent and, in any event, is not likely to be obtained before Growthworks emerges from CCAA protection. There is no trial date for the Allen-Vanguard Proceedings. This is because Growthworks and the other Offeree Shareholders sought and obtained an adjournment of the trial shortly before Growthworks applied for CCAA protection (the trial had been scheduled to proceed on September 3, 2013, a date that had been fixed more than a year and a half earlier). All that is contemplated in the foreseeable future is that the Offeree Shareholders, not Allen-Vanguard, will continue the interlocutory matters yet to be completed, including continued discovery and possibly some motions.

12. In any event, the interests of Growthworks are easily protected. If Allen-Vanguard is successful at some future date in obtaining Judgment against Growthworks for any amount in excess of the Indemnification Escrow Amount, it will move to seek leave of the Court before enforcing any such Judgment if Growthworks has not emerged from the CCAA proceedings by that point in time. Further, it is in Growthworks' interests for the Allen-Vanguard Proceedings to

be adjudicated without delay given that Growthworks has claimed an entitlement to the Indemnification Escrow Amount.

13. Allen-Vanguard requests an Order confirming that the stay imposed by the Initial Order will not be extended to apply to the Allen-Vanguard Proceedings. In the alternative, Allen-Vanguard requests an Order confirming that the stay of proceedings imposed by the Initial Order and any extensions thereto do not apply to any of the non-debtor parties to the Allen-Vanguard Proceedings.

PART II - SUMMARY OF FACTS

1. THE CCAA PROCEEDINGS

14. Growthworks is a labour-sponsored venture capital fund with a portfolio of investments in small and medium-sized Canadian businesses.¹ Its investments are held in illiquid securities consisting of minority equity interests in private companies and restricted equity securities in a publicly traded company.²

15. Growthworks' investments are managed by GrowthWorks WV Management Ltd. (the "Manager")³ and it operates without any employees by outsourcing all of its day-to-day

¹ Affidavit of C. Ian Ross sworn September 30, 2013, para. 2, Application Record of Growthworks dated September 30, 2013, p. 9.

² Affidavit of C. Ian Ross sworn September 30, 2013, para. 5, Application Record of Growthworks dated September 30, 2013, p. 10.

³ Affidavit of C. Ian Ross sworn September 30, 2013, para. 6, Application Record of Growthworks dated September 30, 2013, p. 10.

operations, monitoring of its investments and other management and operational oversight, to the Manager.⁴

16. Aside from Roseway, Growthworks has no known creditors with a claim of more than \$1,000.⁵

17. On September 27, 2013, Growthworks had total assets of approximately \$116 million.⁶ It had a net asset value of approximately \$84.62 million on September 30, 2013.⁷

18. On October 1, 2013, Growthworks sought relief under the CCAA in order to prevent its only secured creditor, Roseway Capital L.P. (“Roseway”), from forcing a fire sale of its assets at a discounted value and to maintain access to its critical documents and systems overseen by the Manager. Growthworks filed the following evidence in support of its request for a stay of proceedings:

NEED FOR CCAA PROTECTION

93. The \$20 million payment is now due and payable to Roseway, and since the Fund is unable to meet that obligation, and the Fund and Roseway have been unable to reach agreement on the terms of an extension of the Fund’s payment obligations to Roseway under the Participation Agreement at this time, the Fund is requesting the Court’s assistance through the granting of an Initial Order.

94. The Fund is seeking the opportunity, under the protection of a stay of proceedings, to explore opportunities to refinance, merge or make judicious divestitures without the threat of an untimely, forced sale of the Venture Portfolio.

95. The Fund is also seeking the Court’s assistance to ensure that it has access to its critical documents and systems and the assistance of the Manager in

⁴ Affidavit of C. Ian Ross sworn September 30, 2013, para. 11, Application Record of Growthworks dated September 30, 2013, p. 12.

⁵ The First Report of FTI Consulting Canada Inc. in its Capacity as Monitor dated October 8, 2013, para. 14.

⁶ Affidavit of C. Ian Ross sworn September 30, 2013, para. 21, Application Record of Growthworks dated September 30, 2013, p. 14.

⁷ Affidavit of C. Ian Ross sworn September 30, 2013, para. 6, Application Record of Growthworks dated September 30, 2013, p. 10.

providing necessary transition services in order to continue to operate and service its Venture Portfolio throughout this process.

96. If the Fund is protected from the negative effects of a fire sale of its assets and given access to its documents and systems, the Fund expects to be able to satisfy the Roseway Obligations in full through a combination of judicious dispositions, new debt financing and/or a merger or other transaction.

...

104. The proposed Order contemplates an order staying Proceedings (as defined therein) against the Fund or the Monitor until and including October 31, 2013 or such later date as the Court may order.⁸

19. The Allen-Vanguard Proceedings were not a factor in the CCAA proceedings and were never raised as a basis for seeking CCAA protection. In fact, the Allen-Vanguard Proceedings were not disclosed to Justice Newbould when Growthworks sought and obtained the Initial Order on October 1, 2013.

20. Paragraph 14 of the Initial Order, which is in the form of the model order requested by Growthworks, provides as follows:

THIS COURT ORDERS that until and including October 31, 2013, or such later date as this Court may order (the “**Stay Period**”), no proceeding or enforcement process in any court or tribunal (each, a “**Proceeding**”) shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

2. THE ALLEN-VANGUARD PROCEEDINGS

(i) *Background*

21. Growthworks has been a party to litigation with Allen-Vanguard since 2008. The litigation relates to Allen-Vanguard’s purchase of MES in 2007.

⁸ Affidavit of C. Ian Ross sworn September 30, 2013, paras. 93-96 and 104, Application Record of Growthworks dated September 30, 2013, pp. 40-41 and 43.

22. Allen-Vanguard entered into a Share Purchase Agreement, made as of August 3, 2007, with Growthworks and the other former majority shareholders of MES to purchase all of the shares of MES for approximately \$600 million, plus an amount established at approximately \$50 million for the purpose of excess working capital (the "Share Purchase Agreement").⁹

23. The share purchase transaction closed on September 17, 2007 (the "Transaction").¹⁰ At that time, Growthworks received over \$70 million from Allen-Vanguard for its approximately 12% stake in MES.¹¹

24. As part of the Share Purchase Agreement, the parties entered into an Escrow Agreement, dated September 17, 2007 (the "Escrow Agreement"). The Escrow Agreement provides that the Indemnification Escrow Amount of \$40 million plus accrued interest is to be held in escrow to indemnify Allen-Vanguard for any claims which Allen-Vanguard may have resulting from breaches of representations, warranties and covenants committed by MES and in accordance with the terms of the Share Purchase Agreement.¹²

25. Schroder Venture Managers (Canada) Limited, Schroder Ventures Holding Limited, Richard L'Abbé, 1062455 Ontario Inc., and Growthworks were the former majority shareholders of MES and are collectively referred to as the "Offeree Shareholders".¹³

⁹ Affidavit of David E. Luxton, sworn October 28, 2013 ("Luxton Affidavit"), para. 3, Motion Record of Allen-Vanguard Corporation dated October 28, 2013 ("Motion Record of Allen-Vanguard"), p. 11.

¹⁰ Luxton Affidavit, para. 3, Motion Record of Allen-Vanguard, p. 11.

¹¹ Luxton Affidavit, para. 7, Motion Record of Allen-Vanguard, p. 12.

¹² Luxton Affidavit, paras. 3-5, Motion Record of Allen-Vanguard, p. 11.

¹³ Luxton Affidavit, para. 6, Motion Record of Allen-Vanguard, p. 11.

26. The Offeree Shareholders held approximately 80% of the shares of MES immediately prior to the Transaction.¹⁴ The table below sets out the relative shareholdings of the Offeree Shareholders at that time:

| Offeree Shareholder(s) | Approximate Percentage Shareholdings in MES Prior to September 17, 2007 |
|--|---|
| Schroder Venture Managers (Canada) Limited | 30% |
| Schroder Ventures Holdings Limited | 16% |
| Richard L'Abbé / 1062455 Ontario Inc. | 21% |
| Growthworks Canadian Fund Ltd. | 12% |

(ii) The Actions

27. The Offeree Shareholders are Defendants in an action commenced by Allen-Vanguard in Ottawa (Court File No. 08-CV-43544) in December 2008.¹⁵ In its Amended Statement of Claim, Allen-Vanguard has claimed against the Offeree Shareholders indemnification and/or damages for fraudulent and/or negligent misrepresentation and breach of contract in the amount of \$650 million, of which \$40 million is to be distributed to Allen-Vanguard in accordance with the terms of the Escrow Agreement.¹⁶

28. The Offeree Shareholders are also Plaintiffs in an action commenced in November 2008 in Ottawa (Court File No. 08-CV-43188). In that action, the Offeree Shareholders have sought a declaration that they are entitled to payment of the Indemnification Escrow Amount.¹⁷

¹⁴ Luxton Affidavit, para. 7, Motion Record of Allen-Vanguard, p. 12.

¹⁵ Luxton Affidavit, para. 15, Motion Record of Allen-Vanguard, p. 13.

¹⁶ Luxton Affidavit, paras. 36-39, Motion Record of Allen-Vanguard, pp. 18-19.

¹⁷ Luxton Affidavit, para. 13, Motion Record of Allen-Vanguard, p. 13.

29. The entire Indemnification Escrow Amount continues to be held in escrow by Computershare Trust Company of Canada as a result of the litigation between Allen-Vanguard and the Offeree Shareholders.

30. Documentary and oral discovery has been ongoing in the actions involving the Offeree Shareholders since 2009. The table below describes the Examinations for Discovery conducted to date:

| Party/Parties | Discovery Representative | Days of Examination for Discovery |
|--|---------------------------------|--|
| Allen-Vanguard Corporation | David E. Luxton | 21 days |
| Schroder Venture Managers (Canada) Limited / Schroder Ventures Holding Limited | Paul Echenberg | 6 days |
| Richard L'Abbé / 1062455 Ontario Inc. | Richard L'Abbé | 3 days |
| Growthworks Canadian Fund Ltd. | Richard Charlebois | 1 day |

31. The single day of discovery for Richard Charlebois (a then retired employee of Growthworks Capital Ltd.) in August 2011 reflects the extremely limited involvement and role of Growthworks in the litigation.¹⁸

32. Both actions, as well as a related action involving Paul Timmis, the former Vice-President of Electronic Systems at MES (Court File No. 08-CV-41899) have been ordered to be tried together by the same trial judge, and were scheduled to proceed to trial in Ottawa on September 3, 2013.¹⁹

¹⁸ Luxton Affidavit, para. 31, Motion Record of Allen-Vanguard, p. 18.

¹⁹ Luxton Affidavit, paras. 33-34, Motion Record of Allen-Vanguard, p. 18.

33. The trial was adjourned on May 30, 2013 at the request of the Offeree Shareholders on the basis that the Offeree Shareholders intend to bring a motion for summary judgment.²⁰

34. Following the adjournment of the trial, the Offeree Shareholders sought to schedule a further motion with respect to privilege issues (the Offeree Shareholders' first privilege motion was heard and decided by Case Management Master MacLeod in 2011) as well as a summary judgment motion.²¹

35. Allen-Vanguard intended to bring a motion to stay the Offeree Shareholders' summary judgment motion on the basis that a summary judgment motion is inappropriate at this stage of the litigation and in these factual circumstances, and to ensure that a new trial date will be fixed without further delay.²²

36. At a Case Conference held on July 9, 2013, Master MacLeod ordered a timetable for the delivery of materials with respect to the privilege motion, the summary judgment motion and the motion to stay the summary judgment motion.²³ The following table sets out the relevant deadlines:

| Deadline | Procedural Step |
|--------------------|---|
| September 6, 2013 | The Offeree Shareholders to serve their motion material for the privilege motion |
| September 30, 2013 | Allen-Vanguard to serve its responding material for the privilege motion |
| October 16, 2013 | The Offeree Shareholders to serve their motion material for the summary judgment motion |
| October 31, 2013 | Allen-Vanguard to serve its motion material to stay the summary |

²⁰ Luxton Affidavit, paras. 44-45, Motion Record of Allen-Vanguard, p. 20.

²¹ Luxton Affidavit, para. 46, Motion Record of Allen-Vanguard, p. 21.

²² Luxton Affidavit, para. 46, Motion Record of Allen-Vanguard, p. 21.

²³ Luxton Affidavit, para. 47, Motion Record of Allen-Vanguard, p. 21.

37. Allen-Vanguard and the Offeree Shareholders subsequently agreed to extend the deadline for the delivery of materials in respect of the privilege motion, but no agreement was made to extend the deadlines for the delivery of the summary judgment motion materials.²⁴

38. At a Case Conference held on October 2, 2013, Master MacLeod scheduled the Offeree Shareholders' privilege motion for December 10, 2013. He also advised the parties that Regional Senior Justice Hackland had agreed to hear the stay motion and the summary judgment motion.²⁵

3. THE OFFEREE SHAREHOLDERS HAVE REFUSED TO TAKE ANY STEPS IN THE ALLEN-VANGUARD PROCEEDINGS

39. Following the Initial Order of Justice Newbould on October 1, 2013, counsel for the Offeree Shareholders advised Allen-Vanguard that Growthworks had applied for and obtained an Initial Order pursuant to the CCAA.²⁶

40. In correspondence sent to Allen-Vanguard's counsel on October 10, 2013, counsel for the Offeree Shareholders stated that "we will not be delivering motion materials or taking any steps until the stay is lifted" and also proposed to address the issue at an upcoming Case Conference before Master MacLeod scheduled for November 12, 2013.²⁷

41. Counsel for the Offeree Shareholders also wrote to Master MacLeod on October 10, 2013 to advise of the Initial Order made with respect to Growthworks on October 1, 2013. In that letter, counsel for the Offeree Shareholders stated the following:

²⁴ Luxton Affidavit, para. 48, Motion Record of Allen-Vanguard, p. 21.

²⁵ Luxton Affidavit, para. 49, Motion Record of Allen-Vanguard, p. 22.

²⁶ Luxton Affidavit, para. 50, Motion Record of Allen-Vanguard, p. 22.

²⁷ Luxton Affidavit, para. 51, Motion Record of Allen-Vanguard, p. 22.

We have informed Lenczner Slaght of this development. We have also stated to them that, in light of this development, we cannot serve any motion materials or take any active steps in this litigation until we sort out the issues with GrowthWorks, the monitor or the presiding judge in the CCAA proceedings.²⁸

42. On October 11, 2013, counsel for Allen-Vanguard wrote to Master MacLeod in response to the correspondence received from the Offeree Shareholders' counsel on October 10, 2013. In that letter, counsel for Allen-Vanguard acknowledged that the Initial Order temporarily stayed the proceedings against Growthworks, but that there was no basis for the other Offeree Shareholders not to comply with the timetable set by Master MacLeod:

Although the Initial Order dated October 1, 2013 stays proceedings against Growthworks Canadian Fund Ltd., there is of course no stay of this proceeding against the Schroder Defendants, Mr. L'Abbe or 1062455 Ontario Inc.

As a result, there is no basis for these defendants not to comply with the timetable set by this Court. Those Offeree Shareholders are still required to deliver their motion material for the summary judgment motion by October 16, 2013 and there is no reason why that deadline should not be complied with.

The fact that all defendants are represented by Mr. Conway is not a factor that has any bearing on the obligations of the unaffected defendants to meet this Court's requirements.

We are certainly prepared to convene a Case Conference to discuss the implications of the Initial Order on the proceedings against Growthworks. However, the Initial Order has no impact on the continuation of the proceedings against the remaining defendants.

In the circumstances, we expect to receive the motion material of the unaffected Offeree Shareholders by October 16, 2013.²⁹

43. On October 15, 2013, counsel for the Offeree Shareholders sent a letter to counsel for Allen-Vanguard which stated the following:

Your interpretation of Mr. Justice Newbould's order may well be correct, but regrettably it is not for Master MacLeod to say. If you are not correct, you are

²⁸ Luxton Affidavit, para. 52, Motion Record of Allen-Vanguard, p. 22.

²⁹ Luxton Affidavit, para. 53, Motion Record of Allen-Vanguard, p. 23.

asking Master MacLeod to interpret and vary the order of a judge. A Master does not have the jurisdiction to vary the order of a judge of the Superior Court.

As you know from the terms of Mr. Justice Newbould's order itself, there is, as is usual in CCAA proceedings, provision for another hearing to consider whether the Initial Order should be continued or varied in any material way. In our view, your concerns, which we share, should be addressed in that forum.

As you will note, the Initial Order expires at the end of October, so we hope that we will know by then what GrowthWorks' continued involvement in the above-noted actions will be.

A related issue, to which your letter makes only passing reference, is that of our joint retainer with the Offeree Shareholders. You do not appear to give this issue any serious consideration, but as you well know, we have been acting for all of the Offeree Shareholders on a joint retainer and must therefore receive the same instructions from all of them. At the moment, the court order prevents us from taking any further steps in the proceeding on behalf of GrowthWorks. As a consequence, we cannot take any fresh steps on behalf of any of our clients.

I can assure you again that our clients are as anxious as yours is to move these proceedings along. We are hoping to have this issue resolved at the earliest possible opportunity, and to that end have been in contact with McCarthy Tétrault, counsel to GrowthWorks in the CCAA proceedings. You might consider contacting McCarthy Tétrault yourself to impress upon them the urgency of having this issue resolved.³⁰

(i) The First Stay Extension and Allen-Vanguard's Motion

44. On October 29, 2013, Growthworks brought a motion to extend the stay of proceedings granted by the Initial Order. The sworn evidence of C. Ian Ross filed in support of Growthworks' motion to extend the stay of proceedings was that:

The Initial Order included a stay of proceedings **as against the Applicant** until and including October 31, 2013, or such later date as the Court may order (the "**Stay Period**").³¹

[Emphasis added]

³⁰ Luxton Affidavit, para. 54, Motion Record of Allen-Vanguard, pp. 23-24.

³¹ Affidavit of C. Ian Ross sworn October 25, 2013, para. 32, Motion Record of Growthworks dated October 25, 2013, p. 20.

45. In its motion material served on October 25, 2013, Growthworks again made no mention of the Allen-Vanguard Proceedings, let alone providing any basis as to why the extension of the stay should apply to the Allen-Vanguard Proceedings.

46. As a result of the position taken by the Offeree Shareholders following the Initial Order, Allen-Vanguard served its Motion Record on October 28, 2013 seeking the relief in this motion.

47. On October 29, 2013, Growthworks requested an adjournment of Allen-Vanguard's motion and Allen-Vanguard consented to the adjournment on the basis that it was without prejudice to Allen-Vanguard's position on the motion. As a result, Justice Mesbur granted an extension of the Stay Period until January 15, 2014 and provided that the adjournment of Allen-Vanguard's motion was "without prejudice to the parties' positions."³²

(ii) The Ottawa Court Determined that the Stay Does Not Apply to the Non-Debtor Parties

48. At a Case Conference held in Ottawa on November 12, 2013, Master MacLeod carefully considered the Initial Order and determined that the stay of proceedings does not apply to the non-debtor parties. Master MacLeod wrote as follows in his Endorsement:

With respect to the stay, counsel disagree about the legal effect of the Commercial List order. I have reviewed the order which refers to two of these proceedings. **I do not accept the argument that the effect of the stay under the CCAA or the specific wording of the stay order itself has any effect on the conduct of these actions except with respect to the participation and interest of Growthworks.**

Obviously as matters stand, Growthworks has no standing to take steps itself nor may any party take steps against Growthworks. The stay also means that nothing may be done in these actions to deal with the liability of Growthworks nor the interest of Growthworks in the escrow fund.

³² Endorsement of Justice Mesbur dated October 29, 2013.

In the absence of a very specific order from a Commercial List judge indicating his or her intention to affect the rights of parties who are not involved in the CCAA proceedings, the stay against Growthworks cannot legally impede Allen-Vanguard from proceeding with its action as against the other offeree shareholders nor prohibit those shareholders from asserting their claims against Allen-Vanguard. In the Timmis action of course, Growthworks is not even a party. Certainly it is not intended that all discovery or motion activity be halted in these actions unless the participation of Growthworks is essential.

...

In the event the Commercial List judge feels it is important to ensure these actions operate in harmony with the CCAA proceeding I am prepared at his or her request to have a joint case conference or case conferences. Alternatively if any party seeks leave to move these actions to the Commercial List they are to advise my office at once.³³

[Emphasis added]

49. There has been no appeal of Master MacLeod's Endorsement of November 12, 2013 by Growthworks or the other Offeree Shareholders.

50. None of the Offeree Shareholders has sought leave from the Ottawa Court to move the Allen-Vanguard Proceedings to the Commercial List.

(iii) Growthworks Resisted Allen-Vanguard's Attempts to Continue the Litigation

51. After writing to counsel for Growthworks and the Offeree Shareholders and receiving no response, Allen-Vanguard submitted a 9:30 a.m. hearing request form on November 27, 2013 in order to:

- (a) require the delivery of summary judgment motion material as previously required by the timetable set by Master MacLeod and as described in the cross-motion of Growthworks; and

³³ Endorsement of Master MacLeod dated November 12, 2013, paras. 3-5 and 10, Brief of Authorities of Allen-Vanguard Corporation ("Authorities"), Tab 1.

- (b) obtain an Order confirming that the stay of proceedings in the CCAA proceedings had no effect on the continuation of the actions in Court File Nos. 08-CV-43544 and 08-CV-43188 as against the non-debtor Defendants.³⁴

52. On December 3, 2013, Justice Mesbur held a 9:30 a.m. in-chambers appointment to consider the relief sought by Allen-Vanguard. Both Growthworks and the non-debtor Offeree Shareholders opposed the relief sought by Allen-Vanguard. Justice Mesbur declined to grant the Order sought by Allen-Vanguard and, instead, invited counsel to agree to an earlier hearing date for this motion and the cross-motion by Growthworks.

(iv) The Second Stay Extension and Claims Process Order

53. On January 7, 2014, Growthworks brought a motion to further extend the Stay Period and approve a claims process. The motion materials filed by Growthworks described the stay of proceedings as “a stay of proceedings **as against the Fund**”³⁵ and “a stay of proceedings **as against the Applicant**”.³⁶

54. On January 9, 2014, Justice McEwen granted a further extension of the Stay Period until March 7, 2014. In his Endorsement, Justice McEwen wrote that “the stay extension is w/o prejudice to the positions of the Applicant and Allen-Vanguard Corp.”³⁷

55. On January 9, 2014, Justice McEwen also granted an Order regarding the claims process. Paragraphs 44 and 46 of the Order provide as follows:

³⁴ 9:30 a.m. Hearing Request Form of Allen-Vanguard Corporation dated November 27, 2013.

³⁵ Notice of Motion of Growthworks Canadian Fund Ltd. dated January 7, 2014, para. 15.

³⁶ Affidavit of C. Ian Ross sworn January 6, 2014, para. 28, Motion Record of Growthworks dated January 6, 2014, p. 23.

³⁷ Endorsement of Justice McEwen dated January 9, 2014.

THIS COURT ORDERS that, for greater clarity, nothing contained in this Order shall prejudice Allen-Vanguard's rights in respect of the Allen-Vanguard Action (Court File No. 08-CV-43544), related actions involving Allen-Vanguard (Court File Nos. 80-CV-43188 and 08-CV-41899), or the pending motion of Allen-Vanguard in these proceedings, now scheduled for February 11, 2014.

...

THIS COURT ORDERS that, notwithstanding any provision of this Order (except paragraphs 42 to 45, inclusive), the procedure for determining the Allen-Vanguard Claim shall not be determined until after the hearing or other determination of the pending motion of Allen-Vanguard and cross-motion of the Applicant, now scheduled for February 11, 2014, unless otherwise agreed by the Applicant, the Monitor and Allen-Vanguard, or by further Order of the Court.

4. GROWTHWORKS WILL SUFFER NO PREJUDICE IF THE ALLEN-VANGUARD PROCEEDINGS CONTINUE

56. Growthworks will experience no prejudice if the Allen-Vanguard Proceedings continue, with or without Growthworks' involvement.³⁸

57. There is no real prospect that Allen-Vanguard will obtain Judgment against the Offeree Shareholders at the moment. All that is contemplated in the foreseeable future is that the Offeree Shareholders, not Allen-Vanguard, will continue the interlocutory matters yet to be completed. There is no trial date for the Allen-Vanguard Proceedings.

58. In fact, it is in Growthworks' interest to have an expeditious and final adjudication of the Allen-Vanguard Proceedings, since Growthworks has claimed an entitlement to the Indemnification Escrow Amount.

59. The uncontradicted evidence on this motion is that the litigation involving Allen-Vanguard:

- (a) is unrelated to Growthworks' Application made under the CCAA;³⁹

³⁸ Luxton Affidavit, para. 58, Motion Record of Allen-Vanguard, p. 26.

- (b) will have no effect on Growthworks' ability to continue its business;⁴⁰
- (c) will not interfere with the restructuring of Growthworks;⁴¹ and
- (d) will not distract Growthworks from the restructuring process.⁴²

60. Growthworks has also not challenged the sworn evidence that it has had, and will continue to have, very limited involvement in the Allen-Vanguard Proceedings:

- (a) the nature of the litigation is such that Growthworks' liability rests upon the evidence of others;⁴³
- (b) Allen-Vanguard has not alleged that Growthworks made any fraudulent misrepresentations, but rather that it is liable (along with the other Offeree Shareholders) under the terms of the Share Purchase Agreement for the fraudulent misrepresentations committed by MES and its former management;⁴⁴
- (c) Growthworks' involvement in the litigation is largely dependent upon an evidentiary record that is focused on the actions of MES and its former management;⁴⁵
- (d) of the 31 days of Examination for Discovery conducted to date in the litigation, Growthworks' representative has been examined for only one day (in August 2011)

³⁹ Luxton Affidavit, para. 55, Motion Record of Allen-Vanguard, p. 24.

⁴⁰ Luxton Affidavit, para. 55, Motion Record of Allen-Vanguard, p. 24.

⁴¹ Luxton Affidavit, para. 55, Motion Record of Allen-Vanguard, p. 24.

⁴² Luxton Affidavit, para. 55, Motion Record of Allen-Vanguard, p. 24.

⁴³ Luxton Affidavit, para. 56, Motion Record of Allen-Vanguard, p. 25.

⁴⁴ Luxton Affidavit, para. 56, Motion Record of Allen-Vanguard, p. 25.

⁴⁵ Luxton Affidavit, para. 56, Motion Record of Allen-Vanguard, p. 25.

and it is unlikely that any further discovery of a Growthworks representative will be necessary;⁴⁶ and

- (e) the Schroder entities will continue to direct the course of the litigation on behalf of Growthworks and the other Offeree Shareholders.⁴⁷

5. THE STAY WILL CAUSE PREJUDICE TO ALLEN-VANGUARD

61. The litigation involving Allen-Vanguard has ground to a halt as a result of the position taken by the Offeree Shareholders.

62. The Offeree Shareholders have failed to comply with the Court-ordered timetable which required the delivery of materials in respect of the summary judgment motion to be brought by the Offeree Shareholders and the stay motion to be brought by Allen-Vanguard, which motions are to be heard in Ottawa by the Honourable Regional Senior Justice Hackland.⁴⁸

63. Their failure to do so has prevented the completion of Examinations for Discovery, the delivery of the Offeree Shareholders' responding expert report, and the scheduling of a new trial date.

64. Although the extensions to the stay of proceedings have been without prejudice to the parties' positions, Allen-Vanguard has experienced prejudice as a result of its inability to continue

⁴⁶ Luxton Affidavit, para. 56, Motion Record of Allen-Vanguard, p. 25.

⁴⁷ Luxton Affidavit, para. 56, Motion Record of Allen-Vanguard, p. 25.

⁴⁸ Luxton Affidavit, paras. 47-48, Motion Record of Allen-Vanguard, p. 21

the litigation involving the Offeree Shareholders, or any of them, for several months. Allen-Vanguard will continue to experience prejudice if it cannot proceed with the litigation.⁴⁹

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

65. There are two main issues on this motion:

- (a) whether Growthworks has met its burden of satisfying the Court that the stay imposed by the Initial Order and any extensions thereto should apply to the Allen-Vanguard Proceedings; and
- (b) in the alternative, whether Growthworks has met its burden of satisfying the Court that the stay imposed by the Initial Order and any extensions thereto should apply to parties other than Growthworks.

I. THE STAY OF PROCEEDINGS SHOULD NOT APPLY TO THE ALLEN-VANGUARD PROCEEDINGS

(i) *The Test for Imposing a Stay of Proceedings*

66. The basis for a stay of proceedings is to restrain conduct that would seriously impair a debtor company's ability to continue in business or concentrate on restructuring.⁵⁰

67. Section 11.02 of the CCAA empowers the Court to impose a stay of proceedings against a debtor company for up to 30 days and to extend the stay after the initial Order has expired.⁵¹ As Growthworks submitted in its Factum on October 1, 2013:

⁴⁹ Luxton Affidavit, para. 57, Motion Record of Allen-Vanguard, p. 25.

⁵⁰ *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1990] B.C.J. No. 2497 at p. 7 (C.A), Authorities, Tab 2; *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 at p. 5 (Gen. Div.), Authorities, Tab 3.

⁵¹ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss. 11.02(1), (2), Schedule B

Pursuant to section 11.02 of the CCAA, the Court has discretion to make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, “on any terms that it may impose” and “effective for the period that the court considers necessary” provided the stay period is not longer than 30 days. **The onus is on the applicants to satisfy the court that circumstances exist that make the order appropriate.**⁵² [Emphasis added]

68. Despite having the onus to satisfy the Court that circumstances existed that made the stay of proceedings appropriate, Growthworks made no mention of the Allen-Vanguard Proceedings in the materials that were filed in order to obtain the Initial Order.

69. Where conduct does not seriously impair the ability of the debtor company to continue in business or concentrate on restructuring, it is not appropriate to deny a party a fundamental right: access to the courts.

(ii) The Test for Extending a Stay of Proceedings

70. The debtor company must apply for an extension prior to the expiry of the initial stay. The test for an extension of the stay is set out in section 11.02(3) of the CCAA – the Court can only order an extension of the initial stay where three preconditions are met:

- (a) the Applicant satisfies the Court that circumstances exist that make the order appropriate;⁵³
- (b) the Applicant satisfies the Court that it has acted and continues to act in good faith;⁵⁴ and

⁵² Factum of Growthworks Canadian Fund Ltd. dated October 1, 2013, para. 56.

⁵³ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, Ss. 11.02(3)(a), Schedule B

⁵⁴ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, Ss. 11.02(3)(b), Schedule B

- (c) the Applicant satisfies the Court that it has acted and continues to act with due diligence.⁵⁵

71. The ability of the court to grant or continue a stay under section 11 of the CCAA is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a restructuring. Rather, section 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings should only be granted in furtherance of the CCAA's fundamental purpose.⁵⁶

(iii) *Growthworks Has Not Satisfied Its Burden to Extend the Stay to the Allen-Vanguard Proceedings*

72. Growthworks sought relief pursuant to the CCAA in order to prevent its only secured creditor, Roseway, from forcing a fire sale of its assets and to maintain access to its critical documents and systems overseen by the Manager. Growthworks' request for CCAA protection and the stay of proceedings have absolutely nothing to do with the Allen-Vanguard Proceedings.

73. Despite the fact that it has the burden of proof, Growthworks has put forward no evidence on this motion. It cannot satisfy the Court that the stay made in the Initial Order should be extended and apply to the Allen-Vanguard Proceedings.

74. In fact, the only relevant evidence before the Court is that put forward by Allen-Vanguard:

given Growthworks' limited role in the litigation, it would experience no prejudice even if the actions with Allen-Vanguard were permitted to proceed against it. Indeed, if Allen-Vanguard obtains judgment as against Growthworks while Growthworks is under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 protection, Allen-Vanguard will seek direction from this Court before taking any steps to enforce any judgment against Growthworks.⁵⁷

⁵⁵ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, Ss. 11.02(3)(b), Schedule B

⁵⁶ *Cliffs Over Maple Bay Investments Ltd. v. Fisgard*, [2008] B.C.J. No. 1587 at para. 26 (C.A.), Authorities, Tab 4.

⁵⁷ Luxton Affidavit, para. 60, Motion Record of Allen-Vanguard, p. 26.

[Emphasis added]

75. As a result of Growthworks' failure to meet its evidentiary burden, the stay cannot be extended to preclude Allen-Vanguard from continuing the litigation against Growthworks or the other Offeree Shareholders.

76. The uncontradicted evidence is that there will be no prejudice to Growthworks if the litigation involving Allen-Vanguard continues. Permitting the litigation to continue will not seriously impair Growthworks' ability to continue in business or concentrate on restructuring.⁵⁸

77. In fact, it is in Growthworks' interest for there to be an expeditious and final adjudication of the litigation, particularly since Growthworks has claimed an entitlement to the Indemnification Escrow Amount.

78. On the other hand, Allen-Vanguard will experience significant prejudice if it is delayed in continuing its action against the Offeree Shareholders, or any of them. The position taken by the Offeree Shareholders following the stay imposed pursuant to the Initial Order has already interfered with Court-ordered deadlines for the delivery of motion materials in the litigation and delayed the Allen-Vanguard Proceedings by several months for no good reason.

79. Allowing the litigation to proceed with Growthworks will not have the effect of preferring one potential creditor over another, or of significantly altering the order of priority amongst the various creditors. Indeed, other than Roseway's secured interest, Growthworks has no known creditors with a claim of more than \$1,000.⁵⁹

⁵⁸ Luxton Affidavit, paras. 55-56, Motion Record of Allen-Vanguard, pp. 24-25.

⁵⁹ The First Report of FTI Consulting Canada Inc. in its Capacity as Monitor dated October 8, 2013, para. 14.

80. Irrespective of any potential stay, the Indemnification Escrow Amount would not otherwise be available to Growthworks' creditors. The only way Growthworks' creditors can potentially benefit from the Indemnification Escrow Amount is to allow the litigation to proceed.

81. This is not a CCAA matter where the Court needs to be concerned with protecting the interests of others. This is a purely commercial use of the CCAA to effect a commercial purpose. There are no widows, orphans, or creditors in need of protection here.

82. The balance of prejudice militates in favour of allowing the litigation to proceed given Growthworks' interest in an expeditious resolution of the Allen-Vanguard Proceedings, and the hardship Allen-Vanguard will face if it is exposed to further delay in resolving the dispute.

83. In any event, the interests of Growthworks and the other Offeree Shareholders are identical. They are represented by the same lawyers (now two firms of them). All that is contemplated in the Allen-Vanguard Proceedings in the foreseeable future is that the Offeree Shareholders, not Allen-Vanguard, will continue the interlocutory matters yet to be completed, including continued discovery, delivery of the Offeree Shareholders' responding expert report and possibly some motions.

84. A final Judgment against the Offeree Shareholders is not imminent and there is no new trial date set for the Allen-Vanguard Proceedings.

II. IN THE ALTERNATIVE, THE STAY SHOULD NOT BE EXTENDED TO THE NON-DEBTOR PARTIES

(i) *The Stay of Proceedings Can Only Extend to Non-Debtor Parties if a Continuance of the Proceedings Causes an Injustice to the Debtor Company*

85. Section 11 of the CCAA authorizes the Court to stay proceedings against a debtor company or affiliated companies. It does not, on its terms, authorize the Court to extend a stay of proceedings to third parties.⁶⁰

86. Indeed, section 11 of the CCAA expressly provides that while the Court may stay any action in respect of a debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, it may only restrain or prohibit proceedings in other actions, suits or proceedings that are **against the company**:

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding **against the company**; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding **against the company**.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

⁶⁰ *Re Woodward's Ltd.*, [1993] B.C.J. No. 42 at para. 32 (S.C), Authorities, Tab 5.

- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding **against the company**; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding **against the company**.⁶¹ [emphasis added]

87. In some cases, courts have resorted to their inherent jurisdiction to extend the stay of proceedings to third parties where it is just and reasonable to do so, in the sense that the proceeding would seriously impair the ability of the debtor company to continue in business or concentrate on restructuring.⁶²

88. However, courts have consistently affirmed that the power to extend the stay to third parties should be exercised sparingly. In *Campeau v. Olympia & York Developments Ltd.*, Justice Blair (as he then was) cautioned that:

The balance of convenience must weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. **The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way.** The stay must not cause an injustice to the plaintiff. On all these issues **the onus of satisfying the Court is on the party seeking the stay.**⁶³

[Emphasis added]

89. In some cases, that threshold will be met. In *Campeau*, Justice Blair (as he then was) extended the stay on the basis of the "great prejudice to Olympia & York if its attention is diverted

⁶¹ *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, Ss. 11.02(1), (2), Schedule B

⁶² *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 at pp. 10 and 12 (Gen. Div.), Authorities, Tab 6; *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 at pp. 6-7 (Gen. Div.), Authorities, Tab 3; *Re Hawkair Aviation Services Ltd.*, [2006] B.C.J. No. 938 at para. 25 (S.C.), Authorities, Tab 7.

⁶³ *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 at p. 6 (Gen. Div.), Authorities, Tab 3.

from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension as this one.”⁶⁴

(ii) The Stay of Proceedings Should Not Extend to the Non-Debtor Parties

90. Master MacLeod has already concluded that there is no basis for the Offeree Shareholders’ contention that the stay prevents any steps from being taken in relation to the non-debtor parties. In his Endorsement dated November 12, 2013, Master MacLeod held that “the stay against Growthworks cannot legally impede Allen-Vanguard from proceeding with its action as against the other offeree shareholders nor prohibit those shareholders from asserting their claims against Allen-Vanguard.”⁶⁵

91. Any argument by Growthworks that the stay of proceedings in the Initial Order extends to the non-debtor parties is a collateral attack on the Endorsement of Master MacLeod.

92. In any event, all of the material filed by Growthworks in these CCAA proceedings makes it abundantly clear that Growthworks only sought a stay of proceedings **against Growthworks** because it wanted to prevent Roseway from forcing a fire sale of its assets and it wanted to maintain access to documents and systems overseen by the Manager. Growthworks never sought a stay of proceedings against any of the non-debtor parties to the Allen-Vanguard Proceedings.

93. If staying the Allen-Vanguard Proceedings were considered necessary for Growthworks to facilitate a compromise or arrangement with its single secured creditor, it would have described and explained this in its Affidavit filed in support of its CCAA Application for an Initial Order and in its subsequent motion to extend the stay. The Court held as much in *Re SNV Group Ltd.*, stating,

⁶⁴ *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 at p. 6 (Gen. Div.), Authorities, Tab 3.

⁶⁵ Endorsement of Master MacLeod dated November 12, 2013, para. 5, Authorities, Tab 1.

I have concluded that the actions of Dominion Hotel cannot and should not be controlled by a stay of proceedings or order to repay.

...

On October 18th, SNV applied for the protection it thought necessary to facilitate the compromise or arrangement it wished to complete with its creditors. It made no application to stay any proceeding by any person claiming indemnity from a third party in relation to an SNV trade obligation. When it applied for and obtained an amendment on October 29, 2001, SNV did not attempt to extend paragraph 3(k) of the order to anyone other than creditors, nor did it apply to make the order retroactive.⁶⁶

94. In *Re Timminco Ltd.*,⁶⁷ the Court declined to grant an Order lifting a stay of proceedings which had applied to the debtor company and third parties. However, in this case, Allen-Vanguard is not seeking to lift the stay and the facts and circumstances are entirely different. First, in *Timminco*, the Court had evidence before it that the litigation would detract from the ability of senior management to focus on the restructuring. There is no similar evidence here.

95. Second, the Court in *Timminco* was concerned about the action proceeding against third parties only to have the same issues re-litigated on a different evidentiary record which could, in turn, lead to inconsistent findings. Again, that is not a concern in this case. The interests of all Offeree Shareholders are identical and they are represented by the same counsel. Most importantly, the evidentiary record is almost exclusively based on the evidence of the former management of MES and is not specific to Growthworks or any of the other Offeree Shareholders.

96. Accordingly, the litigation involving Allen-Vanguard should, at the very least, be permitted to continue against the non-debtor parties even if the stay were to remain in place in respect of Growthworks. The litigation does not seriously impair – or impair at all, for that matter

⁶⁶ *Re SNV Ltd.*, [2001] B.C.J. No. 2497 at paras. 15 and 17 (S.C.), Authorities, Tab 8.

⁶⁷ *Re Timminco Ltd.*, [2012] O.J. No. 1949 (S.C.J.).


– Growthworks’ ability to continue in business or focus on restructuring and therefore does not justify the Court invoking its inherent jurisdiction to stay proceedings in respect of the other Offeree Shareholders.

PART IV - ORDER REQUESTED

97. Allen-Vanguard respectfully requests:

- (a) an Order that the stay of proceedings imposed by the Initial Order and any extensions made thereto, shall not apply to the continuation of Allen-Vanguard Proceedings, on such terms as are just;
- (b) in the alternative, an Order confirming that the stay of proceedings imposed by the Initial Order and any extensions made thereto, shall have no effect on the continuation of the Allen-Vanguard Proceedings against or in respect of any other party named therein, except for Growthworks, on such terms as are just; and
- (c) costs of this motion on a substantial indemnity basis.

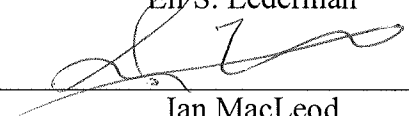
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2014.



Ronald G. Slaght, Q.C.



Eli S. Lederman



Ian MacLeod

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600
130 Adelaide Street West
Toronto ON M5H 3P5

Ronald G. Slaght, Q.C. (12741A)

Tel: (416) 865-2929
Fax: (416) 865-2862
Email: rslaght@litigate.com

Eli S. Lederman (47189L)

Tel: (416) 865-3555
Fax: (416) 865-2872
Email: elederman@litigate.com

Ian MacLeod (60511F)

Tel: (416) 865-2895
Fax: (416) 865-3701
Email: imacleod@litigate.com

Lawyers for Allen-Vanguard Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1. Endorsement of Master MacLeod dated November 12, 2013
2. *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1990] B.C.J. No. 2497 (C.A)
3. *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 (Gen. Div.)
4. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard*, [2008] B.C.J. No. 1587 (C.A.)
5. *Re Woodward's Ltd.*, [1993] B.C.J. No. 42 (S.C)
6. *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 (Gen. Div.)
7. *Re Hawkair Aviation Services Ltd.*, [2006] B.C.J. No. 938 (S.C.)
8. *Re SNV Ltd.*, [2001] B.C.J. No. 2497 (S.C.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

- (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

- (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF ALLEN-VANGUARD CORPORATION
(Motion Regarding Extension and Scope of Stay)**

**LENCZNER SLAGHT ROYCE
SMITH GRIFFIN LLP**

Barristers
Suite 2600

130 Adelaide Street West
Toronto ON M5H 3P5

Ronald G. Slaght, Q.C. (12741A)

Tel: (416) 865-2929

Fax: (416) 865-2862

Email: rslaght@litigate.com

Eli S. Lederman (47189L)

Tel: (416) 865-3555

Fax: (416) 865-2872

Email: elederman@litigate.com

Ian MacLeod (60511F)

Tel: (416) 865-2895

Fax: (416) 865-3701

Email: imacleod@litigate.com

Lawyers for Allen-Vanguard Corporation