

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND
GOLF TOWN GP II INC.**

Applicants

Submissions of Morguard Investments Limited and
Smart REIT (formerly Calloway Real Estate Investment Trust)
(Motion for Assignment of Real Property Leases under s. 11.3 of the *CCAA*)

Date: October 27, 2016

MCLEAN & KERR LLP
Barristers and Solicitors
130 Adelaide Street West, Suite 2800
Toronto, ON M5H 3P5

Linda Galessiere
Law Society No. 34678A
Tel: 416-369-6609
Email: lgalessiere@mcleankerr.com

Walter R. Stevenson
Law Society No. 121780
Tel: 416-369-6602
Email: wstevenson@mcleankerr.com

Lawyers for 20 VIC Management Inc.,
Morguard Investments Limited, Smart REIT
(formerly Calloway Real Estate Investment
Trust) (on behalf of various landlords) and
Crombie REIT (on behalf of various landlords)

To: The Service List

Background

1. Morguard Investments Limited and Smart REIT are the landlords of several Golf Town retail locations (the “Landlords”).
2. In this motion, the Applicants seek the assignment of various real property leases including leases for which Morguard Investments Limited and Smart REIT are landlords.

Provisions of the Proposed Assignment Order

3. The Landlords do not object to the assignment of their leases to the Purchaser (as defined in the Motion Record).
4. Of concern to Landlords, however is paragraph 7 of the proposed draft order. Paragraph 7 of the draft order requests that the court permanently enjoin landlords from enforcing rights/remedies arising from prior breaches of the leases. The Purchaser is attempting to gain for itself greater rights under the leases than those currently held by Golf Town. Neither the Applicants nor the Purchaser have filed any evidence whatsoever to support such a request.
5. Landlords are agreeable to including a provision in the assignment order that leases will not be terminated as a result of breaches by Golf Town arising from Golf Town’s insolvency, *CCAA* proceeding or non-monetary breaches. The Landlords state that paragraph 7 of the proposed order be amended as follows:

7. **THIS COURT ORDERS** that each counterparty to an Assigned Lease (a “Landlord”) is prohibited from **terminating an Assigned Lease** ~~exercising any right or remedy~~ as against the Purchaser by reason of ~~any defaults thereunder arising from [the assignment of the Assigned Lease,]~~ the insolvency of the Vendors, the commencement of these *CCAA* proceedings or proceedings in respect of affiliates of the Vendors pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (“Chapter 11”), or the Vendors having breached a non-monetary obligation under the Assigned Lease, unless such non-

monetary breach arises or continues after the Assigned Lease is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser, and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the Assigned Lease. For clarification purposes, no Landlord shall rely on a notice of default sent to the Vendors to terminate an Assigned Lease as against the Purchaser.

6. This provision has been included in several other orders assigning retail leases including the CCAA proceeding of *Bargain! Shop Holdings Inc.*¹ and in the CCAA proceeding of *Comark Inc.*²

Value of the Estate Preserved

7. The Landlords state that the above noted provision provides sufficient protection to the Purchaser without unduly or unnecessarily limiting Landlords' rights and remedies. Neither the Applicants nor the Purchaser have filed any evidence to suggest that the provision proposed by the Landlords will not adequately protect them. In addition, no evidence has been filed to suggest that the Purchaser will not assume the leases if the provision is amended as requested by the Landlords.

8. Even if the Purchaser declares that certain leases will not be assumed if paragraph 7 were amended as requested by landlords, the Applicants would still receive the maximum value for its assets. In his affidavit sworn September 23, 2016, Mr. White confirmed that the

¹ *TBS Acquireco Inc., The Bargain! Shop Holdings Inc. and TBS Stores Inc. (Re)*, Approval and Vesting Order – BlackRock, dated July 9, 2013 at paragraph 6 (appended hereto at Tab 1)

² *Comark Inc. (Re)*, Order Approving the Assignment of Contracts, dated August 13, 2015 at paragraph 6 (appended hereto at Tab 2).

purchase price to be paid by the Purchaser would be unaffected by the number of assumed real property leases.³

9. It is submitted that if the Applicants required a more restrictive provision, it was incumbent upon the Applicant to file some evidence to support such a request.⁴

10. In *Nexient Learning Inc. (Re)*, Justice Wilton-Siegel noted that the Court should exercise its jurisdiction sparingly when asked to interfere with contractual rights in the context of *CCAA* proceedings. In this regard Justice Wilton-Siegel stated:

The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights *beyond what is absolutely required to further the reorganization process* and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.⁵ (emphasis added)

Fair Balance of Rights

11. In its submissions the Purchaser states that it has attempted to strike a fair balance with landlords. However the Purchaser has only agreed to do what it is bound to do by the provisions of the *CCAA*, namely: pay arrears of rent and assume obligations. It is the landlords that have attempted to strike a fair balance by agreeing not to terminate leases for prior defaults despite the lack of evidence that such a provision is necessary.

³ Affidavit of Robert White sworn September 23, 2016, para 41(c)(i): Motion Record of the Applicants, Tab 3B, page 132.

⁴ In his affidavit sworn September 13, 2016 Mr. Roussy states that the Applicant, with the assistance of Alvarez & Marsal North America LLC undertook a comprehensive review of retail leases. Despite this comprehensive review, no evidence has been filed to support the requested relief. See Motion Record of the Applicants, Tab 3A, page 68 (paragraph 107)

⁵ *Nexient Learning Inc. (Re)*, 2009 CanLII 72037 (ON SC), 2009 CanLII 72037, para. 59 (Ont. S.C.). (appended hereto at Tab 3)

12. Based on the foregoing, it is submitted that paragraph 7 of the assignment order be amended as requested by landlords.

All of which is respectfully submitted this
26th day of October, 2016, by



Linda Galessiere
McLean & Kerr LLP
Lawyers for the M&K Responding
Landlords

Tab 1



**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE MR.

JUSTICE BROWN

) TUESDAY, THE 9th
)
) DAY OF JULY, 2013

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TBS ACQUIRECO INC., THE BARGAINI SHOP HOLDINGS INC.
AND TBS STORES INC. (collectively, the "Applicants")**

**ORDER
(Approval and Vesting Order – BlackRock)**

THIS MOTION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), as amended, for an Order approving the transaction (the "Transaction") contemplated by an agreement of purchase and sale between the Applicants, as vendors, and BlackRock Kelso Capital Corporation, as purchaser ("BlackRock Kelso") dated June 10, 2013, a copy of which is appended to the affidavit of Eric Claus sworn June 19, 2013 (the "Claus Affidavit"), amended and restated on June 28, 2013, a copy of such amended and restated agreement attached to the Eleventh Report (as defined below) (the "Sale Agreement") and vesting in Red Apple Stores Inc. (formerly 7742363 Canada Inc.), as assignee of BlackRock Kelso in accordance with the Sale Agreement, (the "Purchaser"), the Applicants' right, title and interest in and to the Assets (as defined in the Sale Agreement), was heard this day at 330 University Avenue, Toronto, Ontario. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

ON READING the material filed, including the Notice of Motion, the Claus Affidavit, the eleventh report of Ernst & Young Inc. (the "Monitor") dated July 4, 2013 (the "Eleventh Report"), and on hearing the submissions of counsel for the Applicants, counsel for Wells Fargo Capital Finance Corporation Canada ("Wells Fargo"), counsel for BlackRock Kelso and the Purchaser, counsel for the Monitor, and such other counsel present, no one appearing for any other person

on the service list, although properly served as appears from the Affidavits of Service of Devka Sakhrani, sworn June 21, 2013, and Daniel Pearlman, sworn July 5, 2013.

SERVICE

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

APPROVAL OF THE TRANSACTION AND VESTING OF THE ASSETS

2. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved, and the execution and delivery of the Sale Agreement by the Applicants is hereby authorized and approved *nunc pro tunc*. The Applicants and the Monitor are hereby authorized and directed to enter into any non-material amendments to the terms of the Sale Agreement as the parties thereto may agree (subject to obtaining Monitor consents prior to making such amendments) and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Assets to the Purchaser.

3. THIS COURT ORDERS AND DECLARES that the Funding and Transition Agreement is hereby approved. The execution of the Funding and Transition Agreement by the Applicants and the Monitor is hereby authorized and approved, and the Applicants and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Funding and Transition Agreement.

4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "Monitor's Certificate"), all of the Applicants' right, title and interest in and to the Assets including for greater certainty all Contracts shall vest absolutely in the Purchaser, free and clear of and from any and all right, benefits, security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, restrictions, adverse claims, rights of set-off, or other financial or monetary claims, assignments, judgments, options, agreements, rights of distress, legal, equitable, or contractual setoffs, claims, adverse claims, taxes, disputes, debts, liabilities (direct,

indirect, absolute or contingent) or claims (including, without limitation, claims provable in bankruptcy in the event that one or more of the Applicants should be adjudged bankrupt), or encumbrances, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, equitable, possessory or otherwise (collectively, the "Claims") by or of any person or entity of any kind whatsoever, including, without limitation, any individual, firm, corporation, partnership, joint venture, trust, agency, and tribunal and any other natural person or corporation whether acting in its capacity as principal or as trustee, executor, administrator or other legal representative (collectively, "Persons") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by any Order of this Court including, without limitation, the Orders dated February 26, 2013, April 9, 2013, and May 23, 2013; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system in any jurisdiction where the Assets are located, including those registrations listed in Schedule B hereto, (all of which are collectively referred to as the "Encumbrances") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets, other than Permitted Liens, are hereby expunged and discharged as against the Assets, provided however that nothing in this paragraph 4 shall affect the rights and remedies of the applicable landlord against the Purchaser that may exist or arise under or in respect of any real property lease that is assigned to the Purchaser in connection with the Transaction, except as may otherwise be agreed to by the landlord and the Purchaser or as provided herein or in any further order of the Court.

5. THIS COURT ORDERS that pursuant to section 11.3 of the CCAA, the rights and obligations of the Applicants, under the Acquired Store Leases, described in Schedule C hereto, and Designated Contracts, described in Schedule D hereto (individually a "Scheduled Contract" and collectively, the "Scheduled Contracts") are hereby assigned to the Purchaser and such assignment shall be valid and binding upon all of the counterparties to the Scheduled Contracts, without further documentation, as if the Purchaser was a party to the Scheduled Contracts, notwithstanding any restriction, condition or prohibition contained in any such Scheduled Contracts relating to the assignment thereof, including, but not limited to, any provision requiring the consent of any Person to the transfer, conveyance, or assignment of the Scheduled Contracts.

6. THIS COURT ORDERS that no counterparty to an Acquired Premises Lease, or

Designated Contract shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants' insolvency or the Applicants' CCAA proceedings. In addition, no counterparty shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants having breached a non-monetary obligations unless such non-monetary breach arises or continues after the Scheduled Contract is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the applicable Scheduled Contract. For clarification purposes, no counterparty shall rely on a notice of default sent to the Applicants to terminate a Scheduled Contract to terminate the Scheduled Contract as against the Purchaser.

7. THIS COURT ORDERS that as a condition of the assignment of a Scheduled Contract, the existing monetary defaults in relation to the Scheduled Contracts, which for greater certainty shall exclude those arising by reason of the Applicants' insolvency, the commencement of these CCAA proceedings or the Vendors' failure to perform a non-monetary obligation, shall be paid to the Person whose name appears beside such Scheduled Contract in the amounts set out in such Schedules, on Closing.

8. THIS COURT ORDERS that notwithstanding anything contained in this Order, nothing shall derogate from the obligation of the Purchaser to assume the Assumed Obligations under any Acquired Premises Lease, or Designated Contract and to perform its obligations thereunder, as set out in the Sale Agreement.

9. THIS COURT ORDERS that the provisions of paragraph 23 of the Initial Order shall apply to any indemnity or other agreement provided by BlackRock Kelso or the Purchaser to the directors and officers of the Applicant in connection with or in the place of the Directors' Charge (as it related to the Assets prior to being vested out by this Order), on the same basis as such paragraph 23 applied to or in respect of the Directors' Charge.

10. THIS COURT ORDERS that, without limitation to paragraph 4, from and after the Closing (as defined in the Sale Agreement), no creditor of the Applicants will have any right or remedy in respect of amounts on deposit from time to time in any bank account operated and maintained by the Vendor immediately prior to Closing in respect of an Acquired Store, or in respect of the operation of the Vendor's cash management system (the "Transition Bank Accounts") (excluding, in the case of each Transition Bank Account, the bank or other financial

institution at which the account is located in respect of Bank Account Charges for the period after the Closing)..

11. THIS COURT ORDERS that the Applicants and the Monitor shall be authorized and directed to make the payments contemplated by the Funding and Transition Agreement, including in respect of Priority Payables and CCAA Completion Costs, subject to and in accordance with the terms of the Sale Agreement and the Funding and Transition Agreement.

12. THIS COURT ORDERS that the Applicants are authorized and directed to pay Wells Fargo, on the Closing Date, from the net proceeds of the sale of the Assets, an amount sufficient to pay the Wells Fargo Debt as of the Closing Date, in full and in cash, as specified in a pay-out letter to be provided by Wells Fargo on or before the Closing Date.

13. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

14. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Applicants are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Applicants' records pertaining to the Applicants' past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Applicants.

15. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) the pendency of any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act (Canada)* in respect of any of the Applicants and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of any of the Applicants.

the Transaction, the vesting of the Assets in the Purchaser pursuant to this Order and the payment of the Wells Fargo Debt pursuant to this Order, shall be binding on any trustee in bankruptcy or receiver that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors or claimants of any of the Applicants, nor shall they constitute nor be deemed to be fraudulent preferences, assignments, fraudulent conveyances, transfers at undervalue, or other reviewable transactions under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

16. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) and the requirements of any other legislation in respect of the sale of assets in bulk or outside the ordinary course of business in any jurisdiction where the Assets are located.

MONITOR'S REPORT

17. THIS COURT ORDERS that the Eleventh Report and the conduct and activities of the Monitor described therein be and are hereby approved.

GENERAL

18. THIS COURT ORDERS that this Order shall have full force and effect in all provinces and territories in Canada against all persons, firms, corporations, governmental, municipal and regulatory authorities against whom it may otherwise be enforceable.

19. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable to give effect to this Order.

ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 09 2013

NB

A handwritten signature in black ink, consisting of a series of loops and strokes, positioned above a horizontal line.

Schedule A – Form of Monitor's Certificate

Court File No. CV-13-10018-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC.
AND TBS STORES INC. (collectively, the "Applicants")**

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Morawetz of the Ontario Superior Court of Justice (the "Court") dated February 26, 2013, Ernst & Young Inc. was appointed as the Monitor (the "Monitor") of the undertaking, property and assets of the Applicants.

B. Pursuant to an Order of the Court dated [DATE] (the "Approval and Vesting Order"), the Court approved the amended and restated agreement of purchase and sale made as of June 28, 2013 (the "Sale Agreement") between the Applicants, and BlackRock Kelso Capital Corporation, and provided for the vesting in Red Apple Stores Inc. (the "Purchaser") the Applicants' right, title and interest in and to the Assets (as such term is defined in the Approval and Vesting Order and is so used hereafter), which vesting is to be effective with respect to the Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming (i) the payment or satisfaction by the Purchaser of the Purchase Price for the Assets; (ii) that the conditions to Closing as set out in Section 4 of the Sale Agreement have been satisfied or waived by the Applicants and the Purchaser; and (iii) the Transaction (as such term is defined in the Approval and Vesting Order and is so used hereafter) has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. The Purchaser has paid and satisfied, and the Applicants have received, the Purchase Price for the Assets payable on the Closing Date pursuant to the Sale Agreement;
2. The conditions to Closing as set out in Section 4 of the Sale Agreement have been satisfied or waived by the Applicants and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Monitor.
4. This Certificate was delivered by the Monitor at [TIME] on ___ [DATE].

Ernst & Young Inc., in its capacity as court appointed monitor of TBS Acquireco Inc., The Bargain! Shop Holdings Inc., and TBS Stores Inc., and not in its personal capacity

Per: _____

Name:

Title:

Schedule B – Encumbrances

The Bargain Shop! Holdings Inc.

Ontario

	File No.	Secured Party
1.	686819889	BANK OF MONTREAL – TR 5193
2.	629012637	BLACKROCK KELSO CAPITAL CORPORATION
3.	857108502	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA
4.	623789073	GE VEHICLE AND EQUIPMENT LEASING

British Columbia

	Registration No.	Secured Party
1.	8585939	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA
2.	242202D	BLACKROCK KELSO CAPITAL CORPORATION

Alberta

	Registration No.	Secured Party
1.	99112927795	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA
2.	06091521119	BLACKROCK KELSO CAPITAL CORPORATION

Saskatchewan

	Registration No.	Secured Party
1.	114430608	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA
2.	300083374	BLACKROCK KELSO CAPITAL CORPORATION

Manitoba

	Registration No.	Secured Party
1.	201005950908	BUCKWOLD WESTERN LTD.
2.	200616915303	BLACKROCK KELSO CAPITAL CORPORATION
3.	991214111400	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

New Brunswick

	Registration No.	Secured Party
1.	14030407	BLACKROCK KELSO CAPITAL CORPORATION
2.	5395137	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Nova Scotia

	Registration No.	Secured Party
1.	11546215	BLACKROCK KELSO CAPITAL CORPORATION
2.	2418547	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Prince Edward Island

	Registration No.	Secured Party
1.	1674281	BLACKROCK KELSO CAPITAL CORPORATION
2.	670265	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Newfoundland and Labrador

	Registration No.	Secured Party
1.	5216474	BLACKROCK KELSO CAPITAL CORPORATION
2.	2006	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

TBS Acquireco Inc.**Ontario**

	File No.	Secured Party
1.	652727772	TRANSPORTACTION LEASE SYSTEMS INC
3.	629012646	BLACKROCK KELSO CAPITAL CORPORATION
4.	629013681	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

New Brunswick

	Registration No.	Secured Party
1.	17360124	TRANSPORTACTION LEASE SYSTEMS INC
2.	14030506	BLACKROCK KELSO CAPITAL CORPORATION
3.	14035893	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Nova Scotia

	Registration No.	Secured Party
1.	15467871	TRANSPORTACTION LEASE SYSTEMS INC

TBS Stores Inc.**Ontario**

	File No.	Secured Party
1.	650730465	IBM CANADA LIMITED
2.	648804069	BLACKROCK KELSO CAPITAL CORPORATION
3.	648785502	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

British Columbia

	Registration No.	Secured Party
1.	624326E	BLACKROCK KELSO CAPITAL CORPORATION
2.	624218E	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Alberta

	Registration No.	Secured Party
1.	08092607638	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA
2.	08092607677	BLACKROCK KELSO CAPITAL CORPORATION

Saskatchewan

	Registration No.	Secured Party
1.	300380703	BLACKROCK KELSO CAPITAL CORPORATION
2.	300381200	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

Manitoba

	Registration No.	Secured Party
1.	200819193508	BLACKROCK KELSO CAPITAL CORPORATION
2.	200819006902	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

New Brunswick

	Registration No.	Secured Party
1.	16786758	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA
2.	16786774	BLACKROCK KELSO CAPITAL CORPORATION

Nova Scotia

	Registration No.	Secured Party
1.	14510457	WELLS FARGO CAPITAL FINANCE CORPORATION CANADA

	Registration No.	Secured Party
2.	14510499	BLACKROCK KELSO CAPITAL CORPORATION

Prince Edward Island

	Registration No.	Secured Party
1.	3119752	BLACKROCK KELSO CAPITAL CORPORATION

Newfoundland and Labrador

	Registration No.	Secured Party
1.	10757938	BLACKROCK KELSO CAPITAL CORPORATION

Other Registrations

TBS STORES INC.

Active Trademarks:

TRADE-MARK	REGISTRATION NUMBER	SECURITY AGREEMENT FILED BY:
THE RED APPLE	TMA376201	(1) Congress – REMOVED (2) Wachovia
LA POMME ROUGE	TMA388373	(1) Congress – REMOVED (2) Wachovia
THE RED APPLE CLEARANCE CENTRE & Design	TMA392370	(1) Congress – REMOVED (2) Wachovia

THE BARGAIN SHOP! HOLDINGS INC.

Copyright:

TITLE	REGISTRATION NUMBER	SECURITY AGREEMENT FILED BY:
BULLIT SPORTS GEAR	444673	Congress

Active Trademarks:

TRADE-MARK	REGISTRATION NUMBER	SECURITY AGREEMENT FILED BY:
TBS & Design	TMA494688	Congress
TBS	TMA494687	Congress
MERIT	TMA318372	Congress
BOUTIK	TMA247973	Congress
KOALA & Design	TMA254077	Congress
MERIT	TMA329875	Congress
SPRINTER	TMA145723	Congress
LADY PLUS	TMA443634	Congress
LADY PLUS	TMA373596	Congress
MERIT	TMA327504	Congress
MERIT	TMA348509	Congress
FREE LANCE SPORTSWEAR	TMA327157	Congress
LITTLE WONDERS	TMA459868	Congress
THE BARGAIN! SHOP	TMA431467	Congress
NATURAL GIRLS	TMA425068	Congress
BRAND X	TMA249886	Congress
NATURAL GIRLS & Design	TMA456531	Congress
STREET MODES	TMA349918	Congress
BULLIT SPORTS GEAR & Design	TMA453138	Congress
MERIT	TMA336328	Congress
FINALIST	TMA353166	Congress
MERIT	TMA337731	Congress

TRADE-MARK	REGISTRATION NUMBER	SECURITY AGREEMENT FILED BY:
BEACH CLASSICS & Design	TMA369246	Congress
AUTHENTIC AUTHENTIQUE PAULO CONTI & Design	TMA382243	Congress
MERIT	TMA325297	Congress
SERGE SAINT YVES & Design	TMA374406	Congress
PAULO CONTI & Design	TMA376719	Congress
WILLOW RIDGE	TMA423558	Congress
DESIGNER NORTH	TMA392343	Congress
RUFFIES	TMA249464	Congress
MODE 3	TMA255762	Congress
FAST-START	TMA352472	Congress
LITTLE WONDERS SHOP & Design	TMA446552	Congress
BEACH'EADS & Design	TMA369242	Congress
KOALA	TMA248694	Congress
HARVEST HOUSE	TMA134993	Congress
GRIP	TMA475102	Congress

Schedule C – Acquired Store Leases

Store Number	Location of Property	Landlord Name	Cure Cost Amount
52770	Perth Mews Mall 89 Dufferin Street Perth, ON K7H 3A7	Foot Locker Canada Co. Crombie Property Holdings II Ltd.	\$5424.44
52928	500 Veterans Avenue Esterhazy, SK S0A 0X0	Kubik Holdings Corp.	\$0
53801	402 & 420 Broadway Street East Fort Qu'Appelle, SK S0G 1S0	Valley Properties Inc.	\$10,504.56
53863	5018 – 51 st Avenue Vermilion, AB T9X 1B3	Eastalta Co-op Ltd.	\$0
53875	Unit 10 – 826 Island Hwy West Parksville , BC V9P 2B7	Parksville Properties Corp.	\$0
52735	355 Wellington Street London, ON N6A 3N7	I.F. Propco Holdings (Ontario) 31 Ltd.	\$0

Schedule "D"

DESIGNATED CONTRACTS

Designated Contract	Cure Amount
IBM Canada Limited	
ValuePlan Lease Agreement (No. CA3F-83SHKN-7) dated March 25, 2010 between IBM Canada Limited and The Bargain! Shop Holdings Inc. (AS400 Lease)	\$19,837.30
ValuePlan Plus Lease Agreement (No. CA6G-8HUNF8-5) dated July 25, 2011 between IBM Canada Limited and The Bargain! Shop Holdings Inc. (Power 7 Lease)	
ValuePlan Lease Agreement (No. 525575/CFCI Contract No. 0113092VT) dated August 30, 2011 between IBM Canada Limited and The Bargain Shop Holdings Inc. (IBM Cognos Business Software Lease)	
Tender Retail Inc.	
Software Support and Maintenance Agreement dated November 18, 2005 between The Bargain Shop and Freve Computer Enterprises Inc. (o/a Tender Retail Systems), including any agreement for the use of software.	Nil
Tender Retail Order Form dated February 11, 2010 between The Bargain! Shop and Tender Retail with respect to Merchant Connect Multi EMV Enterprise License	\$8,882.74
G.N. Johnston Equipment Co. Ltd.	
Lease Agreement No. 8907 dated March 12, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	\$31,875.91
Lease Agreement No. 8836 dated February 6, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	
Lease Agreement No. 8818 dated March 9, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	
Lease Agreement No. 8820 dated March 9, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	
Lease Agreement No. 7194 dated March 9, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	
Lease Agreement No. 7195 dated March 9, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	
Lease Agreement No. 8819 dated March 9, 2012 between G.N. Johnston Equipment Co. Ltd. (the "Lessor") and the Bargain! Shop Holdings Inc.	

JDA Software, Inc.

Software License Agreement made as of December 23, 1999 between JDA Software, Inc. and Bargain Shop Holdings, Inc., as amended, including:

\$34,713.04

First Amendment to Software License Agreement and Software Support Agreement made as of June 30, 2003 between JDA Software, Inc. and Bargain Shop Holdings, Inc.

Second Amendment to Software License Agreement JDA Software, Inc. an Arizona Corporation ("JDA") and Bargain Shop Holdings, Inc.

Third Amendment to Software License Agreement and Software Support Agreement made as of June 10, 2005 between JDA Software, Inc. and the Bargain! Shop Holdings, Inc.

Fourth Amendment to Software License Agreement and Software Support Agreement made as of December 13, 2005 between JDA Software, Inc. and the Bargain! Shop Holdings, Inc.

In the matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended
And in the matter of A Plan of Compromise or Arrangement of TBS Acquireco Inc., The Bargain! Shop
Holdings Inc. and TBS Stores Inc.

Court File No: CV-13-10018-00CL

APPLICANTS

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(APPROVAL AND VESTING ORDER -
BLACKROCK)

Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

Mario Forte LSUC#: 27293F
T: +1 416.216.4870
E: Mario.Forte@nortonrosefulbright.com

Virginie Gauthier LSUC#: 41097D
T: +1 416.216.4853
E: Virginie.Gauthier@nortonrosefulbright.com

Daniel Pearlman LSUC#: 61659T
T: +1 416.216.1910
E: Daniel.Pearlman@nortonrosefulbright.com
F: +1 416.216.3930

Lawyers for the Applicants

Tab 2



ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE REGIONAL SENIOR)
JUSTICE MORAWETZ)
)

THURSDAY, THE 13TH
DAY OF AUGUST, 2015

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF COMARK INC.

Applicant

ORDER APPROVING ASSIGNMENT OF CONTRACTS

THIS MOTION, made by Comark Inc. (the "**Applicant**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order approving the assignment of certain leases and contracts (the "**Assignment**") to the Purchaser as contemplated by an agreement of purchase and sale (the "**Sale Agreement**") between the Applicant and Pacific West Commercial Corporation ("**PWCC**") and its permitted assignees being 8299684 Canada Inc., 9124055 Canada Inc., 5349 Investments Ltd., and 9371443 Canada Inc. (together, the "**Purchaser Assignees**" and collectively with PWCC, the "**Purchaser**") dated July 16, 2015, was heard this day at 330 University Avenue, Toronto, Ontario.

SERVICE AND DEFINITIONS

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

2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Sale Agreement.

APPROVAL OF ASSIGNMENT OF CONTRACTS

3. THIS COURT ORDERS AND DECLARES that immediately upon the delivery of a monitor's certificate (the "**Monitor's Certificate**") to the Purchaser substantially in the form attached as Schedule "E" hereto, pursuant to section 11.3 of the CCAA:

- (a) all of the rights and obligations of the Vendor under the real property leases/occupation agreements (the "**Bootlegger Leases**") listed in Schedule "A" hereto shall be assigned, conveyed, transferred to and assumed by 8299684 Canada Inc.;
- (b) all of the rights and obligations of the Vendor under the real property leases/occupation agreements (the "**Cleo Leases**") listed in Schedule "B" hereto shall be assigned, conveyed, transferred to and assumed by 5349 Investments Ltd.;
- (c) all of the rights and obligations of the Vendor under the real property leases/occupation agreements (the "**Ricki's Leases**") listed in Schedule "C" hereto shall be assigned, conveyed, transferred to and assumed by 9124055 Canada Inc.;
and
- (d) all of the rights and obligations of the Vendor under the real property leases/occupation agreements (collectively with the Bootlegger Leases, the Ricki's Leases and the Cleo Leases, the "**Real Property Leases**") and contracts listed in Schedule "D" (collectively, with the Real Property Leases, and the real property leases/occupation agreements listed in Schedule "A", "B" "C" and "D", being the

“Contracts”) hereto shall be assigned, conveyed, transferred to and assumed by 9371443 Canada Inc.; and

the Purchaser Assignees shall be entitled and subject to all of the rights and obligations as tenant pursuant to the terms of the Real Property Leases, as applicable and registrations thereof and may enter into and upon and hold and enjoy each of the premises contemplated by the Real Property Leases, as applicable, and any renewals thereof, for their own use and benefit, all in accordance with the terms of the Real Property Leases, without any interruption from the Vendor, the landlords under the Real Property Leases or any person whomsoever claiming through or under any of the Vendor or the landlords under the Real Property Leases.

4. THIS COURT ORDERS that the assignment and transfer of the Contracts shall further be subject to the provision of this Court’s Approval and Vesting Order dated July 29, 2015 (the “Vesting Order”).

5. THIS COURT ORDERS that the assignment of the Contracts is valid and binding upon all of the counterparties to the Contracts, notwithstanding any restriction or prohibition contained in any such Contract relating to the assignment thereof, including, but not limited to, any provision requiring the consent of any party to the transfer, conveyance or assignment of the Contracts.

6. THIS COURT ORDERS that no counterparty to a Contract shall terminate a Contract as against the applicable Purchaser Assignee as a result of the Vendor's insolvency or the Vendor’s CCAA proceedings. In addition, no counterparty shall terminate a Contract as against the applicable Purchaser Assignee as a result of the Vendor having breached a non-monetary obligation unless such non-monetary breach arises or continues after the Contract is assigned to

the applicable Purchaser Assignee, such non-monetary default is capable of being cured by the applicable Purchaser Assignee and the applicable Purchaser Assignee has failed to remedy the default after having received notice of such default pursuant to the terms of the applicable Contract. For clarification purposes, no counterparty shall rely on a notice of default sent to the Vendor to terminate the Contract as against the applicable Purchaser Assignee.

7. THIS COURT ORDERS that all monetary defaults in relation to any of the Contracts, if applicable, other than those arising by reason only of the Vendor's insolvency, the commencement of these CCAA proceedings or failure to perform a non-monetary obligation under any Contract; existing on or before the Closing Date, shall be paid no later than two Business Days following the delivery of the Monitor's Certificate.

8. THIS COURT ORDERS that notwithstanding anything contained in this Order, nothing shall derogate from the obligations of each applicable Purchaser Assignee to assume the Assumed Liabilities and to perform its obligations under the Assigned Contracts, as set out in the Sale Agreement.

9. THIS COURT ORDERS AND DIRECTS that the Monitor is hereby authorized and directed to take such actions as it deems necessary or appropriate in the circumstances to assist the Vendors in the assignment and transfer of the Contracts.

10. THIS COURT ORDERS AND DIRECTS that the "**Bridging Charge**" referenced in Section 6(A) of the Vesting Order refers to the "Bridging Inventory Charge".

REPORT OF THE MONITOR

11. THIS COURT ORDERS that the Fifth Report of the Monitor dated August 6, 2015 is hereby approved and the activities of the Monitor as described therein are hereby approved.

SEALING

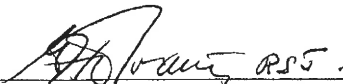
12. THIS COURT ORDERS that a copy of the Information Memorandum (as defined in the Affidavit of Gerald Bachynski sworn July 31, 2015) be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

GENERAL

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

14. THIS COURT ORDERS that the Vendor, the Purchaser, the Monitor and any counterparty to any Contract being assigned may apply to this Court for advice and direction, or to seek relief in respect of any matters arising from or under this Order, including without limitation, as necessary, to effect the transfer of the Contracts (including any transfer of title registrations in respect of such Contracts), the interpretation of this Order or the implementation

thereof, and for any further order that may be required, on notice to any party likely to be affected by the order sought or on such notice as this Court requires.



ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 14 2015



SCHEDULE A

BOOTLEGGER LEASES

LEASES

Tier	Store #	Division	Shopping Centre	Prov	Landlord's Legal Name	Notice Party
A	20511	Bootlegger	St. Vital Centre	MB	20 Vic Management Inc. & OPB Realty (St. Vital) Inc.	20 Vic Management Inc.
A	20928	Bootlegger	Aberdeen Mall	BC	Aberdeen Kamloops Mall Limited	20 Vic Management Inc.
A	20385	Bootlegger	Quinte Mall	ON	HOOPP Realty Inc.	20 Vic Management Inc.
A	20599	Bootlegger	Midtown Plaza	SK	Midtown Plaza Inc.	20 Vic Management Inc.
A	20049	Bootlegger	Halifax Shopping Centre	NS	OPB Realty (Halifax Centre) Inc.	20 Vic Management Inc.
A	20456	Bootlegger	Pen Centre	ON	OPB Realty Inc.	20 Vic Management Inc.
A	20653	Bootlegger	Emerald Hills Centre	AB	1445006 Alberta Ltd.	Courtenay Real Estate Services Inc.
A	20092	Bootlegger	Avalon Mall	NL	Crombie Properties	Crombie
A	20917	Bootlegger	Cottonwood Mall	BC	2046459 Ontario Inc.	Morguard Investments Limited
A	20881	Bootlegger	Sevenoaks Shopping Centre	BC	585562 B.C. Ltd.	Morguard Investments Limited
A	20901	Bootlegger	Coquitlam Centre	BC	Pensionfund Realty Limited	Morguard Investments Limited
A	20736	Bootlegger	Prairie Mall	AB	Revenue Properties Company Limited	Morguard Investments Limited
A/A	20346/ 20345	Bootlegger Bootlegger	Intercity Shopping Centre New Sudbury Centre	ON ON	HOOPP Realty Inc.	Morguard Investments Limited
A (Georgian Mall) Other (Parkland Mall)	20406/ 20606	Bootlegger Bootlegger	Georgian Mall Parkland Mall	ON SK	RioCan Holdings Inc.	RioCan REIT
A/A/A/A	20533/ 20430/ 20615/ 30615 20874	Bootlegger Bootlegger Bootlegger/ Ricki's Bootlegger	Brandon Shoppers Mall Cambridge Centre Centre At Circle And Eighth Pine Centre Mall	MB ON SK BC	Morguard Real Estate Investment Trust	Morguard Investments Limited

<u>Tier</u>	<u>Store #</u>	<u>Division</u>	<u>Shopping Centre</u>	<u>Prov</u>	<u>Landlord's Legal Name</u>	<u>Notice Party</u>
A	20359/ 30359	Bootlegger/Ricki's	Pickering Town Centre	ON	OPB Realty (Pickering Ctr) Inc.	20 Vic Management Inc.
A	20735/ 30735	Bootlegger/Ricki's	Parkland Mall (AB)	AB	Red Deer Shopping Centre Inc.	Morguard Investments Limited
A	20336/ 30336	Bootlegger/Ricki's	Timmins Square	ON	Timmins Square Shopping Centre Inc. & 1451945 Ontario Limited	RioCan REIT
B	20842/ 30842	Bootlegger/Ricki's	Haney Place Mall	BC	SmartREIT (Maple Ridge) Inc.	SmartREIT
A	20755/ 30755/ 40685	Bootlegger/Ricki's/cleo	Londonderry Mall	AB	Londonderry Shopping Centre Inc.	20 Vic Management Inc.
A	20593/ 30602/ 40559	Bootlegger/Ricki's/cleo	Lawson Heights	SK	3934390 Canada Inc.	Morguard Investments Limited

SCHEDULE B

CLEO ASSETS

LEASES

<u>Tier</u>	<u>Store #</u>	<u>Division</u>	<u>Shopping Centre</u>	<u>Prov</u>	<u>Landlord's Legal Name</u>	<u>Notice Party</u>
A	40539	cleo	St. Vital Centre	MB	20 Vic Management Inc. & OPB Realty (St. Vital) Inc.	20 Vic Management Inc.
A	40890	cleo	Aberdeen Mall	BC	Aberdeen Kamloops Mall Limited	20 Vic Management Inc.
A	40609	cleo	Cornwall Centre	SK	Cornwall Centre Inc.	20 Vic Management Inc.
A	40389	cleo	Lambton Mall	ON	KS Lambton Mall Inc.	20 Vic Management Inc.
A	40256	cleo	Lansdowne Place	ON	Lansdowne Place Inc.	20 Vic Management Inc.
A	40605	cleo	Midtown Plaza	SK	Midtown Plaza Inc.	20 Vic Management Inc.
A	40444	cleo	Erin Mills Town Centre	ON	OPB (EMTC) Inc.	20 Vic Management Inc.
A	40074	cleo	Halifax Shopping Centre	NS	OPB Realty (Halifax Centre) Inc.	20 Vic Management Inc.
A	40474	cleo	Pen Centre	ON	OPB Realty Inc.	20 Vic Management Inc.
A	40343	cleo	Lynden Park Mall	ON	CentreCorp Management Services Limited	CentreCorp
A	40088	cleo	Avalon Mall	NL	Crombie Properties	Crombie
B	40384	cleo	Milton Crossroads Shopping Centre	ON	First Milton Shopping Centres Limited	First Gulf Development Corporation
A	40889	cleo	Cottonwood Mall	BC	2046459 Ontario Inc.	Morguard Investments Limited
A	40923	cleo	Sevenoaks Shopping Centre	BC	585562 B.C. Ltd.	Morguard Investments Limited
A	40267	cleo	St. Laurent Shopping Centre	ON	713949 Ontario Limited	Morguard Investments Limited
A	40436	cleo	Bramalea City Centre	ON	Ackion Capital Corporation & Bramalea City Centre Equities Inc.	Morguard Investments Limited
A/A	40275	cleo	New Sudbury Centre	ON	HOOPP Realty Inc.	Morguard Investments Limited
A	40836	cleo	Coquitlam Centre	BC	Pensionfund Realty Limited	Morguard Investments Limited
A	40691	cleo	Parkland Mall (AB)	AB	Red Deer Shopping Centre Inc.	Morguard Investments Limited
B	40401	cleo	Heartland Town Centre	ON	Orlando Corporation	Orlando Corporation
A	40594	cleo	Parkland Mall	SK	RioCan Holdings Inc.	RioCan REIT
A	40338	cleo	Burlington Mall	ON	RK (Burlington Mall) Inc.	RioCan REIT
A	40062	cleo	SmartCentres St. John's East	NL	Calloway REIT (Stick Pond) Inc.	SmartCentres
A	40247	cleo	SmartCentres Oakville	ON	SmartReit (Oakville) Inc.	SmartCentres
A/A	40521/ 40442	cleo cleo	Brandon Shoppers Mall Cambridge Centre	MB ON	Morguard Real Estate Investment Trust	Morguard Investments Limited

<u>Tier</u>	<u>Store #</u>	<u>Division</u>	<u>Shopping Centre</u>	<u>Prov</u>	<u>Landlord's Legal Name</u>	<u>Notice Party</u>
A	40491/ 30288/ 40353	cleo Ricki's/cleo	Devonshire Mall Quinte Mall	ON ON	HOOPP Realty Inc.	20 Vic Management Inc.
A	30355/ 40355	cleo/Ricki's	SmartCentres Barrie South	ON	Calloway REIT (Barrie) Inc.	Calloway REIT
A	30244/ 40244	cleo/Ricki's	SmartCentres Scarborough	ON	Calloway REIT (1900 Eglinton) Inc.	SmartCentres
A	30259/ 40259	cleo/Ricki's	Etobicoke Power Centre	ON	Calloway REIT (Etobicoke) Inc.	SmartCentres

SCHEDULE C

RICKI'S LEASES

LEASES

<u>Tier</u>	<u>Store #</u>	<u>Division</u>	<u>Shopping Centre</u>	<u>Prov</u>	<u>Landlord's Legal Name</u>	<u>Notice Party</u>
A	30524	Ricki's	St. Vital Centre	MB	20 Vic Management Inc. & OPB Realty (St. Vital) Inc.	20 Vic Management Inc.
A	30925	Ricki's	Aberdeen Mall	BC	Aberdeen Kamloops Mall Limited	20 Vic Management Inc.
A	30258	Ricki's	Billings Bridge Plaza	ON	Capital City Shopping Centre Limited	20 Vic Management Inc.
A	30590	Ricki's	Cornwall Centre	SK	Cornwall Centre Inc.	20 Vic Management Inc.
A	30496	Ricki's	Devonshire Mall	ON	HOOPP Realty Inc.	20 Vic Management Inc.
A	30376	Ricki's	Lambton Mall	ON	KS Lambton Mall Inc.	20 Vic Management Inc.
A	30494	Ricki's	Tecumseh Mall	ON	KS Tecumseh Mall Inc.	20 Vic Management Inc.
A	30254	Ricki's	Lansdowne Place	ON	Lansdowne Place Inc.	20 Vic Management Inc.
A	30601	Ricki's	Midtown Plaza	SK	Midtown Plaza Inc.	20 Vic Management Inc.
A	30291	Ricki's	Carlingwood Mall	ON	OPB Realty (Carlingwood) Inc.	20 Vic Management Inc.
A	30041	Ricki's	Halifax Shopping Centre	NS	OPB Realty (Halifax Centre) Inc.	20 Vic Management Inc.
A	30283	Ricki's	Pen Centre	ON	OPB Realty Inc.	20 Vic Management Inc.
A	30682	Ricki's	Capilano SmartCentres	AB	Calloway REIT (Edmonton East) Inc. & IG Investment Management, Ltd.	Calloway REIT
A	30282	Ricki's	Innes Rd & Mer Bleue Power Centre	ON	Calloway REIT and Calloway LP	Calloway REIT
B	30274	Ricki's	Aurora North Power Centre	ON	SmartREIT (Aurora North II) Inc. and Calloway REIT (Aurora North) Inc.	Calloway REIT
B	30271	Ricki's	Oshawa South Power Centre	ON	SmartREIT (Oshawa South II) Inc. and Calloway REIT (Oshawa South) Inc.	Calloway REIT
A	30426	Ricki's	Lynden Park Mall	ON	CentreCorp Management Services Limited	CentreCorp
A	30651	Ricki's	Emerald Hills Centre	AB	1445006 Alberta Ltd.	Courtenay Real Estate Services Inc.
A	30083	Ricki's	Avalon Mall	NL	Crombie Properties	Crombie
B	30371	Ricki's	Milton Crossroads Shopping Centre	ON	First Milton Shopping Centres Limited	First Gulf Development Corporation
A	30902	Ricki's	Cottonwood Mall	BC	2046459 Ontario Inc.	Morguard Investments Limited
A	30882	Ricki's	Sevenoaks Shopping Centre	BC	585562 B.C. Ltd.	Morguard Investments Limited
A	30470	Ricki's	St. Laurent Shopping Centre	ON	713949 Ontario Limited	Morguard Investments Limited

Tier	Store #	Division	Shopping Centre	Prov	Landlord's Legal Name	Notice Party
A	30351	Ricki's	Bramalea City Centre	ON	Acktion Capital Corporation & Bramalea City Centre Equities Inc.	Morguard Investments Limited
A	30741	Ricki's	Prairie Mall	AB	Revenue Properties Company Limited	Morguard Investments Limited
B	30404	Ricki's	Heartland Town Centre	ON	Orlando Corporation	Orlando Corporation
A	30665	Ricki's	Mayfield Common	AB	1451945 Ont Ltd & Sun Life Assurance Co. of Canada	RioCan REIT
A	30522	Ricki's	Garden City Shopping Centre	MB	1562903 Ontario Ltd.	RioCan REIT
A	30289	Ricki's	RioCan Durham Centre I	ON	Durham Holdings Limited	RioCan REIT
A	30483	Ricki's	Hamilton SE Power Centre	ON	RioCan Holdings (Hamilton) Inc.	RioCan REIT
A	30285	Ricki's	RioCan Green Lane Centre	ON	Riotrin Properties (Newmarket) Inc.	RioCan REIT
A	30657	Ricki's	Signal Hill Centre	AB	Riotrin Properties Inc.	RioCan REIT
A	30286	Ricki's	Guelph Power Centre	ON	6 & 7 Developments Limited	SmartCentres
A	30536	Ricki's	Kenaston Power Centre	MB	Calloway Limited Partnership	SmartCentres
A	30281	Ricki's	Burlington North Power Centre	ON	Calloway REIT (Burlington) Inc.	SmartCentres
A	30768	Ricki's	Edmonton NE Power Centre	AB	Calloway REIT (Edmonton) Inc.	SmartCentres
B	30396	Ricki's	London North Power Centre	ON	Calloway REIT (London N) and Canadian Property Holdings (Ontario) Inc.	SmartCentres
A	30069	Ricki's	SmartCentres St. John's East	NL	Calloway REIT (Stick Pond) Inc.	SmartCentres
A	30249	Ricki's	SmartCentres Oakville	ON	SmartReit (Oakville) Inc.	SmartCentres
A	30320/ 30486	Ricki's Ricki's	Intercity Shopping Centre New Sudbury Centre	ON ON	HOOPP Realty Inc.	Morguard Investments Limited
A/A	30592/ 30661	Ricki's Ricki's	Parkland Mall South Trail Crossing	SK AB	RioCan Holdings Inc.	RioCan REIT
A/A/ A	30515/ 30462/ 30848	Ricki's Ricki's Ricki's	Brandon Shoppers Mall Cambridge Centre Pine Centre Mall	MB ON BC	Morguard Real Estate Investment Trust	Morguard Investments Limited

SCHEDULE D

MANAGEMENT ASSETS

CONTRACTS

Counterparty	Agreement	Date of Agreement
Aviscar Inc.	Avis Worldwide Rate Agreement	October 1, 2014
Beanstream Internet Commerce Inc.	Beanstream Pre-Authorized Debt (PAD) Plan Agreement	August 12, 2012
Bell Canada	Master Communications Agreement – Non Tariffed (Retail)	July 1, 2009
Bell Canada	Master Communications Agreement – Tariffed (Retail)	July 1, 2009
Fujitsu Transaction Solutions Canada Inc.	Master Agreement for the Supply of Equipment and Services	November 25, 2008
Oracle Canada ULC	General Terms of Master Agreement	May 20, 2015
Datavantage Corporation	Global Support Services Agreement, Agreement #1443	April 15, 2009
Datavantage Corporation	First Amendment to the Proact Software License Agreement No. 1245	June 26, 2008

Datavantage Corporation	Addendum to Analytics Software License and Services Agreement No. 1245	December 21, 2007
Datavantage Corporation	Proact Software License Agreement No. 1245, Exhibit 1F Statement of Work - Xstore Release 9 - Base Upgrade (PTS 312453)	December 30, 2011
Datavantage Corporation	Proact Software License Agreement No. 1245 Proact - XBR	November 3, 2004
Prodc International Inc.	RMS Services Contract	March 10, 2010
Prodc International Inc.	Hardware Extended Warranty and Support Agreement	January 1, 2010
Rogers Communications Partnership	Enterprise Customer Agreement between Rogers Communications Partnership and Comark	March 17, 2006
Rogers Wireless Partnership	Amendment #1 to Enterprise Customer Agreement between Rogers Communications Partnership and Comark	December 20, 2010
Rogers Wireless Partnership	Amendment #2 to Enterprise Customer Agreement between Rogers Communications Partnership and Comark	March 31, 2013
ValueLink LLC	Stored Value Card Agreement	No date
ValueLink LLC	Amendment No. 1 of the Stored Value Card Agreement	December 30, 2008

ValueLink LLC	Amendment No. 2 of the Stored Value Card Agreement	May 7, 2012
---------------	--	-------------

LEASES

Tier	Store #	Division	Shopping Centre	Prov	Landlord's Legal Name	Notice Party
Other	809201	CMK warehouse	930 ST-MARTIN BOUL (Distrib. Centre)	QC	Cominar REIT	Cominar Real Estate Investment Trust

SCHEDULE E

Court File No. CV15-10920-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF COMARK INC.

Applicant

RECITALS

- A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Order of the Court dated July 29, 2015 (the "**Approval Order**") approving the Sale Agreement entered into among Comark Inc. ("**Comark**") and Pacific West Commercial Corporation ("**PWCC**") and its permitted assignees (the "**Purchaser**") dated July 16, 2015 (as amended from time to time, the "**Sale Agreement**").
- B. Pursuant to the Approval Order, the Court approved the Sale Agreement and provided for the vesting in and sale, assignment and transfer to the Purchaser of Comark's right, title and interest in and to the Purchased Assets, which vesting, sale, assignment and transfer is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser and Comark of a certificate confirming: (i) the conditions to Closing as set out the Sale Agreement have been satisfied or waived by the Purchaser and Comark, as applicable; and (ii) the Transaction has been completed to the satisfaction of the Monitor.
- C. PWCC has entered into a certain Assignment of Asset Purchase Agreement dated ●, 2015 with 8299684 Canada Inc., 5349 Investments Ltd., 9124055 Canada Inc. and 9371443 Canada Inc. as permitted Purchaser Assignees, a copy of which is attached as Appendix "A" hereto.

D. As of the date hereof, Comark and the Purchaser, with the consent of the Monitor, have agreed to effect the sale, assignment and transfer of the Purchased Assets in accordance with the provisions of the Sale Agreement and the Approval Order.

THE MONITOR CERTIFIES the following:

1. The conditions to Closing with respect to the Purchased Assets as set out in Articles 7 and 8 of the Sale Agreement have been satisfied or waived by the Purchaser and Comark, as applicable; and
2. The Transaction with respect to the Purchased Assets has been completed to the satisfaction of the Monitor.

This Monitor's Certificate was delivered by the Monitor at _____ on _____, 2015.

ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor of Comark Inc. and not in its personal or corporate capacity

Per: _____
Name:
Title:

Appendix "A"

Tab 3



Nexient Learning Inc. (Re), 2009 CanLII 72037 (ON SC)

Date: 2009-12-23

Docket: CV-09-8257-00CL

Citation: Nexient Learning Inc. (Re), 2009 CanLII 72037 (ON SC),

<<http://canlii.ca/t/2758v>>, retrieved on 2016-10-26

COURT FILE NO.: CV-09-8257-00CL

DATE: 20091223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, As Amended

And in the Matter of a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

BEFORE: Mr. Justice H.J Wilton-Siegel

COUNSEL: *George Benchetrit*, for Nexient Learning Inc. and Nexient Learning Canada Inc.

Margaret Sims and Arthi Sambasivan, for Global Knowledge Network (Canada) Inc.

Catherine Francis, David T. Ullman and Melissa McCready, for ESI International Inc.

Lynne O'Brien, for the Monitor, RSM Richter Inc.

DATE HEARD: November 30, 2009

ENDORSEMENT

[1] On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of

termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statute.

Background

The Parties

[2] Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

[3] Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

[4] ESI is a United States corporation having its head office in Arlington, Virginia.

[5] Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

[6] The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

[7] Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of \$2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

[8] ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

[9] Global Knowledge Training LLC, a United States corporation (“Global Knowledge U.S.”), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI’s largest competitors.

Relevant Provisions Of The BA Agreement

[10] Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three “trigger” events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

6. Term and Termination

6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:

...

6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.

6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

[11] Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party’s business.

[12] Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings Under The CCAA

[13] On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the “Initial Order”).

[14] On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the “Monitor”). Both ESI and Global Knowledge participated in that process. In

this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the “NDA”).

[15] By letter dated July 24, 2009 (the “Termination Notice”), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the “Insolvency Defaults”). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient’s assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI’s distributor in Canada for the BA materials solely to fulfill Nexient’s existing obligations. Such licence was expressed to terminate on August 21, 2009.

[16] No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

[17] It is undisputed that Nexient owes ESI approximately \$733,000 on account of royalties for the use of ESI’s corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the “umbrella” agreement that governs the strategic partnership between ESI and Nexient.

[18] By letter dated July 28, 2009, counsel for Nexient informed ESI of its client’s view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

[19] The existence and content of the Termination Notice and the letter of Nexient’s legal counsel dated July 28, 2009 were communicated orally to Brian Branson (“Branson”), the chief executive officer of Global Knowledge U.S., by Donna De Winter (“De Winter”), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

[20] Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the “APA”) and a transition and occupation services agreement dated August 17, 2009 (the “Transition Agreement”).

[21] Under the APA, Global Knowledge agreed to acquire all of Nexient’s assets as a going concern pursuant to the terms of the APA (the “Sale Transaction”). As Global Knowledge had not completed its due diligence of Nexient’s contracts, the APA provided for a ninety-day period after the closing date (the “Transaction Period”) during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as “Excluded Assets” which would not be assigned at the closing but would instead be dealt with

pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the “Contracts”) as “Excluded Assets”.

[22] Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as “Excluded Assets”:

2.7 Purchaser’s Rights to Exclude

Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

[23] It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient’s right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all “Claims” (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI’s rights of termination based on the Insolvency Defaults.

[24] Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient’s right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

[25] On or about August 17, 2009, subsequent to submitting Global Knowledge’s bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey (“Elsey”), the president and chief executive officer of ESI, regarding ESI’s right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI’s right to terminate the BA Agreement. As discussed below, it is unclear

whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

[26] Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

[27] Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

[28] The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

[29] The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

[30] "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

[31] The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the

same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

[32] At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transition Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

[33] Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

[34] At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

[35] According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

[36] Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

[37] Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

[38] As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

[39] In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

[40] ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

[41] Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

[42] On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

[43] ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

[44] As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

[45] First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

[46] Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

[47] Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

[48] I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

[49] Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

[50] Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?
2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

[51] The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignability of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

[52] I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

[53] The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp. (Re)*, [2001] O.J. No. 4459 (S.C.J.).

[54] In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....

Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

[55] However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

[56] On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Re Woodwards Ltd.*, [1993] B.C.J. No. 42 (S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J.

framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

[57] In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

[58] Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

[59] It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

[60] This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

[61] Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

[62] However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on

insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

[63] There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

[64] Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

[65] First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

[66] Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

[67] In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by

the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

[68] There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

[69] Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

[70] Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

[71] As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

[72] The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium* illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

[73] In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency

Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

[74] Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers – the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

[75] Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

[76] There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of \$733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

[77] Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says

that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

[78] There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

[79] This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately \$733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

[80] Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

[81] However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

[82] The applicants' request for relief is denied for the following three reasons.

[83] First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

[84] The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction – in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets – it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

[85] Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

[86] The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

[87] More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order

permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

[88] In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

[89] It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

[90] Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

[91] Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

[92] I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

[93] However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

[94] First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials

described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

[95] Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

[96] This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

[97] First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

[98] Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

[99] ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

[100] Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations

between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

[101] Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

[102] The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Wilton-Siegel J.

DATE: December 23, 2009



[Terms of Use](#)

[Privacy](#)

[Help](#)

[Contact Us](#)

[About](#)

By **LEXUM**  for the law societies members of the  Federation of Law Societies of
Canada

