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Applicant	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 LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 186330 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP
DOCUMENT	**BENCH BRIEF OF APOLLO MANAGEMENT, L.P. AND GSO CAPITAL PARTNERS**
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Date:	November 15 and 16, 2016
Time:	10:00am

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I. OVERVIEW

1. Apollo Management, L.P. and GSO Capital Partners (together, the "**Secured Noteholders**") file this Bench Brief in support of the "**Threshold Motion**" brought by Lightstream Resources Ltd. ("**Lightstream**" or the "**Company**") to determine whether or not the Court would grant an order (the "**Participation Remedy**") requiring the Company to allow Mudrick Capital Management ("**Mudrick**") and FrontFour Capital Corp. and FrontFour Capital Group LLC ("**FrontFour**") (together, the "**Plaintiffs**") to participate in a second lien financing transaction that was announced on July 2, 2015 (the "**Transaction**") despite the fact that such an order would have the effect of altering the legal and economic rights of persons not implicated in the Plaintiffs' oppression claim (the "**Plaintiffs' Claim**").[1] Assuming the Plaintiffs were to succeed in establishing their alleged facts and considering their case at its very best, the Plaintiffs would only be entitled to an unsecured damages claim against the Company only. In no circumstances would a Court find a factual and legal basis for granting the extraordinary form of relief the Plaintiffs seek.

2. The Secured Noteholders file this Bench Brief to emphasize three arguments that are particularly unique to the Secured Noteholders as bystanders to the Plaintiffs' litigation and who, by the Plaintiffs' Claim, are not alleged to have committed any misconduct.

3. First, the Participation Remedy is a form of equitable and mandatory order and would have a material adverse impact on the legal and economic rights of the Secured

[1] At the hearing on October 11th, 2016 counsel for the Plaintiffs confirmed that the Plaintiffs are only seeking the Participation Remedy as an alternative to damages, and were not seeking to unwind the Transaction. See Transcript of the Proceedings dated October 11, 2016, page 76, lines 30-40 attached at Tab 1 of the Record for Hearing of Apollo Management, L.P. and GSO Capital Partners, page 78 [Record for Hearing of the Secured Noteholders].

Noteholders, the other holders of the Secured Notes (the "**Other Secured Noteholders**"), and the other holders of the unsecured notes (the "**Unsecured Noteholders**") (together, the "**Affected Non-Parties**"). However, the Plaintiffs have not made allegations and offer no evidence of misconduct by any of the Affected Non-Parties, and the Plaintiffs have not included any of the Affected Non-Parties in their litigation. Even if the Plaintiffs are entitled to relief from oppression, the Court should not grant the Participation Remedy since it would adversely impact the rights of the Affected Non-Parties who are not alleged to have committed wrongful acts and who are not parties to the litigation.

4. Second, the Participation Remedy sought by the Plaintiffs is a form of mandatory order that is rooted in equity. Although it is available as a possible form of relief as part of the oppression remedy under the Alberta *Business Corporations Act*,[2] it is not a form of order that a successful complainant is entitled to receive as of right. Mandatory orders like the Participation Remedy that require parties to act (in this case to offer new financing, amend the terms of existing financing arrangements, and alter credit priorities among creditors), are discretionary and made only in extraordinary circumstances consistent with equitable principles:

    (i) Mandatory orders are not appropriate for claims based on breach of contract or misrepresentation. Instead, an award of monetary damages is considered to be the standard and appropriate remedy because it compensates the plaintiff at the defendant's expense without involving the Court in the challenges of ensuring compliance with a mandatory order (which here would mean effectively drafting and imposing new agreements on litigants and other strangers to the litigation).

[2] R.S.A. 2000, c. B-9.

(ii) Principles of equity and oppression law require that the Court grant the least intrusive remedy capable of alleviating the effects of alleged oppression. The Court must consider the effect of any proposed remedy on the interests and reasonable expectations of the other stakeholders who may be affected by a proposed remedy. In this case, the Participation Remedy involves compelling the Company to enter new agreements with the Plaintiffs and the Secured Noteholders and to then issue an undefined number of new secured notes to the Plaintiffs in consideration for the unsecured notes the Plaintiffs currently hold and an additional undefined amount of cash financing. Hence, the Participation Remedy will presumptively benefit the Company (by providing additional financing albeit with repayment obligations) who is the source of and responsible for the Plaintiffs' alleged harm, while causing material harm to the Affected Non-Parties who are not alleged to have committed any wrongful acts. The economic and legal interests of the existing Secured Noteholders and the other Secured Noteholders will be materially diluted, and the interests of the Unsecured Noteholders will be subordinated to an expanded class of secured noteholders. Viewed from this perspective, a monetary award of damages represents the most effective and equitable means of compensating the Plaintiffs and holding the Company responsible for its misconduct because it respects the interests of the stakeholders who are not involved in or responsible for the litigation and does not compel the Court to be involved in altering the relative rights and obligations of the Company's stakeholders.

5. Third, in proceedings under the *Companies' Creditors Arrangements Act* ("**CCAA**"),[3] Courts steadfastly guard against attempts by creditors to jump the priority queue by either seeking remedies or attempting to reframe their claims in ways that have the effect of allowing them to jump the priority queue. The fact that the Plaintiffs' Claim focuses on their specific self-interest alone reveals that the Plaintiffs' strategy of focusing on the Participation Remedy is aimed at moving their individual interests up the priority queue – that kind of strategy is inconsistent with the CCAA. Denying the Plaintiffs an opportunity to achieve that objective does not mean the Plaintiffs are denied a remedy as

[3] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended [CCAA].

they can still continue to advance their claims against the Company, its directors and officers and their respective insurers.

II. FACTS

6. The Secured Noteholders repeat and adopt the facts as described by the Company at paragraphs 11 to 84 of their Bench Brief. In addition, the Secured Noteholders draw the Court's attention to the following facts.

7. The Company and the Secured Noteholders entered into the Note Purchase and Exchange Agreement (the "**Agreement**") in respect of the Transaction on July 2, 2015. That same day, the Company issued a press release announcing the Transaction.[4]

8. The Plaintiffs commenced their legal proceedings against the Company on July 9, 2015 (Frontfour) and July 30, 2015 (Mudrick). Each of the actions seek damages and other mandatory and equitable relief.[5]

9. The wrongful conduct alleged by the Plaintiffs is that the Company breached the indenture governing the unsecured notes and made certain misrepresentations.

10. The Plaintiffs would have learned the identity of the Secured Noteholders through the Company's documentary productions, after which, they did not amend their claim to make any new allegations of misconduct against either of the Secured Noteholders and did not add either of them to the litigation as necessary parties.

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[4] Note Purchase and Exchange Agreement dated July 2, 2015 attached at Tab 18 to the Record for Hearing of the "Threshold Issue." [Record for Hearing].

[5] Statement of Claim of FrontFour filed July 9, 2015; Record for Hearing, Tab 2; Originating Application of Mudrick filed July 30, 2015; Record for Hearing, Tab 3(c); Statement of Claim of Mudrick; Record for Hearing, Tab 1.

11. The Plaintiffs proceeded through documentary productions and examinations for discovery. No requests for productions or information were ever made by the Plaintiffs of the Secured Noteholders.

12. The Plaintiffs are now ready for trial.[6]

13. On October 11, 2016, the Plaintiffs' counsel advised the Court that the Plaintiffs are not seeking an order to unwind the Transaction. The Plaintiffs' counsel also confirmed that the Plaintiffs are seeking an order that would allow the Plaintiffs to participate in the Transaction on the same terms and conditions as the Secured Noteholders did in July, 2015 (i.e., the Participation Remedy).[7]

14. In order to grant the Plaintiffs the Participation Remedy, the Court would have to order the Company, the Secured Noteholders and the Other Secured Noteholders to agree to new and amended financing terms to effect the issuance of new Secured Notes to the Plaintiffs Secured Notes on the same terms as the Second Noteholders obtained their notes.

15. The effects of granting the Participation Remedy would be to:

    (a) dilute the economic and legal interests of the Secured Noteholders and the other Secured Noteholders; and

[6] Transcript of Proceedings, dated September 26, 2016, page 22, lines 20 – 32; Record for Hearing of the Secured Noteholders, Tab 2, page 114.

[7] See Transcript of the Proceedings dated October 11, 2016, page 76, lines 30-40; Record for Hearing of the Secured Noteholders, Tab 1, page 78.

(b) impair the economic interests of the Unsecured Noteholders by increasing the amount of secured debt ranking ahead of the Unsecured Noteholders.

16. In addition to its claim for damages, the Plaintiffs can seek relief in the form of damages against the Company, and can seek relief against the directors and officers and their insurers.

III. ISSUES

17. For the reasons submitted by the Company, it is clear that a Court will not grant an order giving effect to the Participation Remedy sought by the Plaintiffs. In addition, the Secured Noteholders raise the following three issues that militate against the granting of the Participation Remedy:

(a) the Secured Noteholders were not added as parties to the Plaintiffs' Claim and, therefore, the Participation Remedy cannot be granted since it adversely and disproportionately affects their rights;

(b) the Participation Remedy is a discretionary equitable remedy and the factors to be considered militate against granting the Participation Remedy; and

(c) the effect of the Participation Remedy is to impermissibly recharacterize the nature of the Plaintiffs' claim to improve their Priority Position.

IV. ARGUMENT

A. The Secured Noteholders were not added as parties to the Plaintiffs' Claim and, therefore, the Participation Remedy cannot be granted since it adversely and disproportionately affects their rights

18. As noted above, the Plaintiffs elected to not sue or otherwise add the Secured Noteholders, the Other Secured Noteholders or the Unsecured Creditors as parties to the Plaintiffs' Claim. Accordingly, no orders that adversely affect their rights, such as the Participation Remedy, can be granted.

19. It is a basic principle of the adversarial judicial system that persons whose rights might be affected by the litigation must be made parties to the litigation so that they have a meaningful ability to protect their interests.

20. In *Union Natural Gas Co. v. Chatham Gas Co.*,[8] the Court held that all parties impacted by litigation should be made parties to the litigation. In that case, the original action between the plaintiff and the defendant had proceeded to judgment. The judgment provided, in part, that the defendant was perpetually restrained from diverting gas it received from the plaintiff to a third party, the Dominion Sugar Co. ("**Dominion**"). On appeal, the court pointed out that since the relief sought in the claim had the potential to annul Dominion's contract with the defendant, the judgment created an injustice given

[8] *Union Natural Gas Co. v. Chatham Gas Co.*, (1917), 40 O.L.R. 148, 38 D.L.R. 753 (Ont. Sup. Ct (Appeal Court)), rev'd on other grounds *Union Natural Gas Co. v. The Chatham Gas Co.* (1918), 56 S.C.R. 253 [*Union Natural Gas Co. v. Chatam Gas Co*] at Tab 1 of the Book of Authorities of Apollo Management, L.P. and GSO Capital Partners [Secured Noteholders' Book of Authorities].

the potential adverse impact on Dominion's rights when it was not a party to the litigation. Accordingly, a panel of five judges of the Ontario Supreme Court overturned the trial decision and ordered a new trial.

21. In its decision, the Court quoted with approval the decision of the United States Supreme Court in *Minnesota v. Northern Securities Co.*, in which the Court succinctly summarized the principle requiring the participation of all necessary parties as follows:[9]

> The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the Court is enabled to make a complete decree between the parties, to prevent future litigation, by taking away the necessity for a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. (*Minnesota v. Northern Securities Co.* (1902), 184 U.S. 199 at 235).

22. Although *Union Natural Gas Co.* was subsequently overturned on other grounds, the Court's decision on this issue, and the passage from the US Supreme Court, was quoted with approval by the Ontario Court of Appeal in *Coulson et al. v. Secure Holdings Ltd. and Jackson et al.*[10]

23. Having elected to not to make allegations against or join the Affected Non-Parties in the litigation, the Plaintiffs must accept the legal consequences of that election – that there are and will be no legal, equitable or factual basis for designing a remedy that benefits the Plaintiffs and that harms the interests of bystanders to the litigation.

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[9] *Minnesota v. Northern Securities Co.* (1902), 184 U.S. 199 at 235; Secured Noteholders' Book of Authorities, Tab 2.

[10] *Coulson et al. v. Secure Holdings Ltd. and Jackson et al.*, [1976] O.J. No. 1459, at para. 12; Secured Noteholders' Book of Authorities, Tab 3.

24. The Plaintiffs have always been free to include the Affected Non-Parties in the litigation. Decisions about whom to include in a lawsuit are not taken lightly by sophisticated parties and their counsel. The Plaintiffs elected, and have continued to elect until the eve of trial, to pursue their claim solely against the Company. Accordingly, the Plaintiffs must accept all of the consequences that flow from their strategic decisions, including the fact that they cannot now seek a remedy that would adversely affect the Affected Non-Parties' rights and recoveries.

25. Courts have held that non-compensable prejudice can exist when a new party is proposed to be added as a defendant after most of the procedural steps have already taken place. In *Leclair v. Ontario* (Attorney General),[11] Master Beaudoin (as he then was) denied the plaintiffs' motion to add a new defendant where there was no explanation for either the delay in discovering his alleged involvement or the proposed amendment. The prospective defendant was found to have been misled about his involvement as a witness during discovery: he had given discovery evidence as a non-party and the plaintiffs subsequently sought to add him as a defendant. While this deception was held to be prejudicial, Master Beaudoin held that "[e]ven if there were no such prejudice, I conclude it would be unfair to add [the proposed defendant] as party at this time" for reasons of procedural fairness, including the fact that the proposed defendant had been denied the opportunity to participate in the discoveries, there was no substitute for participating in the discoveries at the time they were being conducted, and there was a general unfairness

[11] *Leclair v. Ontario (Attorney General)*, [2008] OJ No 2428 at para. 31 [*Leclair*]; Secured Noteholders' Book of Authorities, Tab 4, citing *Seaway Trust Co. v. Markle* [1988] OJ No 164 (Ont SC) at para. 43, aff'd [1990] OJ No 3115 (Ont HCJ)); Secured Noteholders' Book of Authorities, Tab 5.

in requiring him to participate in future motions and trial after having been excluded from the action to date.[12]

26. It is not for the Affected Non-Parties to effectively chase the Plaintiffs to have themselves named as defendants in the Plaintiffs' Claim. Rather, it is for the Plaintiffs to evaluate who is responsible for their alleged harm and to assess the advantages and disadvantages of adding various parties to their claim. The Plaintiffs alone must live with the consequence of their analysis of these issues and their strategic decisions – including having to bear the risks and potential risks of enforcement against an insolvent defendant.

27. In drafting their pleadings the Plaintiffs must have been aware of the potential impact of the mandatory orders included in their prayer for relief on the rights and interests of the Affected Non-Parties. It is abundantly clear from the relief claimed that the Plaintiffs were seeking to change their priority ranking from unsecured creditor to a secured creditor,[13] thereby diluting the interests of the Secured Noteholders and the Other Secured Noteholders from that which they agreed to in the Agreement, and placing the Unsecured Creditors behind more secured debt than the Unsecured Creditors would have understood the consequences of the Transaction to be.

28. The Plaintiffs cannot now resile from the consequences of their litigation strategy. The simple truth is that the Plaintiffs' Claim supports an award of monetary damages only – not the Participation Remedy.

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[12] *Leclair supra* at pars. 43, 46 and 47; Secured Noteholders' Book of Authorities, Tab 4. See also *Din v. Melady*, [2009] OJ No 5658 (Div Ct); Secured Noteholders' Book of Authorities, Tab 6.

[13] See for example the Statement of Claim of Mudrick filed October 5, 2015, paras. 7, 21(b)(ii) and 22 (b); Record for Hearing, Tab 1, pages 4; 7, 8 and 9; Statement of Claim of FrontFour filed July 9, 2015, paras. 27 and 33; Record for Hearing, Tab 2, pages 15 and 16; Affidavit of David Kirsch, sworn September 23, 2016, para. 20; Record for Hearing, Tab 3, page 29.

B. The Participation Remedy is a discretionary equitable remedy, and the factors to be considered militate against granting the Participation Remedy

29. The selection and imposition of a remedy after a finding of oppression is an exercise of discretion – no complainant has an inherent right to any particular form of oppression remedy. There are a number of principles that govern the exercise of the Court's discretion in crafting an oppression remedy.

(i) Factors in the selection of remedies in oppression cases

30. Courts have recognized that the purpose of an oppression remedy is not to punish but to remedy the effects of the oppressive conduct, and in fashioning an oppression remedy, courts must be mindful of the principle of minimal interference: "[c]ourts should interfere to the extent necessary to correct the matters complained of but no further."[14]

31. A corollary of this principle is that the Court must consider the potential effects of a particular remedy on the Company's other stakeholders and third parties.[15]

32. A similar, but distinct, factor the Court must consider is the reasonable expectations of the other stakeholders.[16] Needless to say, justice is not achieved by granting a remedy that is contrary to the reasonable expectations of other stakeholders.

33. The imperative under oppression law to consider the potential impacts on third parties is an off-shoot of the long-standing principle that when granting equitable relief, the court must consider the effect of the relief sought on third parties. For example, in claims

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[14] Markus Koehnen, *Oppression and Related Remedies*, (Toronto: Thomson Carswell, 2004) at 328; Secured Noteholders' Book of Authorities, Tab 46, citing *Naneff v. Con-Crete Holdings Ltd.*, (1995), 23 O.R. (3d) 481 (Ont. C.A.) at paras. 22, 32-34 [*Naneff*]; Secured Noteholders' Book of Authorities, Tab 7.

[15] *Naneff, supra* at para. 37; Secured Noteholders' Book of Authorities, Tab 7.

[16] *Ibid* at paras. 28 and 29; Secured Noteholders' Book of Authorities, Tab7.

seeking specific performance, it has long been recognized that the relief is discretionary and how specific performance will impact third parties must be considered. The court may decline to grant specific performance where the order could require the defendant to breach a contract with a third party.[17]

(ii) Court must consider the mandatory order nature of the Participation Remedy

34. When a Court considers granting a remedy in response to a finding of oppression, it must also consider the general test for granting that remedy in the non-oppression context. Merely because a particular form of relief is sought within an oppression claim does not permit the Court to ignore the various conditions to granting that particular remedy.[18]

35. Since the Participation Remedy would require the Company to enter into a new contract with the Plaintiffs, it is in fact a form of mandatory order. Therefore, the Court must also determine whether the test for a mandatory order has been satisfied.

36. It is a basic principle that equitable remedies "will be granted only where damages would provide an inadequate remedy."[19] Indeed, "[t]he very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs, for which

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[17] *Webb v. Dipenta*, 1 D.L.R. 216 at para. 20; Book of Authorities, Tab 9. C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 8th ed (Agincourt: The Carswell Company Ltd., 2009) at page 154; Secured Noteholders' Book of Authorities, Tab 47. See also *Warmington v. Miller*, [1973] Q.B. 877, where the court declined to award specific performance in part because to do so would force the defendant to breach the terms of their lease with a third party (at page 377); Secured Noteholders' Book of Authorities, Tab 10.

[18] For example, see *Maynes v. Allen-Vanguard Technologies Inc.*, 2011 ONCA 125 at para. 67 [*Allen-Vanguard*]; Secured Noteholders' Book of Authorities, Tab 11.

[19] Robert Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2015) at 1.60 [*Sharpe*]; Secured Noteholders' Book of Authorities, Tab 48.

damages are the proper remedy."[20] This is also a basic principle of contract law: the usual remedy for breach of contract is damages, "and it is only where damages are inadequate that equitable relief may be available."[21]

37. In his text *Injunctions and Specific Performance*, Justice Sharpe points out that with respect to mandatory orders, "the general principles governing the availability of injunctive relief apply, [and] the very fact of requiring a positive course of action raises special problems."[22] One such problem is the requirement for and difficulty of ongoing judicial supervision and intervention.[23]

38. Moreover, the Plaintiffs' Claim, in effect, also amounts to a request that the Court impose a bargain between the Company, the Plaintiffs and the existing secured noteholders, which the parties did not negotiate themselves. It is a long established principle in contract law that courts should generally not interfere with agreements made by sophisticated parties – it is simply not the role of a Court to renegotiate the parties' clear bargain.[24] Even more radical than asking the Court to renegotiate a particular term of an existing contract, the Plaintiffs are asking the Court to impose a new bargain between the

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[20] *London & Blackwall Ry. Co. v. Cross* (1886), 31 Ch. D. 354 (C.A.) at p.369; Secured Noteholders' Book of Authorities, Tab12.

[21] *Pointe East Windsor Ltd. V. Windsor (City)*, 2014 ONCA 467 at para. 17; Secured Noteholders' Book of Authorities, Tab 13, citing *UBS Securities Canada Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328 at para. 96; Secured Noteholders' Book of Authorities, Tab 14.

[22] *Sharpe* at 1.10; Secured Noteholders' Book of Authorities, Tab 48.

[23] *Sharpe* at 1.270; Secured Noteholders' Book of Authorities, Tab 48.

[24] See e.g., *Mascia v. Dixie X-Ray Associates Ltd.*, [2008] O. J. No. 4554 at para. 14; Secured Noteholders' Book of Authorities, Tab 15, *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 45; Secured Noteholders' Book of Authorities, Tab 16, and *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 169; Secured Noteholders' Book of Authorities, Tab 17.

parties that simply never existed in the first place. This unprecedented request is based on a fundamental misunderstanding of the role of the oppression remedy.

(iii) Damages are appropriate and adequate in this case

39. The Plaintiffs' Claim, at its core, is a breach of contract or misrepresentation claim, and should be treated as such. Indeed, the Alberta Court of Appeal recently reiterated that "[o]ppression remedies are not intended to be a substitute for an action in contract, tort or misrepresentation."[25]

40. Courts routinely grant awards of damages for breach of contract and misrepresentation cases, including cases based on alleged diminution in value of publicly traded securities. That type of claim and damages award are part of the bread-and-butter of commercial law. There is nothing in the Plaintiffs' Claim that makes an award of damages an inappropriate or an inadequate remedy in this case. Accordingly, damages are an adequate remedy for the alleged oppression claim.

41. Moreover, a damages award fully compensates the Plaintiffs for their losses caused by the alleged oppressive conduct. Whereas before they would only have a claim for diminution in the market value of their Unsecured Notes, the Plaintiffs now have an immediate and incontrovertible claim for the full face value of the Unsecured Notes in the CCAA proceedings, which claim includes and subsumes any previous lost market value caused by the alleged oppressive conduct.

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[25] *Shefsky v. California Gold Mining Inc.*, 2016 ABCA 103 at para. 22; Secured Noteholders' Book of Authorities, Tab 18.

42. Aside from the fact that damages are an adequate remedy, the proposed Participation Remedy is disproportionate as a result of its effects on the Affected Non-Parties' reasonable expectations and the degree of Court intervention it would require.

43. The expectations of stakeholders of a public company like Lightstream would include the basic expectation recognized by the Supreme Court of Canada that "the directors act in the best interests of the corporation."[26] Accordingly, the Court must consider the fairness of the Participation Remedy in light of the Affected Non-Parties' reasonable expectations that:

(a) as a publicly traded company, the Company would not forego a transaction that is in its best interests because a minority noteholder wanted to, but could not, participate in the transaction; and

(b) the Affected Non-Parties would expect that the Company would not make any misrepresentations, and that they would not be held responsible for misrepresentations allegedly made by the Company that they had no knowledge of or involvement in.

44. Moreover, the Participation Remedy would materially rewrite the bargain that was struck between the Company and the Secured Noteholders. Under the Transaction, the Secured Noteholders (i) exchanged their unsecured notes for secured notes at a discount; and (ii) gave the Company another $200 million of financing. The negotiated balancing of the exchange rate, the injection of new financing and the amount of allowable additional

[26] *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 66; Secured Noteholders' Book of Authorities, Tab 8.

secured financing (which was fully taken up by the Other Secured Noteholders) was a significant part of a heavily negotiated financing package. It would be unfair to the Secured Noteholders who negotiated that bargain, and the Other Secured Noteholders who subsequently participated in the Transaction, to now rewrite the economics of the Transaction and foist upon them an economic position they specifically negotiated to prevent.

45. Lastly, were the Court to order the Participation Remedy, the Court would be ordering the Company to do a financing transaction in late 2016 based on a discount exchange rate negotiated in 2015, and would be ordering the Company to incur new debt since the Plaintiffs would also have to advance new financing (*pro rata* to the $200 million that was injected by the Secured Noteholders). Again, were it to do so, the Court would be completely altering the economic terms of the bargain and displacing the business judgement of the Board of the Company as to how much debt the Company ought to incur, and on what terms.

46. For these reasons, damages are an adequate and appropriate remedy and the Participation Remedy would not be granted by a Court.

C. Effect of the Participation Remedy is to impermissibly recharacterize the nature of the Plaintiffs' Claim to improve their priority position

47. Another significant fact militating against the imposition of the Participation Remedy is that the effect of the Participation Remedy is to improve the Plaintiffs' priority position vis-à-vis the Affected Non-Parties. As discussed below, the nature of the Plaintiffs' Claim is determined as of the CCAA filing date, and on that date the Plaintiffs had a claim for the full "face" value of the Unsecured Notes. Contingent claims that are

premised upon the future exercise of discretion by a third party decision maker are too remote to be considered by a CCAA Court. Accordingly, (i) since the Plaintiffs' Claim for the Participation Remedy is based solely on the future exercise of discretion by the Court, it can only be treated as unsecured claim; and (ii) since the Participation Remedy is aimed at changing the unsecured claim to a secured claim, it can only be regarded as an attempt to change the respective priority between the Plaintiffs and the Affected Non-Parties.

(i) Status of a creditor's claim is to be determined as of date of CCAA Filing

48. It does not help the Plaintiffs to argue that they had commenced their litigation prior to the commencement of the CCAA proceedings and that, therefore, the existence of the CCAA proceedings should be ignored. Such an argument ignores the basic CCAA principle that the nature of a claim is to be determined as of the date of the commencement of the CCAA proceedings.

49. The CCAA incorporates by reference certain sections of the *Bankruptcy and Insolvency Act*[27] that address the criteria for what is a "provable" claim. A provable claim is one that is accepted for valuation purposes for voting and distribution of assets. However, if a claim is too remote or speculative it is not provable.[28] A claim that cannot be valued in

[27] R.S.C. 1985, c. B-3, as amended [*BIA*].

[28] *AbitibiBowater Inc., Re*, 2012 SCC 67 at paras. 34-36, [2012] S.C.J. No. 67 [*AbitibiBowater*]; Secured Noteholders' Book of Authorities, Tab 19; *Re Confederation Treasury Services Ltd.*, 1997 CarswellOnt 31 at para. 4 (C.A.); Secured Noteholders' Book of Authorities, Tab 20.

the sense that it is not "measurable by any actuarial computation" is not provable.[29] Only provable claims are dealt with in a CCAA proceeding.

50. The Supreme Court of Canada has recently articulated a three-part test to determine when a contingent claim is a provable claim in an insolvency proceeding: (i) there must be a debt, a liability or an obligation to a creditor; (ii) the debt, liability or obligation must be incurred before the debtor enters into the insolvency proceedings; and (iii) it must be possible to attach a monetary value to the debt, liability or obligation.[30]

51. There is no question that the Plaintiffs have a "provable claim" in the CCAA proceedings for the full principal amount of their Unsecured Notes: as at the filing date, the Plaintiffs held Unsecured Notes (a debt obligation) that were issued and acquired prior to the filing date, and the monetary value of the claim, being the face value of the Unsecured Notes, was readily ascertainable. However, the issue on this motion is whether the claim for the Participation Remedy, which is a contingent claim based upon a future event, is also a provable claim.

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[29] *Re Carling Acceptance Ltd.*, 1976 CarswellOnt 72 at paras. 8-9 (S.C. (In Bank.)), aff'd 1997 CarswellOnt 1977 (C.A.); Secured Noteholders' Book of Authorities, Tab21.

[30] *AbitibiBowater supr*a at para. 26; Secured Noteholders' Book of Authorities, Tab 19.

52. Where there is no basis to pre-suppose the happening of the contingency on which a contingent claim is based, the claim is too remote and speculative to be a provable claim:[31]

(a) Claims involving the issuance of orders by government authorities have been found to be provable where the regulator had issued an order prior to the date of filing,[32] where it was a "near certainty" or a mere "formality" based on pre-filing events that an order would issue, and where the issuance of the order was merely a formality not dependent on the exercise of discretion.[33] In contrast, a claim has been considered too remote and speculative where the regulator had not held a hearing, made findings, or exercised its discretion to make a decision prior to the date of bankruptcy.[34]

(b) Due to the discretionary nature of costs awards (just like oppression remedies), it has been held that no debt, liability or obligation is incurred until the discretion is actually exercised by the Court and the cost award is granted. Consequently, if the award is not granted until after the date at which claims are to be calculated,

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[31] *Re Air Canada,* 2004 CarswellOnt 3320 at paras. 2, 5 (Sup. Ct. J. (Comm. List)); Secured Noteholders' Book of Authorities, Tab 22; *Re Edgewater Casino,* 2008 CarswellBC 2 at paras. 58, 61-63 (S.C.); Secured Noteholders' Book of Authorities, Tab 23.

[32] *Re Air Canada,* 2006 CarswellOnt 8175 (Sup. Ct. J. [Commercial List]); Secured Noteholders' Book of Authorities, Tab 24.

[33] *Re Lemare Holdings Ltd.*, [2012] B.C.J. No. 2218 at paras. 50-54, 86 (S.C.) [*Lemare*]; Secured Noteholders' Book of Authorities, Tab 25; *Re Harvey,* [2004] A.J. No. 1218 at para. 19 (Q.B.); Secured Noteholders' Book of Authorities, Tab 26.

[34] *Re Thow,* 2009 BCSC 1176 at paras. 38, 45-46 [*Thow*]; Secured Noteholders' Book of Authorities, Tab 27.

there is no provable claim, contingent or otherwise. The same reasoning applies to other discretionary awards.[35]

(c) Similarly, where liability depends on an exercise of discretion by a regulator, the claim is generally considered too remote or speculative to be provable. In particular, where the exercise of discretion depends on the regulator undertaking an investigation, holding a hearing, making findings, and then exercising its discretion in reaching a decision, the claim is not provable. Accordingly, an administrative penalty imposed by a securities commission after bankruptcy based on conduct of the bankrupt before bankruptcy was found not to be a provable claim.[36]

53. These cases all demonstrate that where a claim is based on the exercise of discretion by a regulator or a judicial or quasi-judicial body, that claim is not a provable claim. Accordingly, the Plaintiffs' claim for the Participation Remedy, which is based on the Court's discretion in granting and fashioning an oppression remedy after a finding of oppression in a trial that has not yet occurred, is not a provable claim.

54. Accordingly, while the Plaintiffs have a provable claim based on the Unsecured Notes, they do not have a provable claim to convert those Unsecured Notes into secured notes. Thus, the status of the Plaintiffs' Claim on the date of bankruptcy is an unsecured claim.

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[35] *Jema International Food Products Inc. v. Scholle Canada Limited*, 2013 ONSC 2785 at paras. 7-10; Secured Noteholders' Book of Authorities, Tab 28; *Ross v. Ross Mining Limited*, 2012 YKSC 102 at paras. 25-35; Secured Noteholders' Book of Authorities, Tab 29; *Thow, supra;* Secured Noteholders' Book of Authorities, Tab 27.

[36] *Thow supra* at paras. 38, 45-46; Secured Noteholders' Book of Authorities, Tab 27.

The continued request for the Participation Remedy can only be regarded as an attempt to move up the priority rankings.

(ii) Courts Prevent Creditors' Jumping the Priority Queue

55. In the fight for scarce resources, creditors often attempt to disguise their claim as something other than a debt claim in the hope of bettering their position vis-à-vis the other creditors, or they may take other steps to try to move their claims up the priority ladder.

56. However, one of the objectives of the CCAA is to prevent any manoeuvering for position among the creditors.[37] This extends to oppression claims - in *Re Canadian Airlines Corp.*,[38] the court held that the oppression applications that were to be determined after the commencement of the CCAA proceedings were to be considered through the lens of the CCAA proceedings.

57. As discussed below, Courts have consistently rebuffed creditors seeking to improve their priority status in CCAA proceedings by seeking constructive trusts, characterizing equity claims as debt claims, and seeking equitable subordination. These cases illustrate that a court should not grant an oppression remedy that has the purpose or effect of allowing a creditor to jump the priority queue, especially in a CCAA proceeding.

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[37] *Re Lehndorff General Partner Ltd.*[1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]) at para. 6; Secured Noteholders' Book of Authorities, Tab 30.

[38] *Re Canadian Airlines Corp.*, 2000 CarswellAlta 662 (QB), at paras. 139-158, leave to app ref'd, 2000 CarswellAlta 919 (C.A.); Secured Noteholders' Book of Authorities, Tab 31.

Constructive Trusts

58. Although not claimed by the Plaintiffs, creditors often claim that they are entitled to a remedial constructive trust over the assets of a debtor due to the debtor's wrongful conduct or as a result of an unjust enrichment. Courts have long recognized that a constructive trust, otherwise available based on established legal tests, cannot be imposed for the purpose of giving the proposed beneficiary a priority over other creditors of the estate. This would amount to imposing what may otherwise be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of other creditors of the insolvent party.[39] This principle has been applied in oppression cases that have sought the imposition of a constructive trust.[40]

59. In its seminal decision in *Soulos v. Korontzilas*, the Supreme Court of Canada held that the court must be "informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account." [41] In establishing a test for the imposition of a constructive trust to remedy an equitable wrong, the Court held that one part of the test is that there must be no factors which would render the imposition of a constructive trust unjust in all the circumstances of the case, and that the interests of intervening creditors must be protected.[42]

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[39] *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 at para. 4; Secured Noteholders' Book of Authorities, Tab 32.

[40] *Allen-Vanguard supra* at paras. 66-80; Secured Noteholders' Book of Authorities, Tab 11.

[41] *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 34; Secured Noteholders' Book of Authorities, Tab 33.

[42] *Ibid* at para. 45; Secured Noteholders' Book of Authorities, Tab 33.

60. In *Canada (Attorney General) v. Confederation Life Insurance*,[43] the winding-up court considered the imposition of a constructive trust claimed by former employees in respect of certain post-retirement benefits in order to provide them with priority over the company's policyholders. The Court held that in considering the competing equities "in the context of a constructive trust claim against the assets of an insolvent constructive trustee, it is important to be aware of the interests of the insolvent's other creditors as well as those of the constructive trust claimant."[44] The Court then suggested that one possible way to "approach the matter of whether someone should be granted a preference over other creditors in an insolvency situation through the application of the constructive trust doctrine, is to ask whether that person, or group of persons, accepted the risk of the constructive trustee becoming insolvent."[45]

61. In this case, the Plaintiffs, as Unsecured Noteholders, accepted the risk under section 4.06(b) of the Indenture that they might rank behind an additional US$1.5 billion in senior secured debt,[46] as that section gave the Company the right to incur up to US$1.5 billion in additional senior secured debt ranking ahead of the unsecured noteholders.[47] Conversely, the Affected Non-Parties did not accept that they would face

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[43] *Canada (Attorney General) v. Confederation Life Insurance* (1995), 24 O.R. (3d) 717 (Ont. Gen. Div.); Secured Noteholders' Book of Authorities, Tab 34.

[44] *Ibid* at para. 221; Secured Noteholders' Book of Authorities, Tab 34.

[45] *Ibid* at para. 223: Secured Noteholders' Book of Authorities, Tab 34.

[46] Section 4.06(b) of Indenture; Record for Hearing, Tab 3(A), page 86..

[47] For example, the Plaintiffs accepted the risk that the Company issued US$1.5 billion in secured notes to third parties, and that the Plaintiffs would rank behind them in an insolvency. The identity of who holds that $1.5 billion in secured debt does not change the fact that the Plaintiffs accepted the risk of ranking behind that much in additional secured debt. Indeed, as publically traded notes, the identities of the noteholders cannot possibly influence whether or not the Plaintiffs accepted that risk or their reasonable expectations.

an insolvency situation in which the Plaintiffs (or this Court) would have unilaterally increased the amount of the outstanding second-lien claims.

62. Courts have refused to elevate the claims of creditors in situations where the creditors were far more sympathetic than the Plaintiffs. In *Wurth v. Estate of 1135096 Alberta Ltd.*,[48] the Alberta Court of Queen's Bench refused to impose a constructive trust over sale proceeds held by an insolvent debtor partnership. The plaintiff originally deposited funds into a partnership ("**126**"), to be held in trust by 126. Instead, 126 transferred a portion of the funds, without the consent or knowledge of the plaintiff, to a second partnership ("**113**"); 113 then expended the funds in the operation of its business. In addition, 126 paid a portion of the plaintiff's trust funds to a third-party contractor with respect to construction work performed by the contractor on a hotel owned by 113. 113 later became bankrupt and the hotel was sold. The plaintiff sought a constructive trust over the sale proceeds of the hotel held by 113 in an attempt to recover his stolen funds. However, even in that case, the court refused to impose a constructive trust on the basis that the sale proceeds could not be traced directly to any specific assets acquired with the stolen funds, and thus the plaintiff could not identify specific property that was the subject of the enrichment of 113. Without the ability to trace, the imposition of a constructive trust would be unfair to the other creditors since it would give the plaintiff priority over the other claimants which it did not otherwise have.

63. Just as constructive trusts cannot be used to vault the Plaintiffs to a higher priority position, the Plaintiffs should not be granted the Participation Remedy, the direct effect

[48] *Wurth v. Estate of 1135096 Alberta Ltd.*, 2014 ABQB 520 at paras. 25-26; Secured Noteholders' Book of Authorities, Tab 35.

of which would be to elevate their claims from an unsecured claim to a secured claim, to the direct detriment of the Affected Non-Parties.

Equity Claims Disguised as Creditor Claims

64. CCAA Courts are also careful to prevent claims derived from shareholders' equity interests from being characterized as unsecured claims. Courts have steadfastly held that claims must be characterized on the basis of the original underlying interest giving rise to the claims.

65. In *Sino-Forest Corp., Re.*,[49] the underwriters and auditors of the debtor company were treated as equity claimants with respect to their contractual claims for contribution and indemnity against the debtor company. In determining the proper character of their indemnity claims, the Ontario Court of Appeal focused on the fact that the claims underlying the indemnity were shareholder class action lawsuits, which are claims to enforce equity interests. Since the indemnity claims would only arise if the shareholder equity claims in the class action were successful, the Court held that the indemnity claims themselves were properly characterized as equity claims and, therefore, were subordinated to the claims of other creditors.

66. In *Nelson Financial Group Ltd., Re*,[50] certain preferred shareholders made a number of allegations against the debtor company, including fraud, misrepresentation, and unlawful conversion of notes into preferred shares. The claims included payments for declared but unpaid dividends, unperformed requests for redemption, damages resulting from

[49] *Sino-Forest Corp., Re.*, 2012 ONCA 816; Secured Noteholders' Book of Authorities, Tab 36.

[50] *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229; Secured Noteholders' Book of Authorities, Tab 37.

negligent or fraudulent misrepresentation, and payment of amounts due upon rescission. Justice Pepall (as she then was) found that, notwithstanding that certain characteristics of the claims were reminiscent of debt claims, the substance of the arrangement was a relationship based in equity. Accordingly, the claimants were prevented from elevating their claim from a subordinated equity claim to a debt claim.

67. Similarly, in *Central Capital Corp, Re*,[51] the Ontario Court of Appeal held that, notwithstanding that they held a right of retraction, preferred shareholders of a debtor company were not creditors and thus were not entitled to claim in the bankruptcy of the debtor. Even a claimant who had exercised his right of retraction but who had not yet been paid by the debtor corporation was properly classified as an equity claimant. This holding exemplifies the staunch adherence to the true character of the underlying claim when considering a potential creditor's claim in bankruptcy.

68. In this case, the Plaintiffs' interests derive from their interests as Unsecured Noteholders and they are attempting to use an oppression claim against only the Company to transform their unsecured claim into a secured claim. Just as allowing claimants to re-characterize equity claims as debt obligations would create an impermissible re-prioritization, allowing the Plaintiffs to re-characterize their unsecured claim as a secured claim through the guise of the Participation Remedy would similarly allow the Plaintiffs to unjustly elevate their claim to the detriment of the Affected Non-Parties.

[51] *Central Capital Corp, Re*, [1996] OJ No 359; Secured Noteholders' Book of Authorities, Tab 38.

Equitable Subordination

69. There have been a number of attempts in Canada, based on the alleged misconduct of a creditor, to re-order priorities using the US doctrine of equitable subordination, under which an impugned creditor's claim is subordinated to that of other innocent creditors.[52] The Ontario Court of Appeal recently held in *US Steel Inc. (Re)*[53] that judges have no jurisdiction to apply the doctrine in CCAA proceedings given that the effect is to reorder priorities as between the various creditors as opposed to dealing with the rights of the claimant vis-à-vis the debtor as of the date of the CCAA filing. As noted above, the Participation Remedy is merely a mechanism to change the relative priorities between the Plaintiffs and the Affected Non-Parties, an activity that was rejected by the CCAA Court in *US Steel*.[54]

(iii) The Plaintiffs are simply seeking to recharacterize their claim to better their position vis-à-vis the Other Creditors

70. The Plaintiffs' claim for the principal amount due under their Unsecured Notes is clearly a provable claim. Further, since that claim is for the full principal amount of the Notes, it already encompasses the damages the Plaintiffs would receive to remedy the alleged breach of contract and misrepresentations (since those damages are based on the drop of the market price for the Unsecured Notes, relative to the face value).

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[52] *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 at paras. 88-91; Secured Noteholders' Book of Authorities, 39; *Re Indalex*, 2013 SCC 6 at para. 77 [*Indalex*]; Secured Noteholders' Book of Authorities, Tab 40; *New Solutions Financial Corp. v. 952339 Ontario Ltd.*, 2007 29 C.B.R. (5th) 222 (Ont. S.C.J. [Commercial List]); Secured Noteholders' Book of Authorities, Tab 41.

[53] *US Steel Inc. (Re)*, 2016 ONCA 662 at para. 101; Secured Noteholders' Book of Authorities, Tab 42.

[54] *Ibid;* Secured Noteholders' Book of Authorities, Tab 42.

71. For this reason, it is clear that the Plaintiffs no longer need the oppression remedy to recover their losses from the alleged oppressive conduct.

72. This lays bare what the Plaintiffs are seeking to do through the guise of the oppression remedy – the request for the Participation Remedy is being pursued to change their provable unsecured claim that exists on the filing date to a secured claim.

73. As discussed above, the Courts have rebuffed the attempts of creditors to jump the priority queue by resorting to constructive trusts, recharacterization or equitable subordination. Similarly, this Court – as a CCAA court – should be very circumspect of any attempt to use the oppression remedy as a means of permitting a creditor to better their priority position vis-à-vis the other creditors.

74. The concepts of certainty and predictability are crucial to commercial law.[55] Priority rules in the CCAA provide clear rules upon which commercial players can operate, particularly within the context of insolvency proceedings. Violence would be done to commercial law and lending markets if established priority regimes could be regularly altered or circumvented on an *ad hoc* basis based on individual notions of fairness, and without any cogent evidence of misconduct at all on behalf of the other creditors. It could have an undesirable chilling effect on the market for financing by causing lenders to doubt their ability to recover on their security in the event of an insolvency, or on the market for distressed debt which provides liquidity for borrowers.[56]

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[55] *Indalex, supra,* para. 228 and 240; Secured Noteholders' Book of Authorities, Tab 40.

[56] *Re Pacific Shores Resort & Spa Ltd.,* 2013 BCSC 480 at para. 75; Secured Noteholders' Book of Authorities, Tab 43; *Re Hollinger Inc.*, 2013 ONSC 5431 at paras 40-42 (Ont. Sup. Ct. J. [Commercial List]); Secured Noteholders' Book of Authorities, Tab 44; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14 at paras. 64-

V. CONCLUSION AND RELIEF SOUGHT

75. For the reasons discussed above, regardless of whether or not the Plaintiffs can prove oppression against the Company, there is no basis for the Court to award the Participation Remedy sought by the Plaintiffs against any of the Affected Non-Parties:

(a) the Plaintiffs only have a claim against the Company, and not any of the Affected Non-Parties;

(b) given that the Plaintiffs' Claim is based on oppression and misrepresentation by the Company, with no claims made with respect to any misfeasance by any of the Affected Non-Parties, any remedy must be linked to the alleged wrong without impairing the rights or recoveries of any of the Affected Non-Parties;

(c) the Plaintiffs' Claim of harm is premised on the alleged diminution of value in the Unsecured Notes, which is the very type of claim that damages can easily remedy;

(d) the Affected Non-Parties are the ones who will be disproportionately and adversely affected by the Participation Remedy;

(e) the factors the Court is required to consider in granting an oppression or an order in the nature of a mandatory order (minimum interference, effects on the rights of others) all mitigate against granting the Participant Rights;

66; Secured Noteholders' Book of Authorities, Tab 45. In *Indalex*, *supra* at para. 240 , the Supreme Court of Canada cautioned that "a judicially ordered constructive trust, imposed long after the fact, is a remedy that tends to destabilize the certainty which is essential for commercial affairs and which is particularly important in financing a workout for an insolvent corporation."; Secured Noteholders' Book of Authorities, Tab 40

(f) the fact that the Company is in CCAA proceedings cannot be a factor militating in favour of granting the Participation Remedy because (i) the nature of the Plaintiffs' claim is established at the commencement of the CCAA proceedings, and that claim is an unsecured clam; and (ii) the existence of the CCAA proceeding requires the Court to ensure the relief granted does not disrupt the parties' relevant priority, and the Affected Non-Parties would be irreparably prejudiced by the granting of a Participation Remedy;

(g) the Plaintiffs have other avenues of recourse – in addition to its claims against the Company, it has claims against the directors and officers and their insurers; and

(h) it is a condition precedent to the restructuring proposal that the Plaintiffs' Claim does not have an adverse impact on the Secured Noteholders; accordingly, if the Participation Remedy is granted, the restructuring proposal may fail to the prejudice of not only the Affected Non-Parties, but also the first ranking bank lenders and the Company's other stakeholders, including trade creditors and its employees.

76. The Plaintiffs have not alleged any unlawful or oppressive conduct against any of the Secured Noteholders, the Other Secured Noteholders or the Unsecured Noteholders, and have not included any of them in the Claim. Accordingly, the Court should not fashion an equitable remedy, such as the Participation Remedy, that allows the Plaintiffs to jump the priority queue to the detriment of the Affected Non-Parties given that damages are the adequate and appropriate remedy.

77. For these reasons, the Secured Noteholders respectfully submit that the Plaintiffs are not entitled to the Participation Remedy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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