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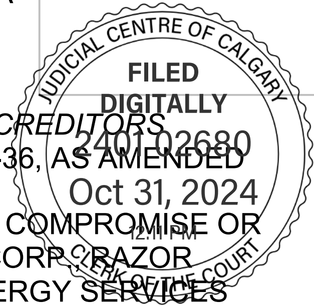

COURT FILE NUMBER	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
	AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 - 7 Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins, KC / Pantelis Kyriakakis / Nathan Stewart / Samantha Arbor Phone: 403-260-3531 / 3536 / 3534 / 3506 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca / sarbor@mccarthy.ca

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BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP. WITH RESPECT TO THE APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE M.H. BOURQUE

November 8, 2024 at 10:00 a.m.

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I. INTRODUCTION

1. This bench brief is submitted by Razor Energy Corp. ("**Razor Energy**"), Razor Holdings GP Corp. ("**Razor Holdings**"), and Blade Energy Services Corp. ("**Blade**", Blade, Razor Holdings, and Razor Energy are collectively referred to as, the "**Applicants**") in support of the Applicants' application, returnable on November 8, 2024 (the "**Application**"), seeking an Approval and Reverse Vesting Order, a Retained Contracts Order, a Stay Extension and Enhanced Monitor's Powers Order, and a Restricted Court Access Order (each as defined in the Notice of Application).

2. The central issue in the Application is whether this Honourable Court should approve the sale transaction and other steps (collectively, the "**Texcal Transaction**") contemplated by the Subscription Agreement, dated October 27, 2024 (the "**Subscription Agreement**"), between Razor Energy, as vendor, and Texcal Energy Canada Inc. (the "**Purchaser**"), as purchaser.

3. The Texcal Transaction contemplates that: (i) the Purchaser will obtain one hundred percent (100%) of the equity interests in Razor Energy (the parent company of the other Applicants), and all other equity interests in Razor Energy will be retracted and cancelled, for nominal consideration; (ii) the Applicants will retain all of their abandonment and reclamation obligations ("**AROs**"), deemed to be in the amount of approximately $115 million to $123 million, depending on methodology, and the majority of their existing property, including all petroleum and natural gas rights and working interests; (iii) the remaining property of the Applicants, along with all claims, liabilities, and encumbrances, other than certain specified retained, assumed, or permitted liabilities and encumbrances, will be transferred to a newly-incorporated entity ("**ResidualCo**"); and, (iv) the $8.375 million in proceeds, payable under the Subscription Agreement, and any other proceeds which FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of the Applicants, may subsequently realize from the property of ResidualCo, will be utilized to satisfy post-filing priority or regulatory claims, as applicable.

4. Various stakeholders have indicated disappointment with the outcome of these proceedings; particularly as it is anticipated that certain post-filing obligations of the Applicants will not be paid, and there will be no recoveries for many pre-filing secured and

unsecured creditors. There is, however, no better or in fact, other viable alternative transaction. The Texcal Transaction and the Subscription Agreement:

(a) are the sole going concern transaction available to the Applicants, will result in significant deleveraging of the Applicants' balance sheets, and are anticipated to preserve jobs for at least some of the Applicants' fifty-four (54) employees and contractors, while preserving numerous ongoing contractual relationships, for the ongoing benefit of the Applicants' counterparties;

(b) are the sole viable offer resulting from a robust, Court-approved sale and investment solicitation process (the "**SISP**"), conducted by a third-party sales advisor – the fairness, efficacy, and integrity of which has not been challenged by any party;

(c) are the only available alternative to transferring Razor Energy's significant AROs to the Orphan Well Association ("**OWA**"), which would result in all of the Applicants' other creditors and stakeholders receiving *nil* recoveries;

(d) will result in the immediate satisfaction of, among other claims, (i) all cure costs payable in respect of the Restricted Retained Contracts (as defined below); (ii) approximately $2.997 million in post-filing municipal taxes; and, (iii) all amounts owing, by Razor Energy, to: (A) the OWA, on account of the 2024 orphan fund levy; (B) the Alberta Energy Regulator ("**AER**"), on account of the 2024 administration fee; and, (C) the Alberta Petroleum Marketing Commission ("**APMC**"), on account of Razor Energy's unremitted royalty share for the month of January 2024; and,

(e) are anticipated to provide a pool of approximately $2.8 million in cash, against which creditor or other claims may be asserted, pursuant to a post-closing claims process to be conducted by the Monitor. ResidualCo will also obtain certain equipment, and is the beneficiary of any positive adjustment to the purchase price under the Subscription Agreement, with the result that additional funds may become available for the Applicants' creditors and stakeholders following closing of the Texcal Transaction.

5. Razor Energy holds working interests in approximately 2074 wells, of which 1245 are operated. The OWA's well inventory has more than doubled in 2024 alone. The transfer of Razor Energy's wells to the OWA would represent an unnecessary and added burden to the OWA and the stakeholders the OWA protects.

6. Razor Energy's board of directors and senior management have determined that the Texcal Transaction is in Razor Energy's best interests. In making such determination, it is noteworthy that there is no financial or pecuniary gain arising from the Texcal Transaction to Razor Energy's directors, officers, or shareholders. There are no distributions (beyond nominal consideration of $0.00001 per common share to shareholders), there is no key employee retention plan or other incentive payment to management or employees, and all existing officers and directors and senior management will resign upon closing of the Texcal Transaction.

7. There are no other alternatives. The Applicants are forecasted to run out of liquidity in mid-November 2024 if the Texcal Transaction does not close, and there is accordingly not enough time to source any other or better transaction (even assuming, despite the results of the SISP, that such a theoretical transaction might be possible). Finally, while the Texcal Transaction is complex, all of the relief sought by the Application is undisputably within the scope of this Honourable Court's jurisdiction.

8. In short, the relief sought by the Application is necessary, appropriate, and in the best interests of the Applicants' creditors and stakeholders; including various municipal governments, regulatory agencies, the Applicants' employees and contractors, contractual counterparties, working interest partners, the OWA, the AER, and the public.

II. FACTS

A. The SISP and SISP Results

9. On January 30, 2024, the Applicants and Razor Royalties Limited Partnership (together, the "**Razor Entities**") each filed Notices of Intention to Make a Proposal pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and commenced proceedings under the BIA (the "**NOI Proceedings**").

Affidavit #11 of Doug Bailey, sworn October 28, 2024 (the "Bailey #11 Affidavit"), at para. 3.

10. On February 28, 2024, the Honourable Justice N.J. Whitling granted an initial order (the "**Initial Order**"), in respect of the Applicants, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). Among other things, the Initial Order: (i) established a stay of proceedings against the Applicants for ten (10) days (the "**Stay Period**") and extended the stay of proceedings to Razor Royalties LP, for the duration of the Stay Period; (ii) appointed FTI Consulting Canada Inc. ("**FTI**") as Monitor of the Razor Entities; (iii) approved the SISP; and, (iv) authorized the Applicants, the Monitor, and Peters & Co. Ltd. ("**Peters & Co**"), in its capacity as the "**Sales Agent**" under the SISP, to carry out the SISP.

Bailey #11 Affidavit, at paras. 3 and 6.

The SISP

11. The SISP was broadly structured to solicit *en bloc* asset sales or going concern offers, or offers for individual assets.

Bailey #11 Affidavit, at para. 13.

12. The SISP contained the following key dates and terms:

(a) the Sales Agent was the sole contact for all interested parties, and responsible for administering the SISP;

(b) the SISP commenced on February 6, 2024, with the distribution of an information memorandum (the "**Information Memorandum**") to approximately 400 potentially interested parties, including potential strategic and financial purchasers;

(c) the SISP was posted in the Daily Oil Bulletin on February 7 and February 8, 2024, and the BOE Report, commencing on February 7, 2024.

(d) the Sales Agent and Razor Energy prepared a virtual data room ("**VDR**") containing financial and technical information regarding Razor Energy's petroleum and natural gas assets. Interested parties who wished to obtain access to the VDR were required to execute a confidentiality agreement ("**CA**");

(e) as the SISP permitted offers for specific assets, the Information Memorandum and additional information included in the VDR identified, among other things, ten (10)

distinct geographically delineated asset packages, as potential acquisition targets for asset-specific bids;

(f) submissions from interested parties were required to be submitted by 12:00 p.m. MST on March 12, 2024 (the "**Bid Deadline**"); and,

(g) Razor Energy, in consultation with the Sales Agent and the Monitor, would assess all bids received, to determine the highest and best bid(s), and the Applicants would seek Court approval of one or more transactions following such determination and the execution and delivery of definitive transaction documentation. Preference would be given to any bid(s) which would result in the sale of all of Razor Energy's petroleum and natural gas assets to one or more licensed operators.

Bailey #11 Affidavit, at para. 17 and Exhibit "A".

13. The conduct of the robust Court-approved SISP was sufficiently broad in canvassing the market, for parties interested in the Applicants' business and assets. No parties or potential bidders have alleged any unfairness in the working of the SISP or in the structure or timelines thereunder.

Bailey #11 Affidavit, at para. 18.

SISP Results

14. Pursuant to the SISP:

(a) fifty-three (53) CAs were executed and the parties to the CAs were provided access to the VDR;

(b) twenty-one (21) indicative bids were received to purchase various asset packages. The majority of such indicative bids were "non-conforming bids", and did not comply with some or all of the bidding requirements under the SISP. Specifically, in many cases, bidders only bid on specific producing wells for inclusion in their bids, which would result in a significant number of inactive wells and "stranded" liabilities being left behind; and,

(c) one (1) *en bloc* corporate offer was received, being the Solidarity LOI (as defined below).

Bailey #11 Affidavit, at paras. 19-20 and 23, and Confidential Exhibit "1".

15. The material issues with the non-selected asset bids included, among other things, that:

    (a) the asset-based indicative bids did not, collectively, provide a solution for all of Razor Energy's AROs;

    (b) a number of bids included financing conditions or provided no details on the proposed sources of funds;

    (c) certain bidders did not have regulatory approval to operate petroleum and natural gas assets;

    (d) many indicative bids excluded all or a significant portion of the associated AROs or non-producing assets; and,

    (e) some bids did not provide sufficient consideration for the selected assets.

Bailey #11 Affidavit, at para. 22 and Confidential Exhibit "1".

16. As a result, in consultation with the Sales Advisor and the Monitor, Razor Energy determined that the indicative asset bids (excluding the HWN LOI, as defined below) were not viable.

Bailey #11 Affidavit, at para. 21.

17. Only one (1) *en bloc* corporate offer was received pursuant to the SISP; being a non-binding letter of intent, dated March 28, 2024 (the "**Solidarity LOI**"), submitted by Solidarity Holdings Inc. ("**Solidarity**").

Bailey #11 Affidavit, at para. 23 and Exhibit "B".

18. The Solidarity LOI was selected to move forward because it was the only bid which addressed all of the Razor Entities' assets, working interests, and associated AROs.

Bailey #11 Affidavit, at para. 24.

19. In addition to the Solidarity LOI, and following discussions and negotiations with Solidarity, Razor Energy determined that it would pursue a letter of intent received from HWN (the "**HWN LOI**"), which formed the basis for a since-completed court-approved transaction (collectively, the transactions contemplated by the Solidarity LOI and the HWN LOI are

referred to as, the "**SISP Transactions**"). Such determination was made in consultation with Solidarity, Peters & Co., and the Monitor, and for the following reasons:

Approval and Vesting Order (HWN Transaction), granted by Justice D.R. Mah on July 17, 2024.

(a) consideration under the HWN LOI, for the assets included within the HWN Transaction (the "**HWN Assets**"), was in excess of the imputed value of the HWN Assets under the Solidarity LOI;

(b) HWN was the natural purchaser for the HWN Assets, because HWN was the operator of all of the HWN Assets; and,

(c) the HWN LOI was not subject to any financing conditions and contemplated a cash offer for the HWN Assets.

Bailey #11 Affidavit, at para. 25.

20. The selection of the bids underlying the SISP Transactions took into account various factors, including, among others, that:

(a) the Solidarity LOI represented the highest and best overall bid received under the SISP and was the only bid that contemplated a going concern transaction and provided the means of addressing all of the AROs of the Razor Entities (deemed to be in the amount of approximately $115 million to $123 million, depending on methodology);

(b) Solidarity was and remained engaged in due diligence and, in the Sales Advisor's view, had sufficient financial capacity to fund the acquisition contemplated by the Solidarity LOI; and,

(c) the Monitor advised Razor Energy that, in the Monitor's view, the SISP Transactions represented the best overall recovery in the circumstances. Razor Energy's management shared the Monitor's view, based upon a review of the various bids received under the SISP and consultation with the Monitor and the Sales Agent.

Bailey #11 Affidavit, at para. 27.

Initial Consultation with Stakeholders

21. It was apparent that the proceeds of the Potential Transactions would not be sufficient to repay all creditors of the Razor Entities, including those holding security interests. As a result, following consultation with the Monitor, Razor Energy arranged a confidential and without prejudice virtual meeting with key stakeholders and affected creditors (the "**Virtual Meeting**"). The purpose of the Virtual Meeting was to present the SISP Transactions, the alternatives to the SISP Transactions, and the proposed distributions under the SISP Transactions, as then existing and in the form contemplated at such time, to the Razor Entities' key stakeholders.

Bailey #11 Affidavit, at para. 28.

22. On May 16, 2024, the Applicants' counsel sent an email to eleven key stakeholders including specific confidentiality terms to be adhered to, as a prerequisite to participation in the Virtual Meeting. Nine of those stakeholders agreed to the confidentiality terms and attended the Virtual Meeting, including:

(a) governmental agencies: the AER, OWA, and the Alberta Petroleum Marketing Commission ("**APMC**");

(b) counsel to certain municipal authorities, namely Big Lakes County and Vulcan County;

(c) counsel to Arena Investors, LP ("**Arena**"), a secured creditor;

(d) counsel to Solidarity; and,

(e) counsel to Razor Energy's largest working interest partners, Conifer Energy Inc. ("**Conifer**") and Canadian Natural Resources Ltd. ("**CNRL**").

Bailey #11 Affidavit, at para. 29.

23. Following the Virtual Meeting, the Applicants received various information requests from key stakeholders and engaged with various parties concerning the proposed transaction under the Solidarity LOI, which was then referred to as the "**Corporate Transaction**".

24. Among other things:

(a) on May 28, 2024 and June 25, 2024, Conifer, through its counsel, delivered correspondence to counsel to Razor Energy and counsel to the Monitor (collectively, the "**May and June Conifer Letters**") containing enquiries regarding the proposed Corporate Transaction and a dispute between Razor Energy and Conifer relating to a purported right of first refusal asserted by Conifer. Razor Energy, through its counsel, responded to the May and June Conifer Letters by way of a letter dated July 2, 2024 (the "**July 2 Response**").

Copies of the May and June Conifer Letters and the July 2 Response were attached as Exhibits "C", "D", and "E", to the Affidavit #8 of D. Bailey, sworn on July 10, 2024

(b) counsel to the Applicants met with counsel to Big Lakes County and counsel to Vulcan County on June 5, 2024, to discuss structuring and transactional matters, with further correspondence and discussions following in September 2024 and afterwards; and

(c) Doug Bailey of Razor Energy met with Ron Laing, Chief Commercial and Corporate Development Officer of CNRL, in person and by telephone on July 24, 2024, to discuss requests made by CNRL with respect to Solidarity.

Bailey #11 Affidavit, at para. 30.

The Texcal Transaction

25. Razor Energy and Solidarity have been engaged in negotiations concerning the proposed Corporate Transaction and, ultimately, the Texcal Transaction, since acceptance of the Solidarity LOI. As a result of various external factors and Solidarity's due diligence process, the transaction has changed from that originally contemplated by the non-binding Solidarity LOI first presented to the Razor Entities' stakeholders, at the Virtual Meeting.

Bailey #11 Affidavit, at para. 31.

26. The initial Solidarity LOI had contemplated that: (i) the retained liabilities of the Razor Entities, following the completion of the transaction, would include all AROs, other than certain non-operated assets located in the Swan Hills region of Alberta (the "**Swan Hills Unit 1 Assets**"); (ii) the Swan Hills Unit 1 Assets were to be included as retained assets, as were the vast majority of Razor Energy's petroleum and natural gas rights; and, (iii) the excluded assets would consist of all equity interests held by Razor Energy in Blade or

FutEra, along with a small subset of Razor Energy's wells, facilities, pipelines and associated rights and assets, as identified in Schedule "A" to the Solidarity LOI.

Bailey #11 Affidavit, at para. 36.

27. Following negotiations throughout June and July 2024, and various conceptual iterations of the Corporate Transaction, Razor Energy delivered a draft copy of the Subscription Agreement to Solidarity, through their respective counsel, on August 16, 2024 (the "**Original Draft Subscription Agreement**"). The Original Draft Subscription Agreement contemplated total consideration of approximately $10,000,000, the assumption of the Arena debt, and the exclusion of the Swan Hills Unit 1 Assets (as defined below).

Bailey #11 Affidavit, at para. 32.

28. On August 13, 2024, representatives of Razor Energy and the Monitor met with representatives of the AER to discuss the proposed Corporate Transaction (the "**August 13 Meeting**").

Bailey #11 Affidavit, at para. 33.

29. The AER subsequently delivered a letter to Razor Energy, dated August 23, 2024 (the "**August 23 Letter**") setting out the AER's position that "[i]f any of Razor's non-operated working interest holdings are not included as part of the corporate transaction or assumed by another responsible party, the AER would not support that transaction."

Bailey #11 Affidavit, at para. 34.

Finalization of the Texcal Transaction

30. Following Razor Energy's receipt of the August 23 Letter from the AER, it became apparent that the form of Corporate Transaction contemplated by the Original Draft Subscription Agreement could not be completed. Accordingly, Solidarity and the Razor Entities renewed their negotiations regarding the proposed transaction, in an effort to reach an executable agreement. As a result, the Swan Hills Unit 1 Assets (as defined below) were reintegrated into the proposed Corporate Transaction, to ensure that none of Razor Energy's working interests would be disclaimed.

Bailey #11 Affidavit, at para. 35.

31. Accordingly, in September and October 2024, Razor Energy and Solidarity worked to finalize the Corporate Transaction in an executable form, which would include the retention of the Swan Hills Unit 1 Assets.

32. The inclusion of the Swan Hills Unit 1 Assets necessitated a number of changes to the proposed transaction.

33. Negotiations concerning the Subscription Agreement continued until October 27, 2024, when the parties reached an agreement on the final terms. The Purchaser is a newly formed entity that is part of the same corporate group as Solidarity.

Bailey #11 Affidavit, at para. 37.

B. The Subscription Agreement

Key Terms of the Subscription Agreement

34. The key terms of the Subscription Agreement are described in detail in the Bailey #11 Affidavit.

35. Upon closing and the completion of the Closing Sequence (as defined below), the Texcal Transaction contemplated by the Subscription Agreement will result in the following (with all capitalized terms not otherwise defined having the same meaning as given to such terms in the Subscription Agreement):

(a) a Subscription Price in the amount of $8,375,000, payable by way of a $1 million Deposit and with balance due on closing;

(b) the Purchaser obtaining will obtain one hundred percent (100%) of the equity interests in Razor Energy (the parent company of the other Applicants) (the "**Subscribed Shares**"), and all other equity interests in Razor Energy will be retracted and cancelled;

(c) Razor Energy retaining the specified Retained Contracts and Retained Assets, free and clear of all claims and encumbrances, other than the Permitted Encumbrances and Assumed Liabilities, as described below;

(d) Razor Energy retaining all of its AROs and all of its current operated and non-operated working interests;

(e) the Excluded Assets, Excluded Liabilities, and Excluded Contracts being vested in ResidualCo;

(f) all Post-Filing Municipal Taxes being paid, to the Monitor, on Closing, and distributed to the applicable parties thereafter; other than those Post-Filing Municipal Taxes in respect of which the Purchaser has entered into a tax payment plan or other agreement regarding payment thereof with the applicable municipal authority(ies), prior to Closing, which shall instead be retained by Razor Energy;

(g) all Cure Costs in respect of the Restricted Retained Contracts being paid to the Monitor on Closing, and distributed to the applicable counterparties thereafter;

(h) pursuant to the Approval and Reverse Vesting Order, the payment, by the Monitor following Closing, of the Regulatory Payments (as defined below), from the cash proceeds of the transaction, to the AER, the OWA, and the APMC; and,

(i) the balance of the Cash to Close, after accounting for the Post-Filing Municipal Taxes, the Cure Costs, the Regulatory Payments, and payment of any accrued amounts under the priority charges granted pursuant to the ARIO, being paid to the Monitor and held pending further order of the Court.

Bailey #11 Affidavit, at paras. 39-40, and Exhibit "C".

36. The Texcal Transaction provides significant benefits to stakeholders of the Razor Entities. Among other things:

(a) the Texcal Transaction will preserve the employment of the Razor Entities' employees;

(b) most contracts, with suppliers, vendors, creditors, and other counterparties will continue in the normal course for the ongoing benefit of all counterparties thereto;

(c) the operations of the Razor Entities will be preserved and continue uninterrupted, in the normal course;

(d) all cure costs relating to the Restricted Retained Contracts will be satisfied;

(e) the Razor Entities will exit the within proceedings (the "**CCAA Proceedings**") with a significantly deleveraged balance sheet;

(f) on closing, the Razor Entities will exit these CCAA Proceedings, following which limited matters will remain for the administration and wind down of ResidualCo, potentially including further distributions to creditors, and the conclusion of these CCAA Proceedings; and,

(g) the Texcal Transaction is anticipated to provide a pool of approximately $2.8 million in cash, against which creditor or other claims may be asserted, pursuant to a post-closing claims process to be conducted by the Monitor. ResidualCo will also obtain certain equipment, and is the beneficiary of any positive adjustment to the purchase price under the Subscription Agreement, with the result that additional funds may become available for the Applicants' creditors and stakeholders following closing of the Texcal Transaction.

Bailey #11 Affidavit, at para. 41.

C. The Reverse Vesting Structure

37. The Texcal Transaction contemplated in the Subscription Agreement has been structured to close via a "reverse vesting" transaction. In essence, instead of providing for a traditional asset sale transaction where all acquired assets are purchased and transferred to a purchaser, on a "free and clear" basis, and all excluded assets, excluded contracts and excluded liabilities remain with a debtor company, the Texcal Transaction provides for a share sale transaction whereby:

(a) the Purchaser will obtain the Subscribed Shares, which will constitute one hundred percent (100%) of all issued and outstanding common shares of Razor Energy, at the Closing Time;

(b) all Existing Shares of Razor Energy will be retracted and cancelled, for nominal consideration;

(c) the Razor Entities will retain the Retained Assets and the Retained Contracts, subject to the Permitted Encumbrances, and the Assumed Liabilities;

(d) all Excluded Assets, Excluded Contracts, and Excluded Liabilities of the Razor Entities will be transferred to and vest in ResidualCo, pursuant to and in accordance with the Approval Orders and the Subscription Agreement; and,

(e) all Claims and Encumbrances will be discharged, as and against the Razor Entities, the Retained Assets, and the Retained Contracts, save and except for all Permitted Encumbrances and Assumed Liabilities.

Bailey #11 Affidavit, at para. 43.

38. The reverse vesting structure is intended to preserve certain assets and attributes of the Razor Entities which are not capable of being transferred or otherwise monetized, or would be difficult to do so, in an asset sale. Those include:

(a) Texcal believes there may be certain tax attributes which could be preserved in the proposed transaction structure;

(b) various licenses and permits held by Razor Energy with the AER (the "**AER Licenses**"), Alberta Boilers Safety Association ("**ABSA**"), Association of Professional Engineers and Geoscientists of Alberta ("**APEGA**"), would require re-issuance to a purchaser, if an asset transfer was implemented; and,

(c) outside of a reverse vesting structure, the Applicants would need to re-establish or enter into new arrangements with respect to various other commercial counterparties including, but not limited to, contracts with consultants that provide field labour and leases with certain landlords.

Bailey #11 Affidavit, at para. 44.

39. The AER Licenses may only be transferred with leave of the AER. In addition, any such transfer is subject to the AER's *Directive 067 – Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* ("**Directive 067**"), which incorporates a holistic assessment of the transferor and transferee and a high degree of scrutiny prior to the approval of any transfer. As a result, in a traditional asset sale transaction structure, the AER Licenses would be difficult to transfer to a purchaser and, to the extent that such transfer is possible, the steps required to proceed with such transfer will likely result in additional delays, costs, and uncertainty. In addition, such a transaction could not close until the process contemplated under Directive 067 is complete. While Directive 067

continues to apply in the contemplated reverse vesting structure under the Texcal Transaction, the assessment can be completed following closing, during which time Razor Energy's business can continue operations.

Bailey #11 Affidavit, at para. 46.

40. Neither the ABSA permit, which is required to operate the Razor Entities' pipelines, nor the APEGA permit, which is required for Razor Energy to provide engineering services, are transferable. Any purchaser of the Razor Entities' business under a traditional asset sale and vesting order would be required to obtain their own permits from ABSA and APEGA before they could continue operations. However, like the AER licenses, neither of these permits is affected by a change of control in the upstream ownership structure of the applicable counterparty and so will continue in the normal course following completion of the Texcal Transaction.

Bailey #11 Affidavit, at para. 48.

41. For this reason, the only feasible structure for the Texcal Transaction is a sale of equity by means of the Approval and Reverse Vesting Order, in large part to permit the Applicants to maintain their existing arrangements and attributes, to the extent possible in the circumstances. Any other structure risks additional delay and, potentially, the loss of the AER Licenses if an assignment is not approved by the AER. These licences are essential to the Razor Entities' business, on which its going concern value is reliant. The value offered for the Razor Entities' business in the Texcal Transaction is based on its value as a going concern business and the implementation of the Texcal Transaction by way of a reverse vesting structure.

Bailey #11 Affidavit, at para. 47-49.

42. The Subscription Agreement also maintains the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the Applicants, though no assignment of contracts is contemplated, the Subscription Agreement provides for all Retained Contracts to remain with the Applicants, with cure costs being paid in respect of any Restricted Retained Contracts (as defined and described below).

Bailey #11 Affidavit, at para. 50.

D. The Releases

43. The Subscription Agreement and the Approval and Reverse Vesting Order contemplate the following releases in favour of persons and entities that have made material contributions to these CCAA Proceedings and the restructuring of the Razor Entities:

    (a) **Directors and Officers, the Monitor, and employees, legal counsel, and advisors of the Monitor, ResidualCo, and the Razor Entities**: releases, in favour of (i) the present directors and officers of the Applicants (the "**Directors and Officers**"), employees, legal counsel and advisors of ResidualCo and the Razor Entities, and (ii) the Monitor and its legal counsel, and their respective present and former directors, officers, partners, employees, and advisors, with respect to any and all claims and liabilities based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the issuance of the "**Monitor's Certificate**" (as defined in the proposed form of Approval and Reverse Vesting Order) (in the case of the Directors and Officers, in their respective capacities as directors or officers, as the case may be, of the applicable Razor Entities) or in connection with the Texcal Transaction (including the reorganization contemplated by the Subscription Agreement (the "**Reorganization**") and the Closing Sequence) or completed pursuant to the terms of the Approval and Reverse Vesting Order, excluding any claim for gross negligence or wilful misconduct or any claim that is not permitted to be released pursuant to Sections 5.1(2) of the CCAA; and,

    (b) **The Sales Advisor:** releases, in favour of (i) the present and former directors, officers, employees, legal counsel and advisors of Peters & Co., and (ii) Peters & Co in its capacity as Sales Agent, with respect to any and all claims and liabilities based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place prior to the issuance of the Monitor's Certificate in connection with the Texcal Transaction or the SISP (as defined in the Amended and Restated Initial Order, granted by the Honourable Justice M.E. Burns on March 6, 2024) or completed pursuant to the terms of the Approval and Reverse Vesting Order, excluding any claim for gross negligence or wilful misconduct.

Bailey #11 Affidavit, at para. 55.

44. In addition to the court-ordered releases contemplated by the Texcal Transaction, the Subscription Agreement contemplates the delivery of the "**ResidualCo Release**", an irrevocable mutual release between ResidualCo, on the one hand, and the Applicants and the Monitor, on the other hand. The ResidualCo Release is a contractual release. The Applicants do not seek Court approval of same, except indirectly in connection with the approval of the Texcal Transaction overall.

Bailey #11 Affidavit, at para. 58.

Channeling Relief

45. Following the filing of the Monitor's Certificate, the proposed Approval and Reverse Vesting Order provides that the recovery of any person having, or claiming any entitlement or compensation relating to any and all present and future claims (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations of any nature or kind whatsoever (whether direct or indirect, known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity, and whether based in statute or otherwise) against any one or more of the Directors and Officers (defined to be those directors and officers as at and prior to closing) of the Razor Entities shall be limited to the proceeds of the applicable insurance policies held by the Razor Entities (collectively, the "**Channeling Relief**").

Bailey #11 Affidavit, at para. 59.

E. Creditor Matters

Disputes with CNRL and Conifer Concerning Post-Filing Obligations

46. As described in the Bailey #11 Affidavit, Razor Energy has disputed certain amounts claimed by Conifer and CNRL to be owing, including with respect to post-filing obligations. The dispute with Conifer is subject to ongoing litigation, including multiple applications brought by Conifer in these CCAA Proceedings (which were dismissed) and one application brought by Razor Energy in the NOI Proceedings (which was granted) and two (2) ongoing appeals by Conifer.

47. The dispute with CNRL relates to certain authorization for expenditure requests which Razor Energy does not believe were approved in the manner required under the applicable agreements. These disputes are incapable of resolution in the near term, particularly given that: (i) limited staff are available to attend to these disputes; (ii) management and remaining accounting staff of the Razor Entities are directing their attention to the Texcal Transaction and to preserving operations pending the completion of same; and, (iii) the Razor Entities have limited liquidity and no time to solve these disputes.

Bailey #11 Affidavit, at paras. 67-68.

48. The following table sets out the potential range of outcomes of the disputes:

Dispute / Party	High (Claimed)	Low (Razor Energy Estimate)
CNRL	Approximately $300,000	$0
Conifer	$1,112,603.65 (excludes the amount of $771,144.36, which Razor Energy agrees is owing)	$0
	Total Conifer: $1,883,748.01 (Inclusive of disputed and undisputed amounts)	**Total Conifer: $771,144.36** (Inclusive of disputed and undisputed amounts)

Bailey #11 Affidavit, at para. 69 and Exhibit "F".

The GORRs

49. Razor Royalties LP is a party to the Second Amended and Restated Term Loan Agreement, dated June 16, 2023 (the "**Arena Loan Agreement**"), between Razor Royalties LP, by its general partner, Razor Holdings, as borrower, Razor Energy, as parent guarantor, Swan Hills Geothermal Power Corp. ("**SHGPC**"), as borrower and guarantor, 405 Dolomite, as agent (the "**Agent**"), and the lenders signatory thereto (being 405 Dolomite and Arena Limited SPV, LLC), as lenders. Pursuant to the Arena Loan Agreement, the lenders made available three senior secured term loan facilities in the initial maximum principal amounts of USD$11,042,617, USD$8,833,922.26, and USD$11,042,403, respectively.

Bailey #11 Affidavit, at para. 70.

50. SHGPC has since been released from its obligations under the Arena Loan Agreement, pursuant to the Release (as defined and described in the Initial Affidavit).

51. The current approximate amount outstanding under the Arena Loan Agreement is $7,012,086.

Bailey #11 Affidavit, at para. 71.

52. In connection with the Arena Loan Agreement and certain predecessor loan agreements, Razor Energy and Razor Royalties LP entered into the: (i) overriding royalty agreement dated February 16, 2021, between Razor Energy, as royalty payor, and Razor Royalties LP, as royalty owner, as amended by the amending agreement dated March 9, 2022; and, (ii) overriding royalty agreement, dated August 12, 2021, between Razor Energy, as royalty payor, and Razor Royalties LP, as royalty owner (collectively, the "**GORR Agreements**").

Bailey #11 Affidavit, at para. 72 and Exhibits "G" and "H".

53. Pursuant to the GORR Agreements, among other things, Razor Energy granted, to Razor Royalties, a ten percent (10%) gross overriding royalty interest in all of its petroleum and natural gas lands and interests (collectively, the "**GORRs**").

Bailey #11 Affidavit, at para. 73.

54. The security in relation to the Arena Loan Agreement is described in the Initial Affidavit and includes, among other things, the: (i) Specific Assignment of Contract, dated as of August 12, 2021, between Razor Royalties LP, by its general partner, Razor Holdings, as assignor, and the Agent, as assignee; and, (ii) Specific Assignment of Contract, dated as of August 12, 2021, between Razor Royalties LP, by its general partner, Razor Holdings, as assignor, and the Agent, as assignee (collectively, the "**Assignment Agreements**").

Bailey #11 Affidavit, at para. 74 and Exhibits "I" and "J".

55. Arena is not a party to the GORR Agreements; as detailed below, the Assignment Agreements are security for the Arena Loan Agreement, and not absolute assignments.

56. The GORRs are synthetic royalties and the structure of the Arena credit was that the GORRs were to approximate the regularly scheduled monthly payments to Arena. Razor Energy has never paid the amount of the GORRs to Razor Royalties LP as contemplated

in the GORR Agreements. Instead, Razor Energy historically advanced funds to Razor Royalties LP in an amount sufficient to cover Razor Royalties LP's obligations to Arena under the Arena Loan Agreement, for any given period.

Bailey #11 Affidavit, at para. 75.

57. The Subscription Agreement contemplates that the GORRs will not be extinguished, as between Razor Royalties LP and Razor Energy. However, all claims, liabilities, security, interests, and rights, over the GORRs, the GORR Agreements, including the Assignment Agreements, will be vested out of the Razor Entities, as Excluded Liabilities (as defined in the Subscription Agreement).

Bailey #11 Affidavit, at para. 76. The "Excluded Liabilities" in relation to the GORRs are particularized in Schedule "D" to the Subscription Agreement, attached as Exhibit "B" to the Bailey #11 Affidavit (Bates No. 152).

F. Retained Contracts Order

58. The Subscription Agreement identifies the Restricted Contracts and Restricted Retained Contracts as set out in Schedule "I" (the "**Retained Contracts Schedule**").

Bailey #11 Affidavit, at para. 61 and Exhibit "D".

59. In the Subscription Agreement, the term "Retained Contract" refers to those contracts listed in the Retained Contracts Schedule, collectively. The term "Restricted Retained Contract" refers to a Retained Contract in respect of which the assignment of the rights and benefits of the applicable Razor Entity thereunder expressly requires the consent of the counterparty(ies) to such Retained Contract, and such consent is not obtained prior to Closing.

Bailey #11 Affidavit, at para. 62 and Exhibit "C".

60. The Subscription Agreement contemplates payment of an amount in respect of all Cure Costs (as defined in the Subscription Agreement), to be held by the Monitor and distributed to the applicable counterparties to the Restricted Retained Contracts, following completion of the Closing Sequence.

Bailey #11 Affidavit, at para. 63.

61. Razor Energy has assessed the amounts owing to the counterparties of the Restricted Retained Contracts, based upon Razor Energy's books and records. The Bailey #11

Affidavit: (i) sets out the particulars of each Restricted Retained Contract and the amount, if any, believed to be owing to the counterparties thereunder; (ii) exhibits a table containing details regarding the Restricted Retained Contracts and a summary of any amounts owing thereunder; and, (iii) exhibits spreadsheets containing summaries of the underlying vendor invoices.

Bailey #11 Affidavit, at paras. 64 – 65 and Exhibits "E" – "F".

G. Ancillary Relief

Monitor's Enhanced Powers

62. Following the completion of the Texcal Transaction, ResidualCo will have no operations but will have assets and property requiring administration and, eventually, distribution, within the CCAA proceedings. However, ResidualCo will have no employees or management and will be unable to manage its own affairs. Accordingly, the proposed enhanced powers with respect to ResidualCo (the "**Enhanced Powers**"), to be granted to the Monitor, under the Stay Extension and Enhanced Monitor's Powers Order, are necessary in order to enable ResidualCo to take steps necessary to conclude these CCAA Proceedings.

Bailey #11 Affidavit, at para. 77.

Stay Extension

63. The current Stay Period will expire on November 8, 2024, unless the Stay Period is extended by further order of this Honourable Court.

64. The Applicants seek an initial extension of the Stay Period, up to and including November 30, 2024, in order to, among other things, provide the Applicants with the time necessary to close the Texcal Transaction.

Bailey #11 Affidavit, at para. 81.

65. The Applicants have sufficient liquidity to fund the necessary obligations, if the Texcal Transaction is approved, up to the end of the proposed extension of the Stay Period.

Bailey #11 Affidavit, at para. 82.

66. It is further proposed that, upon the filing of the Monitor's Certificate, the Stay Period (which will then apply only to ResidualCo) will be extended to June 30, 2025, in order to provide an additional period of time within which the Monitor, exercising the Enhanced Powers, may administer ResidualCo.

Bailey #11 Affidavit, at para. 83.

Corporate Relief

67. The proposed Approval and Reverse Vesting Order would dispense with statutory notice requirements with respect to the articles of amalgamation.

III. ISSUES

68. The issues to be determined in connection with the Application are whether:

(a) the Subscription Agreement and Texcal Transaction should be approved;

(b) a reverse vesting structure is necessary and appropriate;

(c) the Retained Contracts Order and Retained Contracts Stay should be granted;

(d) the Monitor should be granted the Expanded Powers;

(e) the Stay Period should be extended;

(f) the Releases and the Channeling Relief are appropriate;

(g) Arena's security interest in the GORRs should vest in ResidualCo;

(h) the Corporate Relief should be granted; and

(i) the Restricted Court Access Order should be granted.

IV. LAW

A. Approval of Sales Outside the Ordinary Course of Business

69. Section 36 of the CCAA permits a court to authorize a debtor company to sell assets outside the ordinary course of business and states, in pertinent part:

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ["CCAA"], s. 36(1)-(3) [Book of Authorities ("BOA") TAB 1].**

70. Courts considering sale approval applications in CCAA proceedings frequently consider the factors set out in *Royal Bank of Canada v Soundair Corp.* ("***Soundair***"), which partially overlap with those under Section 36(3) of the CCAA. The *Soundair* factors are as follows:

"1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;

2. The interests of all parties;

3. The efficacy and integrity of the process by which offers were obtained; and

4. Whether there has been any unfairness in the sales process."

***Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), at pages 8-9 [BOA TAB 39];**
***Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214 at paras. 15-17 [*Invico*] [BOA TAB 26];**
***Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332, at paras. 29, 40, 49, 53, 60, 63 [BOA TAB 13];**
***Veris Gold Corp*, 2015 BCSC 1204 [*Veris Gold*], at paras. 24-25 [BOA TAB 45].**

B. Reverse Vesting Orders

71. The statutory jurisdiction to grant a reverse vesting order, in the context of a sale approval application, is found under Sections 11 and 36 of the CCAA.

***Harte Gold Corp. (Re)*, 2022 ONSC 653, at paras 24 – 37 [*Harte Gold*] [BOA TAB 18];**
***Invico,* at para. 18 [BOA TAB 26];**
***Quest University Canada (Re)*, 2020 BCSC 1883, at paras. 127 – 128, 136, 150, 174 [*Quest*] [BOA TAB 36].**

72. Section 11 of the CCAA permits a Court to make any order that is appropriate in the circumstances. Specifically, Section 11 of the CCAA states:

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

CCAA, s. 11 [BOA TAB 1].

73. In determining whether it is appropriate to grant a reverse vesting order, in addition to the factors set out under Section 36(3) of the CCAA and the *Soundair* factors, courts have frequently applied the factors set out by Justice Penny in *Re Harte Gold*, which include:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

***Harte Gold*, at para. 38 [BOA TAB 18].**

C. Assignment of Contracts

74. Section 11.3 of the CCAA permits an assignment of agreements to be ordered by the Court, provided certain statutory prerequisites are met:

> **Assignment of agreements**
>
> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
>
> **Exceptions**
>
> (2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under
>
> (a) an agreement entered into on or after the day on which proceedings commence under this Act;
>
> (b) an eligible financial contract; or
>
> (c) a collective agreement.
>
> **Factors to be considered**
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.
>
> **Restriction**
>
> (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

CCAA, s. 11.3 [BOA TAB 1].

D. Royalty Agreements as Financial Interests and Interests in Land

75. A royalty agreement may constitute an interest in land if it satisfies the following two-part test, as set out in *Bank of Montreal v Dynex Petroleum Ltd.*:

> "1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land."

***Bank of Montreal v Dynex Petroleum Ltd.*, 2002 SCC 7 [*Dynex*], at para. 22 [BOA TAB 10];**
***Prairiesky Royalty Ltd. v Yangarra Resources Ltd.*, 2023 ABKB 11 at para. 20 [*Yangarra*] [BOA TAB 35].**

76. In examining the intention of the parties to establish an interest in land, the Court should consider "the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words".

***Third Eye Capital Corporation v. Ressources Dianor Inc.*, 2018 ONCA 253 [Dianor #1] at para. 63 [BOA TAB 42];**
***Bank of Montreal v. Enchant Resources Ltd.*, 1999 ABCA 363 at para. 73 [BOA TAB 11].**

77. Subjective evidence of the parties' intentions, such as post-contract conduct is presumptively inadmissible, except where the words of an agreement "can be reasonably interpreted to have more than one meaning", resulting in ambiguity as to whether the parties intended for the royalty to be an interest in land.

***Yangarra*, at para. 62 [BOA TAB 35].**

78. In cases where a royalty agreement is an interest in land, it may nonetheless be vested in appropriate circumstances. As stated by the Ontario Court of Appeal in *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*:

> Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.
>
> If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and

whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

***Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, at paras. 109-110 [*Dianor* #2] [BOA TAB 43].**

E. Releases Generally

79. The CCAA provides this Honourable Court with jurisdiction to approve releases, with respect to the debtor company and other persons; including outside of a plan of arrangement.

***Re Green Relief Inc.*, 2020 ONSC 6837, at para. 23 [*Green Relief*] [BOA TAB 38].**

80. Releases in favour of parties other than the CCAA debtor company have frequently been granted in the context of reverse vesting orders:

> "[128] It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction. In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in Nemaska Lithium."

***Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828, at para. 128 [*Blackrock*] [BOA TAB 7];**
***Harte Gold*, at paras. 78-86 [BOA TAB 18];**
***Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.,* 2022 ONSC 6354, at para. 67 [*Just Energy*] [BOA TAB 28];**
***NextPoint Financial, Inc. (Re)*, 2023 BCSC 2378, at paras. 22-26 [BOA TAB 31].**

V. ARGUMENT

A. The Subscription Agreement and Texcal Transaction Should be Approved

81. The Subscription Agreement satisfies the requirements of Section 36(3) of the CCAA, and the principles set forth in *Soundair*.

82. The requirements of Section 36(3) of the CCAA are satisfied in the current circumstances. Specifically:

    (a) **Whether the process leading to the proposed sale or disposition was reasonable in the circumstances:** The SISP was approved by this Honourable Court, and conducted by the Sales Advisor, which has significant experience in distressed transactions in the oil and gas industry. The SISP was approved by this Honourable Court on notice to the stakeholders, and there was no opposition to

the approval. The SISP appropriately canvassed the market for a transaction with respect to the Applicants' business. The SISP permitted both asset-specific and *en bloc* offers and incorporated a broad marketing process, including publication in two industry newsletters, and targeted distribution of the Information Memorandum to 400 potentially interest parties selected by the experienced Sales Advisor. Fifty-three (53) parties executed CAs and were permitted access to the VDR. Following the Bid Deadline, the Applicants selected a value-maximizing combination of two viable bids; including the only available bid which provided a means of addressing all of Razor Energy's AROs. Finally, the Applicants engaged in extensive negotiations with the successful bidder, over a period of multiple months and in circumstances including significant regulatory considerations, in an effort to obtain the best available executable transaction;

(b) **Whether the monitor approved the process leading to the proposed sale or disposition**: The Monitor supported the approval of the SISP, was consulted extensively in connection with and during the implementation of the SISP, and has consistently supported the Applicants' efforts to advance the Corporate Transaction, as well as the HWN Transaction which similarly resulted from the SISP;

(c) **Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy:** There is no question that the completion of the Subscription Agreement will be more beneficial to the creditors, as a whole, than a sale or disposition in bankruptcy proceedings. This is particularly the case as the Subscription Agreement will address and resolve all of Razor Energy's AROs, which total approximately $115 - $123 million and, in a liquidation, would need to be satisfied or assumed, in full, before distributions could be made to any other creditors. The Applicants understand that the forthcoming Monitor's report will confirm the Monitor's view in this regard;

(d) **the extent to which the creditors were consulted:** The Applicants extensively consulted with key affected stakeholders and creditors, in a process beginning shortly after the execution of the non-binding Solidarity LOI. The circumstances affecting the Applicants (including the AER's requirement that all of Razor Energy's

working interests must be addressed in any potential transaction, combined with the Applicants' insolvency and inability to return to the market) have necessitated various changes to the proposed Corporate Transaction since it was first introduced to the Applicants' stakeholders. The results were unexpected. However, the Applicants have made significant efforts to consult with creditors, to the extent possible, in the circumstances. Ultimately, the resulting Texcal Transaction satisfies regulatory requirements and will provide significantly higher returns to creditors than the sole viable alternative;

(e) **the effects of the proposed sale or disposition on the creditors and other interested parties:** The effects of the completion of the Subscription Agreement, on creditors and other interested parties, are beneficial. In addition to the fact that the Subscription Agreement will provide recoveries to a wide range of creditors, and provide for a pool of cash and assets against which further claims may be asserted, the completion of the Texcal Transaction will also benefit non-creditor stakeholders. These stakeholders include the Applicants' fifty-four (54) employees and contractors, some of whom will be retained at closing; the municipalities in which the Applicants operate; the Applicants' contractual counterparties, who will retain their contractual arrangements with a recapitalized and solvent entity; and the public, particularly as the completion of the Subscription Agreement will avoid the transfer of 2074 wells to the OWA; and,

(f) **whether the consideration to be received for the assets is reasonable and fair, taking into account their market value:** The Subscription Agreement contemplates $8.375 million in total consideration, along with the potential for additional recoveries through the administration of ResidualCo (which will receive the Applicants' interest in certain equipment and in any adjustment to the price payable under the Subscription Agreement) and the assumption of ARO and Assumed Liabilities. Realizing any value from the Applicants' assets would require the satisfaction of a significant amount of AROs. The SISP resulted in only one (1) *en bloc* corporate transaction. The market has spoken. The purchase price under the Subscription Agreement was arrived at following extensive arm's length commercial negotiations between sophisticated counterparties. In the circumstances, this consideration is fair and reasonable given the demonstrated

market value of the Applicants' business, property, and assets. No other available transaction exists.

83. The Subscription Agreement, which is the ultimate result of the Applicants' SISP, also meets all of the criteria set out in *Soundair*. Specifically:

(a) **Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently**: As discussed in the context of s. 36 of the CCAA, the SISP was thorough, efficacious, and appropriately canvassed the market within the timing constraints necessitated by the Applicants' limited liquidity;

(b) **The interests of all parties:** The approval of the Subscription Agreement is the best available option for the Applicants' creditors and stakeholders. While it is not disputed that a number of creditors are anticipated to receive no recoveries from the completion of the transaction, the only available alternative provides a significantly worse outcome for all stakeholders: namely, the transfer of all of Razor Energy's petroleum and natural gas assets to the OWA. The completion of the Subscription Agreement will provide recoveries for a broad range of stakeholders, including, specifically, the AER, the OWA, the APMC, numerous municipal governments, and the counterparties to the Restricted Retained Contracts. The balance of the proceeds of the transaction (which remain a benefit of same), along with the property transferred to ResidualCo, will be distributed following a summary claims process (the "**Summary Claims Process**"), identifying post-filing obligations and priority secured claims against the ResidualCo Funds and all other property of ResidualCo, to be conducted by the Monitor. Critically, the Subscription Agreement will also maintain Razor Energy as a going concern and provide a solution for all AROs, clearing the way for distributions to creditors other than the OWA. The jobs of at least some of the Razor Entities' fifty-four (54) employees will be preserved. There is no question that the aggregate recoveries under the Subscription Agreement will outweigh those available in the only realistic alternative;

(c) **The efficacy and integrity of the process by which offers were obtained:** The SISP was approved by this Honourable Court, pursuant to the ARIO, and has been carried out in accordance with its terms. The Monitor supported the SISP and no

other party has alleged any defect in the efficacy or integrity of the SISP as actually conducted; and,

(d) **Whether there has been any unfairness in the sales process:** There have been no allegations, from any party, asserting any sort of unfairness in the SISP.

84. In analyzing whether a transaction should be approved, taking into consideration the factors set out under Section 36(3) of the CCAA and the principles identified in *Soundair Corp.*, a court is to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable."

***Veris Gold*, at para. 23 [BOA TAB 45].**

85. The Subscription Agreement and the Texcal Transaction are appropriate, fair, and reasonable, in the circumstances. Specifically, the Texcal Transaction represents the highest and best available offer for the Razor Entities' assets, properties, and undertakings, in the circumstances. This is particularly the case given the following critical factors and alternatives:

(a) in the event that Razor Energy's assets are transferred to the OWA, it is unlikely that any creditor will receive any recoveries, whatsoever, as any proceeds thereof would be utilized towards the satisfaction of the Razor Entities' AROs (deemed by the AER to exceed $115 million);

(b) the Subscription Agreement will provide cash consideration against which creditor and stakeholder claims may be asserted;

(c) the Subscription Agreement excludes certain equipment owned or leased by Blade which may be realized upon by ResidualCo, by and through the Monitor, following the completion of the Texcal Transaction, potentially increasing recoveries to Razor Energy's existing creditors. It is anticipated, in some cases, that there may be equity in the equipment which could be monetized by ResidualCo, for the benefit of the Razor Entities' creditors and stakeholders as all AROs have been addressed under the Subscription Agreement;

(d) the Subscription Agreement and Reverse Vesting Order will result in the payment of all post-filing municipal tax arrears, where Razor Energy holds petroleum and

natural gas assets, as well as the satisfaction of Razor Energy's outstanding payment obligations to the AER, OWA, and APMC;

(e) the Texcal Transaction is anticipated to preserve the jobs of all or many of the fifty-four (54) remaining employees and contractors of the Razor Entities;

(f) the Razor Entities project running out of available liquidity shortly, unless a transaction is completed. No other source of funding is available and it is unlikely that the Razor Entities could locate alternative financing in the short term, particularly in the face of the AROs and SISP results;

(g) It is unclear whether a court-appointed receiver would be capable of closing the Texcal Transaction, as there is significant potential liability for a receiver in possession, due to the Razor Entities' AROs and no liquidity to assist any receiver in dealing with the assets and issues that arise; and,

(h) in addition to the $8.375 million in consideration to be paid under the Subscription Agreement, the Subscription Agreement will also result in over $115 million in AROs being retained by Razor Energy, as all other Assumed Liabilities, and Razor will continue to operate as a going concern.

Bailey #11 Affidavit, at para. 42.

B. A Reverse Vesting Order is Necessary and Appropriate

86. The Texcal Transaction and the Subscription Agreement should be given effect by way of a reverse vesting structure, as it is both necessary to give effect to the Subscription Agreement (and a condition thereof), and appropriate in the circumstances.

87. Reverse vesting orders are generally appropriate: (a) where the debtor operates in a highly-regulated environment, in which its existing permits, licences or other rights are difficult or impossible to assign to a purchaser; (b) where the debtor is party to certain key agreements, that would be similarly difficult or impossible to assign to a purchaser; and (c) where maintaining the existing legal entities would preserve certain tax attributes, that would otherwise be lost in a traditional vesting order transaction.

***Blackrock*, at paras. 114-116 [BOA TAB 7];**
***Harte Gold*, at para. 71 [BOA TAB 18];**
***Quest*, at paras. 136, 142 [BOA TAB 36];**

***Peakhill Capital Inc. v Southview Gardens Limited Partnership,* 2023 BCSC 1476, at paras. 33-34 [*Peakhill*] [BOA TAB 33].**

88. All three of the aforementioned circumstances apply in the present case, as:

(a) the existing permits, licences and other regulatory approvals, which are critical to the Applicants' going concern value, are impossible, or difficult, to transfer, and, where transferable, would take a lengthy period of time to assign to the Purchaser;

Bailey #11 Affidavit, at paras. 46 and 48.

(b) the Restricted Retained Contracts (as defined in the Subscription Agreement) are subject to restrictions on assignment which would, at minimum, make it difficult to complete an assignment to the Purchaser within the time horizon required in the circumstances; and,

Bailey #11 Affidavit, at para. 62.

(c) the Purchaser has expressed its view that certain tax attributes of the Applicants have value, which can only be preserved in the RVO structure.

Bailey #11 Affidavit, at para. 44.

89. While RVOs continue to be regarded as an extraordinary measure, the Applicants submit that the *Harte Gold* factors are satisfied in this case.

***Harte Gold,* at para. 38 [BOA TAB 18].**

<u>The RVO is Necessary in the Circumstances</u>

90. The Approval and Reverse Vesting Order is necessary in order to: (i) permit the retention and realization of the Applicants' permits and licenses and the Restricted Retained Contracts; and, (ii) potentially, preserve the Applicants' tax attributes. In addition, it is a condition of the Subscription Agreement, and the benefits of the proposed reverse vesting order structure is factored into the consideration offered by the Purchaser.

91. Outside of a reverse vesting order, the Applicants' licenses and permits with the AER, ABSA, and APEGA would either not be transferrable (in the case of the APEGA and ABSA licenses) or would require compliance with a detailed, holistic, and time-consuming regulatory approval process prior to closing, in the form of *Directive 067* (in the case of AER permits and licenses). Under a traditional asset sale structure, the AER licenses

would be more difficult and time consuming to transfer and, to the extent that such transfer is possible, the steps required to proceed with same would likely result in additional delays, costs, and uncertainty; none of which can be afforded in the circumstances. In the Applicants' present circumstances, it is simply not possible to continue operations until the resolution of such issues.

92. In addition to the ABSA and APEGA permits, which would require re-issuance to a purchaser under an asset sale, the Applicants would require consents to assign, re-establish, or enter into new agreements with respect to various other commercial counterparties; including the Restricted Retained Contracts. Given the sheer number of contracts identified by the Subscription Agreement as Restricted Retained Contracts, the completion of individual negotiations with each counterparty is not feasible in the circumstances.

93. Additionally, the completion of the Texcal Transaction, by way of a reverse vesting order, is a condition of the Subscription Agreement, and the benefits of the reverse vesting order are factored into the Subscription Price.

The RVO structure produces an economic result at least as favourable as any other viable alternative

94. The market has been thoroughly canvassed and no viable alternative has materialized which produces a result at least as favourable as the Subscription Agreement, which can only be given effect by way of the Approval and Reverse Vesting Order. In fact, there is currently only one alternative.

95. The only alternative to the Texcal Transaction would be a liquidation through bankruptcy or receivership proceedings, which would likely result in no responsible party assuming the AROs associated with Razor Energy's assets, and numerous oil and gas assets being transferred to the OWA. Under those circumstances, none of the Applicants' creditors, including the municipalities, the counterparties to the Restricted Retained Contracts, APMC, and any secured or post-filing creditors (who may participate in the Summary Claims Process if the Subscription Agreement is completed by way of the Approval and Reverse Vesting Order), would receive any distribution or benefits.

96. Receivership is not a viable alternative as: (i) the outside date of November 30, 2024 under the Subscription Agreement and the corresponding lack of certainty regarding whether a transaction can be concluded after that date; (ii) there is currently no source of funding for a receiver to take the steps required to complete the Texcal Transaction or operate the assets until closing; and, (iii) the significant potential liability for a receiver in possession, due to the Razor Entities' ARO and lack of liquidity to address any issues, which may prevent a receiver from taking possession. If the assets are not operated, the value of the Razor Entities as a whole will diminish.

No stakeholder is worse off under the RVO structure than they would have been under any other viable alternative

97. None of the Applicants' existing creditors are worse off under the proposed reverse vesting order than they would be under any viable alternative. As set out above, in any other viable alternative, it is highly unlikely that any stakeholder would receive any proceeds of the Applicants' assets; except for the OWA.

98. Reverse vesting transactions often result in the claims of unsecured creditors and shareholders being transferred to a residual trust or company, which is an empty shell that holds all unassumed or excluded claims and liabilities of the debtor, resulting in no recovery for those stakeholders. When considering such factors, courts have held that this perceived unfairness is not a result of the reverse vesting process, but rather, is a reflection of the value of the debtor's assets and business. In this regard, unsecured creditors and shareholders are treated no differently than if the transaction was effected by way of an asset purchase. As stated by Penny J. in *Acerus Pharmaceuticals*:

> Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. **However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).**
>
> …
>
> **In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants**

> **post-CCAA proceedings if they choose to do so**. While the Subscription Agreement does not require [the purchaser] to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.
>
> While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. **Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction**.

Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314 [_Acerus Pharmaceuticals_], at paras. 18, 31-32 [BOA TAB 4] [emphasis added];
See also _Just Energy_, at para. 57 [BOA TAB 28]; _Blackrock_, at para. 109 [BOA TAB 7].

99. With respect to the counterparties to the Retained Contracts, such parties are no worse off under the Approval and Reverse Vesting Order than they would be in a traditional sale and vesting order, as:

(a) such parties will have the ability to benefit from the Applicants' go forward operations by continuing their existing contractual relationships;

(b) none of the Retained Contracts are being assigned to any party. However, in comparison with the counterfactual scenario where an assignment order might be required for the Restricted Retained Contracts, all counterparties to the Restricted Retained Contracts are being paid their applicable cure costs. Accordingly, such parties are receiving the same treatment that they would, outside of a reverse vesting order; and,

(c) the counterparties to those Retained Contracts which are not Restricted Retained Contracts are not entitled to the payment of cure costs, as addressed in relation to the Retained Contracts Order below, even if an assignment were being undertaken. Accordingly, such parties are also receiving the same treatment that they would outside of a reverse vesting order.

The Consideration Being Paid for the Business Reflects the Importance and Value of the Licences And Permits (or Other Intangible Assets) Being Preserved Under the RVO Structure

100. The Subscription Price accounts for and reflects the value provided by the reverse vesting order. The market has spoken, and the Texcal Transaction is the only available transaction under the SISP, and is conditional on the Approval and Reverse Vesting Order being granted.

101. The Subscription Agreement contemplates a going concern transaction (and in fact is the only going concern bid received under the SISP) and represents the highest and best executable or viable offer received pursuant to the SISP. The consideration flowing to the Applicants' estates, and subsequently to their creditors and stakeholders, is significantly higher than the *nil* value under any other available transaction. Factoring the value of the AROs to be retained by the Razor Entities into the equation, the consideration available under the Subscription Agreement is on its face reflective of the value of the Applicants' intangible assets to be retained under the Approval and Reverse Vesting Order.

102. Furthermore, Courts have favoured approving a proposed reverse vesting order transaction where a debtor's assets have been extensively marketed but have yielded no other potential offers.

***Just Energy*, at para. 59 [BOA TAB 28];**
***Blackrock*, at para. 101 [BOA TAB 7].**

103. In the matter at hand, the SISP broadly marketed the Razor Entities' assets and business. The Purchaser is the only party willing to purchase the Property. Accordingly, the Applicants submit that the consideration contemplated by the Texcal Transaction is fair and reasonable.

C. The Retained Contracts Order is Appropriate

The Retained Contracts and Restricted Retained Contracts Are Not Assigned Under the Terms of the Approval and Vesting Order

104. Under the terms of the Subscription Agreement and the Approval and Reverse Vesting Order, on the Closing Date:

> the Razor Entities shall retain, free and clear of any and all Claims and Encumbrances, other than Permitted Encumbrances, all of the assets, property, and undertakings, of every kind or nature, owned by the Razor Entities on the date of this Subscription Agreement and which are acquired by them up to and including Closing, including the Retained Contracts, Permits and Licences, Petroleum and Natural Gas Rights, the Tangibles, the Miscellaneous Interests, and Books and Records (the "Retained Assets")… For greater certainty, the Retained Assets shall not include any Excluded Assets, Excluded Liabilities, or Excluded Contracts, which shall be transferred to ResidualCo, in accordance with the Closing Sequence and the Sale Approval and Reverse Vesting Orders, on the Closing Date and same shall be vested in ResidualCo pursuant to the Approval Orders.

Bailey #11 Affidavit, at Exhibit "C" (Subscription Agreement, s. 3.1), Bates No. 35-36.

105. In the Subscription Agreement, the term "Retained Contract" refers to those contracts listed in the Retained Contracts Schedule, collectively. The term "Restricted Retained Contract" refers to a Retained Contract in respect of which the assignment of the rights and benefits of the applicable Razor Entity thereunder expressly requires the consent of the counterparty(ies) to such Retained Contract, and such consent is not obtained prior to Closing.

106. In reverse vesting transactions, the assignment of the Retained Contracts is not required; as they are retained by the debtor; in this case, the applicable Razor Entity. Accordingly, resort to Section 11.3 of the CCAA is not required to give effect to the Texcal Transaction.

107. Nonetheless, when considering reverse vesting transactions, Courts typically consider the effect of the reverse vesting structure on the affected creditors, as compared with the form the transaction would take under a traditional vesting structure. The Retained Contracts Order incorporates provisions ensuring that the rights of the Applicants' counterparties are the same as they would be under a traditional asset sale, as:

(a) counterparties to the Restricted Retained Contracts will be paid Cure Costs, as if they were subject to an assignment order under s. 11.3 of the CCAA; and,

(b) counterparties to Retained Contracts, who have either consented to the assignment of their contracts or where no consent to assign is required, will not have Cure Costs paid and will continue to have claims against ResidualCo, as these contracts would not be subject to an assignment order under s. 11.3 of the CCAA in a traditional vesting order, and therefore would have no claim to have their cure costs paid by court order.

Counterparties to the Restricted Retained Contracts Will Be Paid Cure Costs

108. In a traditional transaction, the assignment of the Restricted Retained Contracts to the Purchaser would be subject to the consent of the counterparty or, if consent is not available, an order under s. 11.3 of the CCAA.

> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

CCAA, s. 11.3(1) [BOA TAB 1].

109. Although not expressly stated in the CCAA, it is generally accepted that s. 11.3 overrides "contractual provisions requiring consent, where the court considers the withholding of consent unreasonable."

D. Greenfield, P. Maguire, D. Spencer, and K. Lenz, *When Insolvency and Restructuring Law Supercedes Contract,* Alberta Law Review (2017) 55:2 349-366, 2017 CanLIIDocs 35, at p. 361 [BOA TAB 15].

110. Although there is not a significant body of case law on s. 11.3, the principles underlying Section 11.3 have been considered by courts. Specifically, any relief requested should not adversely affect the third party's contractual rights beyond what is absolutely required for the restructuring:

> 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.

***Nexient Learning Inc. (Re)*, 2009 CanLII 72037 (ON SC) [*Nexient*], at para. 59 [BOA TAB 30].**

111. The policy reason for overriding consent, in an insolvency context, is to facilitate and promote restructuring efforts or liquidation efforts, as the case may be. This permits a CCAA Court to "overrule an objection to assignment and force the assignment of a contract." In these situations, s. 11.3 is necessary and used to effect an assignment of a

contract. As stated in *Nexient*, this must not affect a third party's contractual rights beyond what is absolutely required to effect the reorganization.

J Stam and E Stitt, *Not Quite True Love: Forced Assignment of Agreements*, 2017 AnnRevInsolv 18 [BOA TAB 27].

112. The balance for overriding counterparties' contractual right to withhold consent in a forced assignment is provided for in Section 11.3(4) of the CCAA: the "cure costs" in respect of the contract must be paid. An order forcibly assigning contracts under s. 11.3 may not be made unless all monetary defaults in relation to the agreement are cured:

> 11.3 (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

CCAA, s. 11.3(4) [BOA TAB 1].

113. Although the Restricted Retained Contracts are not being assigned to the Purchaser, they will have their monetary defaults paid, as if an order assigning their interests under s. 11.3 of the CCAA was required. The result is that the counterparties to Restricted Retained Contracts are no worse off under the reverse vesting structure than they would have been under a traditional asset sale, as required by the *Harte Gold* factors. The Subscription Agreement provides that the purchase price includes "An amount sufficient to repay all Cure Costs associated with any Restricted Retained Contracts… and which will be paid, by the Monitor, to the counterparty(ies) of the applicable Restricted Retained Contracts, pursuant to the Approval Orders, on the Closing Date and in accordance with the Closing Sequence".

Bailey #11 Affidavit, at Exhibit "C" (Subscription Agreement, s. 2.2(c)) Bates No. 34.

114. In the result, the counterparties to the Restricted Retained Contracts are in the same position that they would be in a traditional purchase and sale transaction: (i) they will continue to exist following the closing of the Texcal Transaction; and, (ii) their Cure Costs will be paid .

Absent An Order Under S. 11.3, Contractual Counterparties Do Not Have A Right to Have Their Cure Costs Paid

115. An order assigning contracts under s. 11.3 of the CCAA is necessary only with regards to contracts for which a contractual consent, approval, or waiver is necessary, and has not been obtained. Contracts which do not require consent to be assigned, or for which consent to assign is required and has been obtained, do not require an order under s. 11.3.

See, e.g., *In the Matter of Mountain Equipment Cooperative and 1314625 Ontario Limited*, Second Report of the Monitor, dated October 19, 2020, at paras. 5.1-5.5 [BOA TAB 22]; *In the Matter of the Compromise or Arrangement of Entrec Corporation, et al.* (August 31, 2020), ABKB 2001 06423 (Assignment Order), at para. 3 [BOA TAB 25]; *In the Matter of a Plan of Compromise or Arrangement of Carillion Canada Holdings Inc., et al* (March 1, 2018) Ont SCJ Toronto CB-18-590812-00CL (Factum of the Applicants), at para. 11 [BOA TAB 20], and subsequent Order by Hainey J. (March 1, 2018), at para. 3 [BOA TAB 21]; In the Matter of Nexii Building Solutions Inc., No. S240195, Vancouver Registry, Second Report of the Monitor, dated April 19, 2024, at para. 6.3(2) [BOA TAB 23], and subsequent Order by Stephens J., pronounced April 26, 2024 [BOA TAB 24].

116. Where consent to assignment of a contract is required under a contract, and has been obtained, no order under Section 11.3 of the CCAA is required, and no cure costs are required to be paid in relation to these contracts. Courts have confirmed that, while there may be a contractual right to provide (or withhold) consent of an assignment, there is no right to have cure costs paid in the context of an insolvency when consent is provided.

***Zayo Inc. v Primus Telecommunications Canada Inc.*, 2016 ONSC 5251 [*Zayo*] [BOA TAB 47].**

117. In the absence of any provisions restricting assignment, contracts are assignable without the consent of a non-assigning party, just as they would be in a non-insolvency context. Without an order made under Section 11.3, there is no statutory requirement for a debtor to pay cure costs to assign a contract that does not require consent to assignment. There is also no common law requirement to pay cure costs in order to effect an assignment. Instead, under the common law, where an assignment is effected without a novation agreement, the assignor generally remains obligated to the non-assigning party for the performance of its obligations.

118. As a practical matter, if cure costs were required to be paid whenever a contract was assigned in CCAA proceedings, there would be little ability for parties to negotiate and absolutely no reason for any party to consent to the assignment of their contracts, regardless of whether the parties have a contractual right to withhold consent. As

discussed by the Court in *Zayo*, negotiations are critical to the success of CCAA proceedings, and some parties may accept no payment of cure costs in order to ensure their contract remains intact:

> There is also evidence that negotiations took place around the amounts of any payment of pre-filing arrears. As the Supreme Court made clear in *Century Services*, much of what actually happens under CCAA proceedings depends upon the parties' negotiations. In those negotiations, parties to service contracts must weigh the risks of insisting upon their desired position (i.e., they may get nothing if the contract is disclaimed) against the benefits of a future income stream due to the assignment of their contract from an insolvent party to a new, more robust, entity.

***Zayo*, at para. 81 [BOA TAB 47].**

119. The insolvency policy objectives that balance the contractually negotiated right of a counterparty to withhold their consent to an assignment, with the right of that counterparty to have their cure costs paid, if the contract is court-ordered to be assigned, do not apply when a counterparty has not negotiated the right to withhold their consent to an assignment of the contract, or such right has been expressly waived in specific circumstances. In such situations, s. 11.3 of the CCAA, and the corresponding statutory right to have cure costs paid, does not apply, as it is limited to circumstances where a contractual right to object to an assignment must be overruled by the Court for the assignment to take place. Although the Texcal Transaction does not contemplate the assignment of the Retained Contracts in the reverse vesting structure, the result for the counterparties is the same.

120. Contractual counterparties without a right to withhold consent would have no right to a court-ordered payment of their cure costs in the case of a unilateral assignment of their contract, because they do not have a contractual right to object (or withhold their consent) to the assignment. As a result, if there is no contractual right to have cure costs paid in a unilateral assignment, there is no contractual right for the counterparty to object (or withhold their consent). Such a right cannot be conferred simply because it occurs in an insolvency-related context.

***Peakhill*, at para. 64 [BOA TAB 33].**

121. In the present case, the Retained Contracts which are not Restricted Retained Contracts do not require consent of the counterparties to be assigned. Therefore, if the Texcal Transaction were to occur as a traditional vesting order, no order would be required under

s. 11.3 of the CCAA to assign these contracts, and no cure costs would be paid to the counterparties to effect the assignment outside of an insolvency context.

122. The proposed Retained Contracts Order treats such counterparties in the same manner as would apply if the assignment were effected under a traditional vesting order: the contracts will be retained without payment of cure costs.

The Contractual Counterparties' Rights Are the Same Under the Approval and Reverse Vesting Order as They Would be Under an Asset Sale

123. The combined effect of the Approval and Reverse Vesting Order and the Retained Contracts Order on the counterparties to the Retained Contracts is the same as if the Texcal Transaction were completed under a traditional asset sale:

(a) the counterparties to the Restricted Retained Contracts will have their cure costs, in respect of the Restricted Retained Contracts, paid immediately following the closing of the Texcal Transaction, and the declaratory provisions of the Retained Contracts Order will only come into effect upon the payment of such cure costs; and,

(b) the counterparties to the Retained Contracts who have outstanding claims against the Applicants will continue to have their claims, in the same priority as they existed prior to the Texcal Transaction, as against ResidualCo and the proceeds of the Texcal Transaction.

D. The Retained Contracts Stay is Appropriate

124. The Retained Contracts Stay is necessary and appropriate in order to permit the closing of the Subscription Agreement and prevent the frustration of the restructuring proceedings.

125. One of the principal purposes of a stay of proceedings is:

> …to prevent the frustration of a reorganization or restructuring plan after its implementation on the basis of events of default or breaches which existed prior to or during the restructuring period.

***Doman Industries Ltd., Re*, 2003 BCSC 376 [*Doman*], at para. 22 [BOA TAB 16].**

126. Generally, stay orders under the CCAA apply only to the exercise of rights and remedies as against the parties seeking protection under the CCAA and their respective property.

127. Courts have found that they have the jurisdiction, under the CCAA, to order a permanent stay related to events of default or breaches which occurred prior to the restructuring:

> The law is clear that the court has the jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of a contract with the debtor company to terminate the contract**. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.**

***Doman*, at para. 15 [emphasis added] [BOA TAB 16].**

128. If a contract with an existing default is assigned to an entity that is not subject to the CCAA, the non-assigning party may be able to issue notices of default and terminate the agreement, even if the default occurred prior to the third party's involvement. Therefore, it is important that a stay of proceedings, with respect to pre-filing insolvency defaults of the Retained Contracts, be continued after closing.

***Playdium Entertainment Corp. Re*, 2001 CarswellOnt 4109 [*Playdium*] [BOA TAB 34].**

129. In *Playdium*, the Court, when considering whether to order a permanent injunction related to a third party, under a contract that was to be assigned, stated:

> … the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) [now s. 11] it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not be asserted by the Famous Players after the stay period. **If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business**. In view of the remedial nature of the CCAA, **the Court should not take such a restrictive view of the s. 11(4) jurisdiction.**

***Playdium*, at para. 32 [emphasis added] [BOA TAB 34].**

130. Courts have cautioned that any jurisdiction to interfere with contractual rights "must be exercised sparingly" and in a manner that meets the purpose of the CCAA, which is to "further the continuity of the business of the debtor to the extent feasible."

***Northmont Resort Properties Ltd. v. Reid*, 2018 ABQB 1002, at para. 73 [BOA TAB 32], citing *Nexient* [BOA TAB 30].**

131. Where the stay of proceedings is necessary for a reorganization process, the Court has jurisdiction to permanently stay the rights of third parties. However, there must be clear evidence that the permanent stay was envisaged by the parties when they negotiated the transaction:

> In *Nexient*, the court found that it was not an appropriate case for the court to exercise its discretion to permanently stay the third party contractor's right to terminate the contract on insolvency. Staying the third party contractor's rights would not further the purpose of the *CCAA* by helping to reorganize or restructure the company in any way, given that the sale transaction with the purchaser had already completed and could not be unwound: *Nexient* at para. 83. On the other hand, the order would adversely affect the third party's contractual rights under the agreement. These reasons apply equally to the instant case.
>
> In order to eliminate this type of provision [that stays termination related to rights arising as a result of insolvency-related defaults], there must be evidence that the sale was intended (by the third party, insolvent party and purchasing party) to take place only with a permanent stay of the right to terminate. There was no evidence that, upon entering the sale process, [the insolvent party] and [the purchasing party] intended an assignment on the basis of a permanent stay preventing [the third party with contractual rights] from terminating the agreement.

***Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945 (rev'd on other grounds, *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2015 BCCA 421), at paras. 108 and 109 [BOA TAB 12].**

132. In this case, the Retained Contracts Stay is an integral and necessary component to the Approval and Reverse Vesting Order, and is specifically contemplated in the Subscription Agreement as a condition precedent to Closing. Without the Retained Contracts Stay, the Texcal Transaction cannot be completed, not only because it is a requirement under the Subscription Agreement, but because the purpose of the RVO structure and the entire reorganization process would be thwarted.

Bailey #11 Affidavit, at Exhibit "B" (Subscription Agreement), ss. 1.1 (definitions of "Retained Contracts Order" and "Retained Contracts Stay"), 7.1 (Purchaser's Conditions) Bates Nos. 29, 45.

E. The Ancillary Relief Should be Granted

The Monitor Should be Granted Expanded Powers

133. This Court has the authority to expand the powers of the Monitor, pursuant to Sections 11 and 23(1)(k) of the CCAA.

134. Section 23(1)(k) of the CCAA provides that a monitor shall "carry out any other functions in relation to the [debtor] company that the court may direct".

CCAA, s. 23(1)(k) [BOA TAB 1].

135. As the Supreme Court of Canada held in *Callidus*, section 11 of the CCAA provides the Court with a broad discretion that should be exercised in furtherance of the remedial objectives of the CCAA, where it has been demonstrated that: (a) the order sought is appropriate in the circumstances; and (b) the applicant has been acting in good faith and with due diligence.

***9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at paras. 47-49 [*Callidus*] [BOA TAB 2].**

136. Appropriateness is assessed by determining whether the order sought advances the remedial purpose of the *CCAA*.

***Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 15, 70 [*Century Services*] [BOA TAB 14];**
***Callidus*, at para. 50 [BOA TAB 2].**

137. It has become broadly accepted that, in appropriate circumstances, a monitor's powers may be enhanced to allow it to function as a "super monitor" under the CCAA; including allowing a monitor to exercise the powers of the board of directors of an entity or carry out other steps with respect to the administration of the company; akin to a receiver.

***Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659, at para. 68 [*Aquadis*] [BOA TAB 5].**

138. Orders providing for enhanced powers, including to exercise management functions or to bankrupt entities, have also been granted in connection with administering "residual companies" after reverse vesting transactions.

***Aquadis*, at para. 82 [BOA TAB 5].**

139. Following the completion of the Texcal Transaction, ResidualCo will have assets and property requiring administration and, eventually, distribution, within the CCAA Proceedings. However, ResidualCo will have no employees, management, or operators and will be unable to manage its own affairs. Accordingly, the proposed Enhanced Powers, to be granted to the Monitor, under the Stay Extension and Enhanced Monitor's Powers Order, are necessary in order to enable ResidualCo to take steps necessary to conclude these CCAA Proceedings.

Bailey #11 Affidavit, at para. 78.

140. The Enhanced Powers are in the best interests of the Applicants and all their stakeholders, in order to ensure that the value of the property, assets, and undertakings, vested in ResidualCo pursuant to the Approval and Reverse Vesting Order, may be maximized, to the benefit of all creditors and stakeholders.

Bailey #11 Affidavit, at para. 79.

The Stay Period Should be Extended

141. The Stay Period currently expires on November 8, 2024. Section 11.02(2) of the CCAA gives this court the authority to grant an extension of the Stay Period for any period it "considers necessary", provided that the applicants are acting in good faith and with due diligence.

CCAA, s. 11.02(2) [BOA TAB 1].

142. A stay of proceedings is appropriate where it provides the debtors with breathing room, whether they seek to restore their solvency and emerge from their restructuring on a going concern basis or conduct an orderly liquidation or wind-down. Further, a stay of proceedings will be appropriate where it advances the purpose of the CCAA – including avoiding the social and economic effects of bankruptcy.

***Century Services*, at paras. 14 - 15 and 70 [BOA TAB 14].**

143. If the Subscription Agreement is approved, it is necessary and in the best interests of the Applicants and their stakeholders that the Stay Period be extended to November 30, 2024, as it will allow the Applicants to, among other things, close the Texcal Transaction, to the benefit of all creditors and stakeholders and avoiding the social and economic effects of a bankruptcy and liquidation.

144. The Applicants have acted, and are continuing to act, in good faith and with due diligence, including in advancing the Texcal Transaction to executable form and seeking approval of same. The Applicants have forecast to have sufficient liquidity during the Stay Period, in the event that the Subscription Agreement is approved.

145. The further extension of the Stay Period in respect of ResidualCo, to June 30, 2025, upon the filing of the Monitor's Certificate, is appropriate as it will allow the Monitor to commence

the administration of ResidualCo without expending the resources required to seek an additional stay extension.

F. The Releases are Appropriate

146. The factors to be considered when determining whether it is appropriate to grant a release include:

(a) whether the parties to be released were necessary to the restructuring of the debtor;

(b) whether the claims to be released are rationally connected to the purpose of the restructuring and are necessary for it;

(c) whether the restructuring could succeed without the releases;

(d) whether the parties being released contributed to the restructuring; and

(e) whether the releases benefit the debtors as well as the creditors generally.

***Blackrock*, at para. 130 [BOA TAB 7], citing *Harte Gold*, at paras. 76-78 [BOA TAB 18];**
***Lydian International Limited (Re)*, 2020 ONSC 4006, at para. 54 [*Lydian*] [BOA TAB 29];**
***Green Relief*, at paras. 27 – 28 [BOA TAB 38].**

147. No single factor is determinative, nor is it necessary for each factor to apply, in order for the release to be appropriate.

***Lydian*, at para. 54 [BOA TAB 29];**
***Green Relief*, at para. 28 [BOA TAB 38].**

148. This Honourable Court recently, in approving a third-party release, considered, among other factors, the following: (i) the directors and officers provided critical direction leading up to the CCAA proceedings; (ii) the directors and officers were instrumental in administering the sale and investment solicitation process; (iii) the directors and officers played an integral role in identifying and facilitating potential transactions to explore; (iv) the releases would facilitate further monetary distributions to the secured creditor which would otherwise be held back for the D&O Charge, to secure directors' and officers' indemnity; (v) creditors and stakeholders of the applicants were put on notice of the intention to apply for a release of these claims; (vi) the release will not affect claims against directors and officers that are covered by an applicable insurance policy; (vii) the releases

are subject to the limitations under section 5.1(2) of the CCAA; (viii) the releases provide certainty and finality of the CCAA proceedings, in the most efficient manner; and (ix) throughout the CCAA proceedings, the directors and officers acted in good faith and with due diligence.

***Re ENTREC Corporation*, 2020 ABQB 751, at para. 8 [BOA TAB 37].**

149. The beneficiaries of the proposed releases have made significant contributions to these CCAA Proceedings. Specifically:

(a) the Directors and Officers, employees, legal counsel and advisors of the Razor Entities have contributed their time, effort, and professional expertise to assist with sourcing, structuring, and negotiating, the Subscription Agreement, in addition to providing their general advice and services, throughout the CCAA Proceedings. Such persons have made significant, often critical, contributions to maintaining the Razor Entities as going concerns, which has resulted in the preservation of value for the benefit of all creditors and stakeholders, and have continued to act in good faith and with due diligence. These efforts have directly contributed to the commencement, approval, and completion of the SISP, and the resulting Texcal Transaction;

(b) the Sales Agent and its representatives have worked diligently to implement the SISP and source bids for the Razor Entities' business and assets, and have remained engaged following the conclusion of the marketing and bid selection phases of the SISP, to assist in concluding the Texcal Transaction. The Texcal Transaction, which will enable the Razor Entities to avoid a liquidation or the transfer of their petroleum and natural gas assets to the OWA, and continue as a going concern, would not have been possible without the assistance of the Sales Advisor, whose role was approved by this Court and whose involvement has resulted in a materially better outcome for many of the Razor Entities' stakeholders than in a bankruptcy;

(c) the Monitor has professionally carried out its mandate, has been involved in supervising and assisting with the implementation of the SISP and the SISP Transactions (as well as the other transactions concluded inside and outside the SISP in these CCAA Proceedings), and will be administering ResidualCo and the

distributions and the claims process. The Monitor and its representatives have prepared numerous reports for this Honourable Court and have assisted the Razor Entities with the preparation of cash flow forecast, the assessment of bids, and proposed next steps, and various other functions; and,

(d) if the Subscription Agreement and the Texcal Transaction are approved by this Honourable Court, Razor Energy's going concern value will be preserved, to the extent possible, for the benefit of all stakeholders. This result would not have been possible without the participation of the proposed beneficiaries of the releases.

Bailey #11 Affidavit, at para. 57.

150. The Applicants' creditors and stakeholders have been given ample notice of this Application, including the requested releases. The releases will not affect claims against directors and officers that are subject to an applicable insurance policy, and, the Channeling Relief (as described below) ensures the applicability of the insurance policy.

151. The requested releases are necessary to bring finality to the CCAA Proceedings, facilitate the release of the Court-ordered charges, and to protect the released parties from any and all claims and demands (or other matters included within the definition of "Released Claims" in the Approval and Reverse Vesting Order) which existed or took place prior to the issuance of the Monitor's Certificate, or which were undertaken or completed in connection with or pursuant the Texcal Transaction or pursuant to the terms of the Approval and Reverse Vesting Order, or otherwise within the CCAA Proceedings.

Bailey #11 Affidavit, at para. 56.

G. The Channeling Relief Is Appropriate

152. In the context of a plan of compromise or arrangement, Canadian Courts routinely approve releases which include "channeling injunctions". Channeling injunctions are a means to safeguard the rights of a person whose claims is released to recover an amount regarding the liability of a released party or claim against an available insurance policy covering. In other words, channeling injunctions "channel financial recovery to available insurance proceeds".

***Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363 at para 22 [BOA TAB 44].**

153. While not as common as in a plan of compromise or arrangement, Courts have also granted channeling injunctions when approving releases outside of a plan of compromise or arrangement, where insurance policies were in place and released claims could be asserted against the proceeds of such insurance policies.

***Arrangement relatif à Groupe Atis Inc et al*, (December 8, 2021) Que SC Montréal 500-11-059536-215 (Order) at para. 9 [BOA TAB 9];**
***Green Relief Inc et al, Re* (November 9, 2020) Ont SCJ Toronto CV-20-00639217-00CL (Approval and Vesting Order) at para. 24 [BOA TAB 17];**
***IMV Inc., et al., Re,* (October 18, 2023) NSSC Halifax 523334 (Order) at paras. 4 – 6 [BOA TAB 19].**

154. The Channeling Relief is specifically contemplated by the Approval and Reverse Vesting Order. If granted, the Channeling Relief will ensure that any existing claims against the Directors and Officers are preserved, and may be asserted against the Razor Entities' existing insurance policies, while also providing a measure of protection to the Directors and Officers who, as described above, have made material contributions to the Razor Entities' restructuring. The Applicants maintain primary directors and officers insurance policies, which collectively provide the following coverage:

(a) CAD $15,000,000 in total limits, in the aggregate, under the policies described below; each of which cover subsidiaries of Razor Energy;

(b) CAD $5,000,000, aggregate, under Razor Energy's primary directors' and officers' insurance policy, provided by Beazley Syndicates 2623/623 at Lloyd's, as insurer, and subject to certain sub-limits for specified coverage extensions;

(c) CAD $5,000,000, aggregate, in excess coverage under Razor Energy's first excess directors' and officers' insurance policy, provided by HDI Global Specialty SE, UK Branch, as insurer; and,

(d) CAD $5,000,000, aggregate, in secondary excess coverage under Razor Energy's second excess directors' and officers' insurance policy, provided by Lloyd's Underwriter Syndicate No. 2232 AWH, as insurer.

Bailey #11 Affidavit, at para. 60; Affidavit #1 of Doug Bailey, sworn on February 20, 2024, at para. 102; Seventh Report of the Monitor, dated October 2, 2024, at Schedule "A".

H. Arena's Interest in the GORRs is Capable of Being Vested

155. The Applicants do not seek to extinguish the GORRs. Rather, any underlying claims of Arena against the GORRs are sought to be vested. The GORRs are held by Razor Royalties LP, as royalty payee. Arena's interests arise under the Assignment Agreements. The Assignment Agreements are assignments by way of security and capable of being vested under the Approval and Reverse Vesting Order. The effect of the Approval and Reverse Vesting Order on Arena's claims against the GORRs is the same as if the Texcal Transaction were completed under a traditional asset sale; Arena's claims will continue as against the proceeds of the Texcal Transaction.

Principles Relating To The Vesting Of Royalties Granted By Way Of Security

156. Where a royalty agreement expressly states that the royalty constitutes an interest in land, a strong, but rebuttable, presumption is created that the royalty is an interest in land.

***Yangarra*, at para. 63 [BOA TAB 35].**

157. This presumption can be rebutted if, for instance, the royalty interest lasts only upon repayment of a debt or performance of an obligation, as a security interest would.

> Therefore, where the *Dynex* test distinguishes an interest in land from **"a contractual right to a portion of the oil and gas substances recovered from the land", the distinction is between an interest in the produced resource that continues in perpetuity versus a contractual right to a portion of the produced resource as security for payment or performance of an obligation** (see *Accel* at para 3). Whereas the former is capable of lasting for the duration of the underlying estate, **a contractual right to security for payment or performance would extinguish upon repayment of the debt or performance of the obligation.** This interpretation is supported by the policy reasons for upholding GORs as interests in land articulated in *Dynex ABCA* (at paras 35–36): **a GOR that is capable of lasting for the duration of the underlying interest in land reflects an investment in "a particular piece of property", whereas a GOR designed to extinguish upon repayment of a debt or performance of an obligation more closely reflects an investment in "a particular operator or company".**
>
> The presence of an Interest in Land Clause in an agreement that creates a royalty capable of lasting for the duration of the underlying interest in land may be sufficient to satisfy the *Dynex* test. Whether or not ambiguity remains, the whole of the contract and the surrounding circumstances must nevertheless be considered to determine whether the parties intended the royalty to constitute an interest in land *(IFP Technologies* at para 82). Still, courts cannot ignore the words chosen by the parties to a royalty agreement that clearly connote an intention to create an

interest in land (*IFP Technologies* at para 89; *Hudson King v Lightstream Resources Ltd*, 2020 ABQB 149 at para 109). **To rebut the presumption of an interest in land arising from the plain wording of a royalty agreement, the remaining indicia and the surrounding circumstances would have to significantly contradict the intention of the parties to create an interest in land and the ability of the royalty to last for the duration of the underlying estate.**

***Yangarra*, at paras. 65-66 [BOA TAB 35] [emphasis added].**

158. In cases where a gross overriding royalty has been granted as a security interest, rather than an interest in land, there is no question that the Court may vest off such interests.

***Accel Canada Holdings Limited (Re)*, 2020 ABQB 182, at para. 93 [*Accel Canada*] [BOA TAB 3], citing *Dianor #2* [BOA TAB 43].**

159. Whether the parties to a contract intended to create an interest in land is determined by reviewing the agreement as a whole, along with the surrounding circumstances. In cases where the wording of the agreement is ambiguous, the post-contract conduct of the parties may be used to determine the issue.

***Yangarra*, at paras. 59 and 62 [BOA TAB 35], citing *Accel Canada* [BOA TAB 3].**

Arena's Interest In The GORRS Is By Way Of Security Only

160. Arena's interests are security interests. Each of the GORR Agreements contains a clause stating the royalty is an interest in land:

> 2.2 Interest In Land
>
> (a) It is the express intention of the Parties that the Overriding Royalty herein granted by Royalty Payor to Royalty Owner constitutes, and is to be construed as, an interest in land in the Royalty Lands.

Bailey #11 Affidavit, Exhibits "G" and "H", at s. 2.2(a), Bates No. 459 and 482.

161. However, each of the GORR Agreements also contains a restriction on assignment, subject to an express exception for assignments to Arena:

> "(b) Notwithstanding Section 5.2(a), Royalty Owner and Royalty Payor acknowledge and agree that: (i) Royalty Owner has assigned or will hereinafter assign, all of its right, title and interest in and to this Agreement to Arena pursuant to the Arena Security, (ii) Royalty Payor has assigned or will hereinafter assign, all of its right title and interest in and to this Agreement to AIMCo and Arena (or either of them), (iii) the grant of the Arena Security or the AIMCo Security, as applicable, shall not be restricted by this Agreement or cause a default or breach of this Agreement, and (iv) the enforcement of the Arena Security or the AIMCo Security

(including the appointment of a receiver or receivers), as applicable, shall not be restricted by this Agreement or cause a default or breach of this Agreement."

Bailey #11 Affidavit, Exhibits "G" and "H", at s. 5.2(b), Bates Nos. 467 and 490 [emphasis added].

162. Arena's interests arise under the Assignment Agreements. The Assignment Agreements purport to assign the royalty interest to Arena, as security interests. The relevant portions of the Assignment Agreements are as follows:

"2. Assignment

(a) As continuing collateral security for the due and timely satisfaction and performance of the Assignor's obligations under the Loan Agreement, the Assignor hereby transfers, assigns and grants a security interest in, to and in favour of the Agent, for and on behalf of the Agent and the Lenders, of all the Assignor's present and future rights, title and interest whatsoever in and to the agreements and choses-in-action described in Schedule "A" hereto and all amendments, supplements, modifications or extensions thereof (the "**Assigned Contract**") including, without limiting the generality of the foregoing, all of the Assignor's rights, claims, privileges, benefits and advantages comprised therein and arising therefrom, other than the Assignor's entitlement to receive remuneration as lessor.

[…] 4. Concerning Liability

Notwithstanding anything contained herein to the contrary, the Assignor shall remain liable to observe and perform all of the terms and provisions on its part to be observed and performed under the Assigned Contract with no liability whatsoever accruing to the Agent.

[…] 6. No Further Assignment by the Assignor; No Termination of Assigned Contract

(a) Neither the Assigned Contract nor any interest of the Assignor therein shall be transferred, assigned or otherwise alienated or encumbered by the Assignor in favour of any person except in accordance with the provisions of the Loan Agreement.

[…] 9. Termination and Release

Upon payment, satisfaction, settlement or extinguishment of the Assignor's obligations under the Loan Agreement in full, or if the Assignor is otherwise entitled to a release of this Assignment Agreement in accordance with the terms of the Loan Agreement, the Agent, upon request in writing by the Assignor and at the Assignor's expense, shall execute and deliver to the Assignor such deeds or other instruments as shall be requisite to discharge the security interest hereby constituted and to re-assign and transfer to the Assignor all of the right, title and interest of the Agent in and to the Assigned Contract.

Bailey #11 Affidavit, Exhibits "I" and "J", at s. 9, Bates Nos. 502 and 509 [emphasis added].

163. When considered as a whole, the language in the Assignment Agreements is unambiguous and intended to form a security interest. Specifically, (i) such assignment is not absolute, but determinable upon the repayment of the Applicants' indebtedness to Arena; (ii) they were expressly contemplated to be assigned as security at the time they were executed; (iii) the assignments terminate on repayment of the loan and do not run with the land in perpetuity; and, (iv) regardless of whether the GORRs themselves are interests in land, Arena's claims in respect of the GORRs are not interests in land and may be vested. The surrounding circumstances provide evidence that the parties intended for the GORRs to be used as a means to repay Arena debts and secure the same.

164. To the extent that there is any ambiguity in the meaning of the words set out in the contracts, the post-contract conduct of the parties may be considered.

***Yangarra*, at paras. 61-62 [BOA TAB 35].**

165. The post-contract conduct of the parties provides further evidence that the Assignment Agreements are security interests. Razor Energy has never paid the exact amount of the GORRs to Razor Royalties LP as contemplated in the GORR Agreements. Instead, Razor Energy historically advanced funds to Razor Royalties LP in an amount sufficient to cover Razor Royalties LP's obligations to Arena, under the Arena Loan Agreement.

Bailey #11 Affidavit, at para. 75.

Alternatively, the GORRs May Be Extinguished

166. In the alternative, if this Honourable Court determines that the GORRs are interests in land and that Arena has obtained rights in the GORRs beyond a mere security interest, the GORRs are still capable of being vested.

167. As set out in *Dianor #2*, the factors to be considered in determining whether vesting is appropriate include:

> Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.
>
> If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be

adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

***Dianor #2*, at paras. 109-110 [BOA TAB 43].**

168. The GORRs should be extinguished, if necessary, to give effect to the Texcal Transaction. Specifically:

(a) the nature of the interest in land constituted by a gross overriding royalty is akin to an ownership interest. However, Arena has implicitly agreed to the vesting of its interest in the GORRs, pursuant to the provisions of the Assignment Agreement requiring reconveyance upon the repayment of the Arena indebtedness, which in effect makes the extinguishment of the GORRs in this case similar to the vesting and extinguishment of a subordinate mortgage; and,

(b) to the extent it is necessary to consider the equities:

(i) Arena stands to benefit from the availability of the proceeds from the Texcal Transaction, against which it will have a claim in the event that its interest in the GORR is vested;

(ii) if the Texcal Transaction is approved, it will result in a claims process, to be administered by the Monitor, in a fair and transparent manner and which will determine the claims of all stakeholders, including Arena, to the proceeds of the transaction. Accordingly, Arena can be fairly compensated for the loss of any interest in the GORRs;

(iii) it is not possible for the Razor Entities to hold any equity in the property given the magnitude of the outstanding AROs;

(iv) the Razor Entities are acting in good faith and in accordance with the Court-approved SISP, and have found a transaction as a result of the SISP that will avoid the abandonment of its assets to the OWA; and,

(v) the result if the GORRs are not extinguished is that the Texcal Transaction cannot be completed, and there will be no recovery for any creditors or stakeholders, including Arena.

I. The Corporate Relief is Appropriate

169. The proposed form of Approval and Reverse Vesting Order would dispense with the requirement, pursuant to Section 185(3) of the *Business Corporations Act* (Alberta) (the "**ABCA**"), to give notice prior to the filing of the articles of amalgamation (the "**Corporate Relief**"). All other formalities associated with the filing of articles of amalgamation would remain intact.

170. The jurisdiction to grant the Corporate Relief is found in Section 11 of the CCAA, which states:

> **General power of court**
>
> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, **the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, <u>make any order that it considers appropriate in the circumstances</u>**.

CCAA at s. 11 [emphasis added] [BOA TAB 1].

171. Similar relief has been granted in other CCAA proceedings.

***Arrangement relatif à Goli Nutrition Inc.*, 2024 QCCS 1249 [BOA TAB 8];**
***Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2000 [BOA TAB 6].**

172. The jurisdiction under section 11 of the CCAA has been described as "broad and flexible authority" and "the engine" driving the CCAA, which is famously "skeletal in nature" and does not expressly provide for all forms of relief, which may be appropriate or necessary.

***Wiebe v Weinrich Contracting Ltd*, 2020 ABCA 396 at paras. 27, 30 [BOA TAB 46]**;
***Century Services* at para. 57 [BOA TAB 14];**
***Callidus* at para. 48 [BOA TAB 2].**

173. In exercising the jurisdiction under section 11 of the CCAA to craft an appropriate remedy in the circumstances, Courts must give consideration to the three "baseline considerations", that: (i) the order sought is appropriate in the circumstances; (ii) the applicant has been acting in good faith; and, (iii) the applicant has acted with due diligence. The order must promote the remedial objectives of the CCAA.

***Callidus* at para. 49 [BOA TAB 2], citing *Century Services* at paras. 59, 70 [BOA TAB 13].**

174. The Corporate Relief is appropriate in the circumstances, will promote the remedial purposes of the CCAA, and should be granted, as:

(a) compliance with the notice requirements under Section 185(3) of the ABCA, at this time, would require the Applicants to incur further expenses, at a time when the SISP has concluded and the Texcal Transaction is nearing closing, and would decrease the amount of funds available to creditors and stakeholders as a result of the Texcal Transaction;

(b) the Applicants have already provided notice of this Application, and all supporting materials, by way of a public press release, as well as by service to the service list established in these proceedings; the Applicants' creditors and shareholders have received sufficient notice of the existence of these proceedings, and the Applicants have made significant efforts to serve the materials for the Application on any parties who may have an interest in the outcome of this Application; and,

(c) the Applicants' shares have no value given their insolvency and significant AROs.

J. The Restricted Court Access Order Should be Granted

175. This Court has jurisdiction to order that certain materials be filed under seal when:

(a) court openness poses a serious risk to a "public interest", which is not restricted solely to the interests of the parties, but applies at the level of a general principle;

(b) such an order is necessary in order to prevent serious risk to the identified interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(c) as a matter of proportionality, the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible Court proceedings.

***Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, at para 53 [BOA TAB 41];**
***Sherman Estate v Donovan,* 2021 SCC 25, at paras. 38, 41 – 43 [BOA TAB 40].**

176. The Confidential Exhibit contains certain commercially sensitive information concerning the bids received in respect of Razor Energy's assets in the SISP. The public disclosure

and dissemination of the information in the Confidential Exhibit would cause serious and irreparable harm to the estate of the Applicants and their stakeholders. In particular, in the event that the Texcal Transaction does not close, for any reason, the confidential information could affect the bids received for Razor Energy's assets in any future sales process, including any sales process in bankruptcy or receivership proceedings.

Bailey #11 Affidavit, at para. 84.

177. There is an important public interest in: (i) preserving the integrity of distressed sales processes within insolvency proceedings; and (ii) maximizing the value of the assets marketed within such processes. The request to seal the Confidential Exhibit, on the Court file, pending the filing of the Monitor's Certificate or further order of the Court, is necessary in order to prevent serious risk to the commercial interests of the Applicants and their creditors and stakeholders. As a matter of proportionality, the salutary effects of the Sealing Order outweigh its deleterious effects.

VI. CONCLUSION

178. For the reasons set out herein, the Applicants respectfully request that this Court grant the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st DAY OF OCTOBER, 2024.

Sean Collins, KC / Pantelis Kyriakakis /
Nathan Stewart / Samantha Arbor
Counsel to the Applicants,
Razor Energy Corp., Razor Holdings GP Corp., and Blade Energy Services Corp.

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VII. LIST OF AUTHORITIES

STATUTES

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at sections 11, 11.02(2), 11.3, 23(1)(k), and 36(1)-(3);

CASE LAW AND SECONDARY SOURCES

2. *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10;
3. *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182;
4. *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314;
5. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659;
6. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2000;
7. *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828;
8. *Arrangement relatif à Goli Nutrition Inc.*, 2024 QCCS 1249;
9. *Arrangement relatif à Groupe Atis Inc et al*, (December 8, 2021) Que SC Montréal 500-11-059536-215 (Order);
10. *Bank of Montreal v Dynex Petroleum Ltd.*, 2002 SCC 7;
11. *Bank of Montreal v. Enchant Resources Ltd.*, 1999 ABCA 363;
12. *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945;
13. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332;
14. *Century Services Inc. v. Canada (Attorney General)*, [2010] SCC 60;
15. D. Greenfield, P. Maguire, D. Spencer, and K. Lenz, *When Insolvency and Restructuring Law Supercedes Contract*, Alberta Law Review (2017) 55:2 349-366, 2017 CanLIIDocs 35;
16. *Doman Industries Ltd., Re,* 2003 BCSC 376;
17. *Green Relief Inc et al, Re* (November 9, 2020) Ont SCJ Toronto CV-20-00639217-00CL (Approval and Vesting Order);
18. *Harte Gold Corp. (Re)*, 2022 ONSC 653;
19. *IMV Inc., et al., Re*, (October 18, 2023) NSSC Halifax 523334 (Order);

20. *In the Matter of a Plan of Compromise or Arrangement of Carillion Canada Holdings Inc., et al* (March 1, 2018) Ont SCJ Toronto CB-18-590812-00CL (Factum of the Applicants);

21. *In the Matter of a Plan of Compromise or Arrangement of Carillion Canada Holdings Inc., et al* (March 1, 2018) Ont SCJ Toronto CB-18-590812-00CL (Assignment Approval Order);

22. *In the Matter of Mountain Equipment Cooperative and 1314625 Ontario Limited*, Second Report of the Monitor, dated October 19, 2020;

23. *In the Matter of Nexii Building Solutions Inc*., No. S240195, Vancouver Registry, Second Report of the Monitor, dated April 19, 2024;

24. *In the Matter of Nexii Building Solutions Inc.*, No. S240195, Vancouver Registry, Assignment Order, dated April 26, 2024;

25. *In the Matter of the Compromise or Arrangement of Entrec Corporation, et al.* (August 31, 2020), ABKB 2001 06423 (Assignment Order);

26. *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214;

27. J Stam and E Stitt, *Not Quite True Love: Forced Assignment of Agreements*, 2017 AnnRevInsolv 18;

28. *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354;

29. *Lydian International Limited (Re)*, 2020 ONSC 4006;

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

31. *NextPoint Financial, Inc. (Re)*, 2023 BCSC 2378;

32. *Northmont Resort Properties Ltd. v. Reid*, 2018 ABQB 1002;

33. *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, 2023 BCSC 1476;

34. *Playdium Entertainment Corp. Re*, 2001 CarswellOnt 4109;

35. *Prairiesky Royalty Ltd. v Yangarra Resources Ltd*., 2023 ABKB 11;

36. *Quest University Canada (Re)*, 2020 BCSC 1883;

37. *Re ENTREC Corporation*, 2020 ABQB 751;

38. *Re Green Relief Inc.*, 2020 ONSC 6837;

39. *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 (ON CA);

40. *Sherman Estate v Donovan*, 2021 SCC 25;

41. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41;

42. *Third Eye Capital Corporation v. Ressources Dianor Inc.*, 2018 ONCA 253;

43. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508;

44. *Trican Well Service Ltd v Delphi Energy Corp*, 2020 ABCA 363;

45. *Veris Gold Corp,* 2015 BCSC 1204;

46. *Wiebe v Weinrich Contracting Ltd*, 2020 ABCA 396; and,

47. *Zayo Inc. v Primus Telecommunications Canada Inc.*, 2016 ONSC 5251.