Court File No.: 12- CV-9757-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO**

**APPLICATION OF ALLIED SYSTEMS HOLDINGS, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

# MOVING PARTY'S BOOK OFAUTHORITIES

**(Motion Returnable June 26, 2013)**

June 25, 2013

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**INDEX**

# TAB 1

*Case Name:*

# Massachusetts Elephant & Castle Group, Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**
**AND IN THE MATTER OF certain proceedings taken in the United States Bankruptcy Court for the District of Massachusetts Eastern Division with respect to the companies listed on Schedule "A" hereto (The "Chapter 11 Debtors") under Section 46 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**
**RE: Massachusetts Elephant & Castle Group, Inc., Applicant**

[2011] O.J. No. 3280

**2011 ONSC 4201**

81 C.B.R. (5th) 102

2011 CarswellOnt 6610

Court File No. CV-11-9279-00CL

Ontario Superior Court of Justice

**G.B. Morawetz J.**

Heard: July 4, 2011.
Judgment: July 11, 2011.

(40 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Affiliated debtor companies -- Compromises and arrangements -- Applications -- Initial applications -- International insolvencies -- Proceedings -- Practice and procedure -- General principles -- Legislation -- Interpretation -- Statutes -- Courts -- Jurisdiction -- CCAA matters -- International insolvencies -- Orders -- Assisting foreign court -- Application by Massachusetts Elephant & Castle Group Inc ("MECG") for certain orders pursuant to ss. 46 to 49 of the Companies' Creditors Arrangement Act ("CCAA") allowed -- Chapter 11 Debtors commenced proceedings ("Chapter 11 Proceedings") in the United States -- MECG was the lead*

*debtor in the Chapter 11 Proceedings -- MECG satisfied the requirements of s. 47(1) of the CCAA and the Court recognized the foreign proceeding as a foreign main proceeding -- Pursuant to s. 48 of the CCAA, mandatory relief was granted -- The discretionary relief, including recognition of the Chapter 11 orders, was granted -- Companies' Creditors Arrangement Act, ss. 45, 46, 47.*

Application by Massachusetts Elephant & Castle Group Inc ("MECG") for an Initial Recognition Order declaring that: MECG was a foreign representative pursuant to s. 45 of the Companies Creditors Arrangement Act ("CCAA") and was entitled to bring its application pursuant to s. 46 of the CCAA; the Chapter 11 Proceeding in respect of the Chapter 11 Debtors was a "foreign main proceeding" for the purposes of the CCAA; and any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors property were stayed. Application by MECG for a Supplemental Order that: recognized in Canada and enforced certain orders of the US Court made in the Chapter 11 Proceeding; granted a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and appointed BDO Canada Limited as Information Officer in respect of the proceedings. The Chapter 11 Debtors, including MECG, operated and franchised authentic British-style restaurant pubs in the United States and Canada. MECG was the lead debtor in the Chapter 11 Proceeding. On June 28, 2011, the chapter 11 Debtors commenced proceedings ("Chapter 11 Proceedings") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division. MECG was the lead debtor in the Chapter 11 Proceedings. On June 30, 2011, the US Court made certain orders at the first-day hearing held in the Chapter 11 Proceedings, including an order appointing MECG as foreign representative in respect of the Chapter 11 Proceeding. The purpose of the Chapter 11 Proceedings was to sell the Chapter 11 Debtors' businesses as a going concern on the most favorable terms possible and keep the Chapter 11 Debtors' business intact to the greatest extent possible. The issue before the Court was whether it should grant the application for orders pursuant to ss. 46-49 of the CCAA and recognize the Chapter 11 Proceeding as a foreign main proceeding.

HELD: Application allowed. Since MECG satisfied the requirements of s. 47(1) of the CCAA, the Court recognized the foreign proceeding. Section 47(2) of the CCAA required the Court to specify in its order whether the foreign proceeding was a foreign main proceedings or a foreign non-main proceeding. Pursuant to s. 45(1) of the CCAA, a foreign main proceeding was a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest ("COMI"). The location of the debtors' headquarters or head office functions or nerve centre was in Boston, Massachusetts and the location of the debtors' management was in Boston. The entity making up the Chapter 11 Debtors had their COMI in the United States. The foreign proceeding was a foreign main proceeding. The mandatory relief provided for in s. 48 of the CCAA was contained in the Initial Recognition Order. Section 49 of the CCCA gave the Court discretion to provide further relief if it was satisfied that it was necessary for the protection of the debtor company's property or the interest of a creditor or debtors. The supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, was appropriate in the circumstances.

**Statutes, Regulations and Rules Cited:**

Business Corporations Act, R.S.O. 1990, c. B.16,

Canada Business Corporations Act, R.S.C. 1985, c. C-44,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 44, s. 45(1), s. 45(1), s. 45(2), s. 46, s. 46(1), s. 46(2), s. 47, s. 47(1), s. 47(2), s. 48, s. 48(1), s. 49, s. 49(1), s. 50, s. 61, s. 61(1), s. 61(2)

United States Bankruptcy Code, 11 U.S.C. s. 1101-1174, Chapter 11

**Counsel:**

Kenneth D. Kraft, Sara-Ann Wilson, for the Applicant.

Heather Meredith, for the GE Canada Equipment Financing GP.

---

**ENDORSEMENT**

**1 G.B. MORAWETZ J.**:-- Massachusetts Elephant & Castle Group, Inc. ("MECG" or the "Applicant") brings this application under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*"). MECG seeks orders pursuant to sections 46 - 49 of the *CCAA* providing for:

(a) an Initial Recognition Order declaring that:

(i) MECG is a foreign representative pursuant to s. 45 of the *CCAA* and is entitled to bring its application pursuant s. 46 of the *CCAA*;
(ii) the Chapter 11 Proceeding (as defined below) in respect of the Chapter 11 Debtors (as set out in Schedule "A") is a "foreign main proceeding" for the purposes of the *CCAA*; and
(iii) any claims, rights, liens or proceedings against or in respect of the Chapter 11 Debtors, the directors and officers of the Chapter 11 Debtors and the Chapter 11 Debtors' property are stayed; and

(b) a Supplemental Order:

(i) recognizing in Canada and enforcing certain orders of the U.S. Court (as defined below) made in the Chapter 11 Proceeding (as defined below);
(ii) granting a super-priority change over the Chapter 11 Debtors' property in respect of administrative fees and expenses; and
(iii) appointing BDO Canada Limited ("BDO") as Information Officer in respect of these proceedings (the "Information Officer").

**2** On June 28, 2011, the Chapter 11 Debtors commenced proceedings (the "Chapter 11 Proceeding") in the United States Bankruptcy Court for the District of Massachusetts Eastern Division

(the "U.S. Court"), pursuant to Chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. s. 1101-1174 ("*U.S. Bankruptcy Code*").

**3** On June 30, 2011, the U.S. Court made certain orders at the first-day hearing held in the Chapter 11 Proceeding, including an order appointing the Applicant as foreign representative in respect of the Chapter 11 Proceeding.

**4** The Chapter 11 Debtors operate and franchise authentic, full-service British-style restaurant pubs in the United States and Canada.

**5** MECG is the lead debtor in the Chapter 11 Proceeding and is incorporated in Massachusetts. All of the Chapter 11 Debtors, with the exception of Repechage Investments Limited ("Repechage"), Elephant & Castle Group Inc. ("E&C Group Ltd.") and Elephant & Castle Canada Inc. ("E&C Canada") (collectively, the "Canadian Debtors") are incorporated in various jurisdictions in the United States.

**6** Repechage is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("*CBCA*") with its registered office in Toronto, Ontario. E&C Group Ltd. is also incorporated under the *CBCA* with a registered office located in Halifax, Nova Scotia. E&C Canada Inc. is incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B.16, and its registered office is in Toronto. The mailing office for E&C Canada Inc. is in Boston, Massachusetts at the location of the corporate head offices for all of the debtors, including Repechage and E&C Group Ltd.

**7** In order to comply with s. 46(2) of the *CCAA*, MECG filed the affidavit of Ms. Wilson to which was attached certified copies of the applicable Chapter 11 orders.

**8** MECG also included in its materials the declaration of Mr. David Dobbin filed in support of the first-day motions in the Chapter 11 Proceeding. Mr. Dobbin, at paragraph 19 of the declaration outlined the sale efforts being entered into by MECG. Mr. Dobbin also outlined the purpose of the Chapter 11 Proceeding, namely, to sell the Chapter 11 Debtors' businesses as a going concern on the most favourable terms possible under the circumstances and keep the Chapter 11 Debtors' business intact to the greatest extent possible during the sales process.

**9** The issues for consideration are whether this court should grant the application for orders pursuant to ss. 46 - 49 of the *CCAA* and recognize the Chapter 11 Proceeding as a foreign main proceeding.

**10** The purpose of Part IV of the *CCAA* is set out in s. 44:

> 44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> (*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
>
> (*b*) greater legal certainty for trade and investment;
>
> (*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

> (*d*) the protection and the maximization of the value of debtor company's property; and
>
> (*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

**11** Section 46(1) of the *CCAA* provides that "a foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative."

**12** Section 47(1) of the *CCAA* provides that there are two requirements for an order recognizing a foreign proceeding:

> (a) the proceeding is a foreign proceeding, and
> (b) the applicant is a foreign representative in respect of that proceeding.

**13** Canadian courts have consistently recognized proceedings under Chapter 11 of the *U.S. Bankruptcy Code* to be foreign proceedings for the purposes of the *CCAA*. In this respect, see: *Babcock & Wilcox Canada Ltd., Re* (2000), 5 B.L.R. (3d) 75 (Ont. S.C.); *Re Magna Entertainment Corp.* (2009), 51 C.B.R. (5th) 82 (Ont. S.C.); *Lear Canada (Re)* (2009), 55 C.B.R. (5th) 57 (Ont. S.C.).

**14** Section 45(1) of the *CCAA* defines a foreign representative as:

> a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor company, to
>
> (a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or
> (b) act as a representative in respect of the foreign proceeding.

**15** By order of the U.S. Court dated June 30, 2011, the Applicant has been appointed as a foreign representative of the Chapter 11 Debtors.

**16** In my view, the Applicant has satisfied the requirements of s. 47(1) of the CCAA. Accordingly, it is appropriate that this court recognize the foreign proceeding.

**17** Section 47(2) of the *CCAA* requires the court to specify in its order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

**18** A "foreign main proceeding" is defined in s. 45(1) of the *CCAA* as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interest" ("COMI").

**19** Part IV of the *CCAA* came into force in September 2009. Therefore, the experience of Canadian courts in determining the COMI has been limited.

**20** Section 45(2) of the *CCAA* provides that, in the absence of proof to the contrary, the debtor company's registered office is deemed to be the COMI. As such, the determination of COMI is made on an entity basis, as opposed to a corporate group basis.

**21** In this case, the registered offices of Repechage and E&C Canada Inc. are in Ontario and the registered office of E&C Group Ltd. is in Nova Scotia. The Applicant, however, submits that the

COMI of the Chapter 11 Debtors, including the Canadian Debtors, is in the United States and the recognition order should be granted on that basis.

**22** Therefore, the issue is whether there is sufficient evidence to rebut the s. 45(2) presumption that the COMI is the registered office of the debtor company.

**23** In this case, counsel to the Applicant submits that the Chapter 11 Debtors have their COMI in the United States for the following reasons:

(a) the location of the corporate head offices for all of the Chapter 11 Debtors, including the Canadian Debtors, is in Boston, Massachusetts;
(b) the Chapter 11 Debtors including the Canadian Debtors function as an integrated North American business and all decisions for the corporate group, including in respect to the operations of the Canadian Debtors, is centralized at the Chapter 11 Debtors head office in Boston;
(c) all members of the Chapter 11 Debtors' management are located in Boston;
(d) virtually all human resources, accounting/finance, and other administrative functions associated with the Chapter 11 Debtors are located in the Boston offices;
(e) all information technology functions of the Chapter 11 Debtors, with the exception of certain clerical functions which are outsourced, are provided out of the United States; and
(f) Repechage is also the parent company of a group of restaurants that operate under the "Piccadilly" brand which operates only in the U.S.

**24** Counsel also submits that the Chapter 11 Debtors operate a highly integrated business and each of the debtors, including the Canadian Debtors, are managed centrally from the United States. As such, counsel submits it is appropriate to recognize the Chapter 11 Proceeding as a foreign main proceeding.

**25** On the other hand, Mr. Dobbin's declaration discloses that nearly one-half of the operating locations are in Canada, that approximately 43% of employees work in Canada, and that GE Canada Equipment Financing G.P. ("GE Canada") is a substantial lender to MECG. GE Canada does not oppose this application.

**26** Counsel to the Applicant referenced *Re Angiotech Pharmaceuticals Limited*, [2011] B.C.J. No. 123, 2011 CarswellBC 124 where the court listed a number of factors to consider in determining the COMI including:

(a) the location where corporate decisions are made;
(b) the location of employee administrations, including human resource functions;
(c) the location of the debtor's marketing and communication functions;
(d) whether the enterprise is managed on a consolidated basis;
(e) the extent of integration of an enterprise's international operations;
(f) the centre of an enterprise's corporate, banking, strategic and management functions;
(g) the existence of shared management within entities and in an organization;
(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and
(j) the seat of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

**27** It seems to me that, in considering the factors listed in *Re Angiotech,* the intention is not to provide multiple criteria, but rather to provide guidance on how the single criteria, *i.e.* the centre of main interest, is to be interpreted.

**28** In certain circumstances, it could be that some of the factors listed above or other factors might be considered to be more important than others, but nevertheless, none is necessarily determinative; all of them could be considered, depending on the facts of the specific case.

**29** For example:

(a) the location from which financing was organized or authorized or the location of the debtor's primary bank would only be important where the bank had a degree of control over the debtor;
(b) the location of employees might be important, on the basis that employees could be future creditors, or less important, on the basis that protection of employees is more an issue of protecting the rights of interested parties and therefore is not relevant to the COMI analysis;
(c) the jurisdiction whose law would apply to most disputes may not be an important factor if the jurisdiction was unrelated to the place from which the debtor was managed or conducted its business.

**30** However, it seems to me, in interpreting COMI, the following factors are usually significant:

(a) the location of the debtor's headquarters or head office functions or nerve centre;
(b) the location of the debtor's management; and
(c) the location which significant creditors recognize as being the centre of the company's operations.

**31** While other factors may be relevant in specific cases, it could very well be that they should be considered to be of secondary importance and only to the extent they relate to or support the above three factors.

**32** In this case, the location of the debtors' headquarters or head office functions or nerve centre is in Boston, Massachusetts and the location of the debtors' management is in Boston. Further, GE Canada, a significant creditor, does not oppose the relief sought. All of this leads me to conclude that, for the purposes of this application, each entity making up the Chapter 11 Debtors, including the Canadian Debtors, have their COMI in the United States.

**33** Having reached the conclusion that the foreign proceeding in this case is a foreign main proceeding, certain mandatory relief follows as set out in s. 48(1) of the *CCAA*:

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

> (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and
>
> (*d*) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

**34** The relief provided for in s. 48 is contained in the Initial Recognition Order.

**35** In addition to the mandatory relief provided for in s. 48, pursuant to s. 49 of the *CCAA*, further discretionary relief can be granted if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. Section 49 provides:

> 49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (*a*) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
>
> (*c*) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

**36** In this case, the Applicant applies for orders to recognize and give effect to a number of orders of the U.S. Court in the Chapter 11 Proceeding (collectively, the "Chapter 11 Orders") which are comprised of the following:

(a) the Foreign Representative Order;
(b) the U.S. Cash Collateral Order;
(c) the U.S. Prepetition Wages Order;
(d) the U.S. Prepetition Taxes Order;
(e) the U.S. Utilities Order;

(f) the U.S. Cash Management Order;
(g) the U.S. Customer Obligations Order; and
(h) the U.S. Joint Administration Order.

**37** In addition, the requested relief also provides for the appointment of BDO as an Information Officer; the granting of an Administration Charge not to exceed an aggregate amount of $75,000 and other ancillary relief.

**38** In considering whether it is appropriate to grant such relief, portions of s. 49, s. 50 and 61 of the *CCAA* are relevant:

> 50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.
>
> ...
>
> 61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.
> (2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

**39** Counsel to the Applicant advised that he is not aware of any provision of any of the U.S. Orders for which recognition is sought that would be inconsistent with the provisions of the CCAA or which would raise the public policy exception as referenced in s. 61(2). Having reviewed the record and having heard submissions, I am satisfied that the supplementary relief, relating to, among other things, the recognition of Chapter 11 Orders, the appointment of BDO and the quantum of the Administrative charge, all as set out in the Supplemental Order, is appropriate in the circumstances and is granted.

**40** The requested relief is granted. The Initial Recognition Order and the Supplemental Order have been signed in the form presented.

G.B. MORAWETZ J.

* * * * *

**SCHEDULE "A"**

1. Massachusetts Elephant & Castle Group Inc.
2. Repechage Investments Limited
3. Elephant & Castle Group Inc.
4. The Elephant and Castle Canada Inc.
5. Elephant & Castle, Inc. (a Texas Corporation)
6. Elephant & Castle Inc. (a Washington Corporation)
7. Elephant & Castle International, Inc.
8. Elephant & Castle of Pennsylvania, Inc.
9. E & C Pub, Inc.
10. Elephant & Castle East Huron, LLC

11. Elephant & Castle Illinois Corporation
12. E&C Eye Street, LLC
13. E & C Capital, LLC
14. Elephant & Castle (Chicago) Corporation

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---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Wednesday, April 17, 2013  10:45:38

# TAB 2

Court File No.: 12- CV- 9757-00CL

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**(COMMERCIAL LIST)**

| | | |
|---|---|---|
| THE HONOURABLE | ) | TUESDAY, THE 12TH DAY |
| | ) | |
| MR. JUSTICE MORAWETZ | ) | OF JUNE, 2012 |

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

**AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO**

**APPLICATION OF ALLIED SYSTEMS HOLDINGS, INC. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

**INITIAL RECOGNITION ORDER**
**(FOREIGN MAIN PROCEEDING)**

THIS APPLICATION, made by Allied Systems Holdings, Inc. in its capacity as foreign representative (the "**Foreign Representative**") of Allied Systems Holdings, Inc., Allied Systems (Canada) Company ("**Allied Canada**"), Axis Canada Company ("**Axis Canada**", and together with Allied Canada, the "**Canadian Companies**") and those other entities listed on Schedule "A" hereto (collectively, the "**Chapter 11 Debtors**"), pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order substantially in the form enclosed in the Application Record, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Application, the affidavit of Scott Macaulay sworn June 11, 2012 (the "**Macaulay Affidavit**"), the report dated June 11, 2012 (the "**Report**") of Duff &

Phelps Canada Restructuring Inc., in its capacity as proposed information officer (the "**Proposed Information Officer**"), and the first supplemental affidavit of Christopher Eustace sworn June 11, 2012, the second supplemental affidavit of Christopher Eustace sworn June 12, 2012, and the third supplemental affidavit of Christopher Eustace sworn June 12, 2012 (collectively, the "**Eustace Affidavits**") each filed, and upon being provided with copies of the documents required by section 46 of the CCAA,

AND UPON BEING ADVISED by counsel for the Foreign Representative that in addition to this Initial Recognition Order, a Supplemental Order is being sought,

AND UPON HEARING the submissions of counsel for the Foreign Representative, counsel for the Proposed Information Officer, counsel for Yucaipa American Alliance Fund I, L.P.; Yucaipa American Alliance Fund II, L.P.; Yucaipa American Alliance (Parallel) Fund I, L.P.; Yucaipa American Alliance (Parallel) Fund II, L.P., counsel for Black Diamond CLO 2005-1 Ltd., BDCM Opportunity Fund II, LP and Spectrum Investment Partners LP, and those other parties present, no one else appearing, and upon reading the affidavit of service of Jason McMurtrie sworn June 11, 2012:

**SERVICE**

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

**FOREIGN REPRESENTATIVE**

2. THIS COURT ORDERS AND DECLARES that the Foreign Representative is the "foreign representative" as defined in section 45 of the CCAA of the Chapter 11 Debtors in respect of the cases commenced in the United States Bankruptcy Court for the District of Delaware by the Chapter 11 Debtors pursuant to Chapter 11 of the United States Bankruptcy Code (the "**Foreign Proceeding**").

**CENTRE OF MAIN INTEREST AND RECOGNITION OF FOREIGN PROCEEDING**

3. THIS COURT DECLARES that the centre of its main interests for each of the Chapter 11 Debtors is the United States of America and that the Foreign Proceeding is hereby recognized as a "foreign main proceeding" as defined in section 45 of the CCAA.

**STAY OF PROCEEDINGS**

4. THIS COURT ORDERS that until otherwise ordered by this Court:

(a) all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* are stayed;

(b) further proceedings in any action, suit or proceeding against the Chapter 11 Debtors are restrained; and

(c) the commencement of any action, suit or proceeding against the Chapter 11 Debtors is prohibited.

**NO SALE OF PROPERTY**

5. THIS COURT ORDERS that, except with leave of this Court, each of the Chapter 11 Debtors is prohibited from selling or otherwise disposing of:

(a) outside the ordinary course of its business, any of its property in Canada that relates to the business; and

(b) any of its other property in Canada.

**GENERAL**

6. THIS COURT ORDERS that within five (5) business days from the date of this Order, or as soon as practicable thereafter, the Foreign Representative shall cause to be published a notice substantially in the form attached to this Order as Schedule B, once a week for two consecutive weeks, in the Globe and Mail (National Edition).

7. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, to give effect to this Order and

to assist the Chapter 11 Debtors and the Foreign Representative and their respective counsel and agents in carrying out the terms of this Order.

8. THIS COURT ORDERS AND DECLARES that this Order shall be effective as of 12:31 p.m. Eastern Standard Time on the date of this Order.

9. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order or seek other relief on not less than seven (7) days notice to the Chapter 11 Debtors and the Foreign Representative and their respective counsel, and to any other party or parties likely to be affected by the order sought, or upon such other notice, if any, as this Court may order.

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

JUN 12 2012

## SCHEDULE A – CHAPTER 11 DEBTORS

Allied Systems Holdings, Inc.

Allied Automotive Group, Inc.

Allied Freight Broker LLC

Allied Systems (Canada) Company

Allied Systems, Ltd. (L.P.)

Axis Areta, LLC

Axis Canada Company

Axis Group, Inc.

Commercial Carriers, Inc.

CT Services, Inc.

Cordin Transport LLC

F.J. Boutell Driveway LLC

GACS Incorporated

Logistic Systems, LLC

Logistic Technology, LLC

QAT, Inc.

RMX LLC

Transport Support LLC

Terminal Services LLC

## SCHEDULE B – NOTICE OF RECOGNITION ORDERS

Court File No.: 12-

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO**

**APPLICATION OF ALLIED SYSTEMS HOLDINGS, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

# NOTICE OF RECOGNITION ORDERS

**PLEASE BE ADVISED** that this Notice is being published pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Canadian Court**"), granted on June 12, 2012.

**PLEASE TAKE NOTICE** that, on June 12, 2012, Allied Systems Holdings, Inc. ("**Allied Systems**"), Allied Automotive Group, Inc.; Allied Freight Broker LLC; Allied Systems (Canada) Company ("**Allied Canada**"); Axis Areta, LLC; Axis Canada Company ("**Axis Canada**"); Axis Group, Inc.; Commercial Carriers, Inc.; CT Services, Inc.; Cordin Transport LLC; F.J. Boutell Driveway LLC; GACS Incorporated; Logistic Systems, LLC; Logistic Technology, LLC; QAT, Inc.; RMX LLC; Transport Support LLC; and, Terminal Services LLC (together with Allied Systems US, the "**Chapter 11 Debtors**") commenced proceedings pursuant to Chapter 11 of the United States Code (the "**Bankruptcy Code**") with the United States Bankruptcy Court for the District of Delaware (the "**US Court**"). In connection with the Chapter 11 Proceedings, the Chapter 11 Debtors have appointed Allied Systems as their foreign representative (the "**Foreign Representative**"). The Foreign Representative's address is 2302 Parklake Drive, Suite 600, Atlanta, Georgia 30345-2918. The Chapter 11 Debtors carry on business in Canada through Allied Canada and Axis Canada.

**PLEASE TAKE FURTHER NOTICE** that an Initial Recognition Order and a Supplemental Order (together, the "**Recognition Orders**") have been issued by the Canadian Court pursuant to Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, that, among other

things: (i) recognize the Chapter 11 Proceedings as "foreign main proceeding"; (ii) recognize Allied Systems as the Foreign Representative of the Chapter 11 Debtors; and (iii) appoint Duff & Phelps Canada Restructuring Inc. as the Information Officer with respect to the Chapter 11 Proceedings.

**PLEASE TAKE FURTHER NOTICE** that counsel to the Foreign Representative is.:

**GOWLING LAFLEUR HENDERSON LLP**
100 King Street West, Suite 1600
Toronto, Ontario M5X 1G5
Attention: Jennifer Stam
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**PLEASE TAKE FURTHER NOTICE** that persons who wish to receive a copy of the Recognition Orders or obtain any further information in respect thereof or in respect of the matters set forth in this Notice, should contact the Information Officer at the following address:

**DUFF & PHELPS CANADA RESTRUCTURING INC.**
200 King Street West, Suite 1002
Toronto, Ontario M5H 3T4
Attention: Mitch Vininsky
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**PLEASE FINALLY NOTE** that the Recognition Orders, and any other orders that may be granted by the Canadian Court, can be viewed at www.duffandphelps.com/restructuringcases.

**DATED AT TORONTO, ONTARIO** this ● day of June, 2012.

**DUFF & PHELPS CANADA RESTRUCTURING INC.**
(solely in its capacity as Information Officer)

Court File No.: 12- CV-_____

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

**AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO**

**APPLICATION OF ALLIED SYSTEMS HOLDINGS, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

**Proceeding commenced at Toronto, Ontario, Canada**

**INITIAL RECOGNITION ORDER**
**(FOREIGN MAIN PROCEEDING)**

**GOWLING LAFLEUR HENDERSON LLP**
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Lawyers for the Applicant

# TAB 3

**In re EPHEDRA PRODUCTS LIABILITY LITIGATION; In re MUSCLETECH RESEARCH AND DEVELOPMENT INC., et al.; Foreign Applicants in Foreign Proceedings. In re RSM RICHTER INC., AS FOREIGN REPRESENTATIVE OF MUSCLETECH RESEARCH AND DEVELOPMENT INC. AND ITS SUBSIDIARIES, Plaintiff, -v- SHARON AGUILAR, an individual; et al., Defendants.**

**04 MD 1598 (JSR), 06 Civ. 538 (JSR), 06 Civ. 539 (JSR)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK**

**349 B.R. 333; 2006 U.S. Dist. LEXIS 57595; 56 Collier Bankr. Cas. 2d (MB) 734**

**August 11, 2006, Decided**
**August 15, 2006, Filed**

**SUBSEQUENT HISTORY:** Motion to strike granted by, in part, Motion to strike denied by, in part Matheny v. Body Dynamics, Inc. (In re Ephedra Prods. Liab. Litig.), 2006 U.S. Dist. LEXIS 72707 (S.D.N.Y., Oct. 3, 2006)
Related proceeding at Toth v. Bodyonics, Ltd., 2007 U.S. Dist. LEXIS 18278 (E.D. Pa., Mar. 15, 2007)

**PRIOR HISTORY:** In re Ephedra Prods. Liab. Litig., 2006 U.S. Dist. LEXIS 18691 (S.D.N.Y., Apr. 9, 2006)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** In consolidated products liability litigation in which numerous U.S. consumers sued a Canadian company that marketed a certain diet product in the U.S., petitioner, the monitor in a Canadian insolvency proceeding, moved for an order recognizing and enforcing an order of the Canadian insolvency tribunal that approved a claims resolution procedure for all creditor claims. Respondents, four U.S. claimants, objected to the order.

**OVERVIEW:** The claims resolution procedure provided for mandatory mediation, and if the mediation resulted in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims by an appointed claims officer. The claimants contended that

this procedure was manifestly contrary to U.S. public policy under 11 U.S.C.S. 1506 in that it deprived them of due process and a jury trial. The court rejected these contentions. Although initially there were aspects of the procedure that arguably permitted the claims officer to refuse to receive evidence and to liquidate claims without giving interested parties an opportunity to be heard, the procedures were amended to cure these problems. As to the alleged denial of the right to a jury trial, the court found that § 1506 did not prevent a U.S. court from recognizing and enforcing a foreign insolvency procedure for liquidating claims solely on the basis that the procedure did not include a right to a jury. Foreign procedures were not "manifestly contrary to the public policy of the U.S." if they were plainly fair, even if they did not include some common incidents of American practice, such as a jury trial.

**OUTCOME:** The court granted the monitor's motion and recognized and enforced the claims resolution procedure as promulgated, amended, and adopted by the Canadian tribunal.

**CORE TERMS:** jury trial, objectors', public policy, manifestly, foreign judgments, insolvency, ephedra, Model Law, fair and impartial, transferred, claimants, plainly, notice, personal injuries, wrongful deaths, federal cases, insolvency proceeding, foreign forums, interested parties, oral argument, bargaining position, liquidation, unfairness, appointed, approving, mediation, relevance, civilized, conveniens, accorded

**LexisNexis(R) Headnotes**

***Bankruptcy Law > Case Administration > Court Powers***
***Bankruptcy Law > Practice & Proceedings > General Overview***
***Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies***
[HN1] Section 1521(a) of the Bankruptcy Code permits a court, upon the recognition of a foreign proceeding, to grant, at a foreign representative's request, any appropriate relief necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors. 11 U.S.C.S. § 1521(a).

***Bankruptcy Law > Case Administration > Court Powers***
***Bankruptcy Law > Practice & Proceedings > General Overview***
***Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies***
[HN2] Section 105(a) of the Bankruptcy Code provides that a court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. 11 U.S.C.S. § 105(a).

***Bankruptcy Law > Case Administration > Court Powers***
***Bankruptcy Law > Practice & Proceedings > General Overview***
***Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies***
[HN3] Section 1506 of the Bankruptcy Code provides, that nothing in this chapter prevents a court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.

**COUNSEL: [**1]** For Muscletech Research and Development, Inc., Debtor (1:06-cv-00538-JSR): Daniel Joseph Guyder, Allen & Overy, LLP, New York, NY.

For Annabelle Jaramillo, Celestino Jaramillo, Movants (1:06-cv-00538-JSR): Joe L. McClaugherty, McClaugherty & Silver, P.C, Santa Fe, NM.

For HVL Incorporated, Interested Party (1:06-cv-00538-JSR, 1:06-cv-00539-JSR): Meagan E. Costello, Goodwin Procter, LLP, New York, NY.

For Ad Hoc Committee of Tort Claimants, Ad Hoc Committee of Tort Claimants, Interested Party (1:06-cv-00538-JSR, 1:06-cv-00539-JSR): William R. Baldiga, Brown Rudnick Berlack Israels LLP, Boston, MA.

For Timothy A. McLaughlin, Interested Party (1:06-cv-00538-JSR, 1:06-cv-00539-JSR): Bernard Roman Nevoral, Bernard R. Nevoral and Associates Ltd, Chicago, IL; Thomas Edward Engel, Engel & McCarney, New York, NY.

For Candace Ishman, Interested Party (1:06-cv-00538-JSR, 1:06-cv-00539-JSR): Genevieve Nichols, Coffey and Associates, St. Louis, MO.

For RSM Richter Inc., as Foreign Representative of MuscleTech Research and Development Inc. and its subsidiaries, Plaintiff (1:06-cv-00539-JSR): Ken Coleman, Daniel Joseph Guyder, Allen & Overy, LLP, New York, NY.

For **[**2]** Angie Witwer, Scott Witwer, Plaintiffs (1:06-cv-00539-JSR): Barry Edward Newman, Spohrer Wilner, Maxwell, and Matthews, Jacksonville, FL.

For Thomas Hannon, Defendant (1:06-cv-00539-JSR): John D. Goldsmith, Tampa, FL.

For Amazon.Com, Inc., a Delaware corporation, Defendant (1:06-cv-00539-JSR): Angela L Milch, Smith Mazure, New York City, NY.

For James Niss, Special Master (1:04-md-01598-JSR): Attorney Maintenance List 01 - For MDL 1598; Attorney Maintenance List 02 - For MDL 1598; Attorney Maintenance List 03 - For MDL 1598; Attorney Maintenance List 04 - For MDL 1598; Attorney Maintenance List 05 - For MDL 1598; James Niss, New York, NY.

For Joanne Marlow, John Marlow, Plaintiffs (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; Catherine Theodora Heacox, Michael E. Pederson, Weitz and Luxenburg, P.C., New York, NY; Ellen Relkin, Weitz & Luxenberg, New York, NY; Kenneth H. Stone, Law Offices of Kenneth H. Stone, San Diego, CA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love,

Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar **[**3]** Shin & Byrne PLLC, New York, NY.

For David Alcantara, Plaintiff (1:04-md-01598-JSR): Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Vernon L. Baines, Plaintiff (1:04-md-01598-JSR): Edward Frances Blizzard, Blizzard McCarthy & Nabers, Houston, TX; Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Robert M. Schwartz, Williams & Bailey Law Firm, Houston, TX; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; W. Michael Leebron, II, Fibich, Hampton, Leebron & Grath, L.L.P., Houston, TX.

For Jahn Bernard Smith, Plaintiff (1:04-md-01598-JSR): **[**4]** Anne Andrews, Andrews Kurth LLP, Dallas, TX; Edward Frances Blizzard, Blizzard McCarthy & Nabers, Houston, TX; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Robert A. Schwartz, William Bailey Law Firm, L.L.P., Houston, TX; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Irma Garza, Plaintiff (1:04-md-01598-JSR): Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Jason Vickery, Plaintiff (1:04-md-01598-JSR): Edward Frances Blizzard, Blizzard **[**5]** McCarthy & Nabers, Houston, TX; Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Sallie Cooper, Individually and as Administratrix of the Estate of Diane Cooper, Plaintiff (1:04-md-01598-JSR): Katherine M. Lordi, Katherine M. Lordi, Bloomfield, NJ; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Donald Acuff, Plaintiff (1:04-md-01598-JSR): David Howard Berg, Berg & Androphy, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Michael Hodson, Hodson, Woods & Snively, Fayetteville, AR; Russell Scott Briggs, Fibich, Hampton **[**6]** & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Tamera Lee Venzke, Venzke Law Firm, Houston, TX; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Shannon Pierce, Lugene Parsley, Joanne Doss, Patrick Galway, George Segrest, deceased, by and through his widow, Cheryl Segrest, Eiko Winters, individually as surviving heir and executrix of the Estate of Christopher Winters, deceased, Goldshield Group, plc, Goldshield Acquisition, Inc., Plaintiffs (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Daniel Hoak, Plaintiff (1:04-md-01598-JSR): Ethan James Early, Early & Strauss, LLC, New York, NY; J. Nixon Daniel, John F. Windham, Thomas F. Gonzalez, Beggs & Lane, Pensacola, FL; Leslie W. O'Leary Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, **[**7]** Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Sarah Scheingold, Plaintiff (1:04-md-01598-JSR): Charles W. Sickels, Donna Miller Rostant, Hall, Sickels, Rostant, Frei and Kattenburg, Reston, VA; John C. Evans, Specter Specter Evans & Manogue, P.C., Pittsburgh, PA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Timothy Sallis, Plaintiff (1:04-md-01598-JSR): Hal Jon Kleinman, Schiffrin & Barroway, LLP, Radnor, PA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; Anne **[**8]** Andrews, Andrews

Kurth LLP, Dallas, TX.

For Sayonara Bhattacharya, Plaintiff (1:04-md-01598-JSR): Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Norbert Rawert, Individually and as the personal representative of the Estate of Matthew Rawert, Nikeisha Joyner-Wiggins, Plaintiffs (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Ina Rawert, individually and as the personal representative of the Estate of Matthew Rawert, Ronnie Rodriguez, **[**9]** Plaintiffs (1:04-md-01598-JSR): John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Angela Kirk, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Paul D. Rheingold, Rheingold, Valet, Rheingold, Shkolnik & McCartney, LLP, McCartney, LLP, New York, NY; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Harvey L. Levine, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, **[**10]** Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Layne Yranian, Paul Thompson, Robin Thompson, Plaintiffs (1:04-md-01598-JSR): James Stewart White, Law Offices of White, Meany & Wetherall, LLP, Reno, NV; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B.

Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For David Fulton, Plaintiff (1:04-md-01598-JSR): Hugh McMaster Russ, III, Hodgson Russ Andrews Woods & Goody, LLP, Buffalo, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Brenett Forbes, Plaintiff (1:04-md-01598-JSR): Christopher Adam Seeger, Seeger Weiss LLP, New York, **[**11]** NY; David R. Heffernan, Miami, FL; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Edward V. Bonner, Plaintiff (1:04-md-01598-JSR): David C. Zimmaro, Walters, Levine, Klingensmith & Thomison, P.A, Tampa, FL; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For James Riley, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; David B. Rheingold, Rheingold, Valet, Rheingold, Shkolnik & McCartney, L.L.P., New York, NY; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton **[**12]** & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Emanuel Gupilan, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Robert A Wiener, Brennan, Wiener & Simons, La Crescenta, CA; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Alvaro Greve, Plaintiff (1:04-md-01598-JSR): Henry H. Wallace, Wallace Chapas and Associates, Pittsburgh, PA; Jonathan R. Rosenn, Stanley M. Rosenblatt, P.A., Miami, Fl; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Stanley M. Rosenblatt, Miami, FL; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL;

Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Tiffany Smith, **[**13]** Plaintiff (1:04-md-01598-JSR): Amy Rosenberg, Rheingold, Valet, Rheingold & Shkolnik, P.C., New York, NY; Anne Andrews, Andrews Kurth LLP, Dallas, TX; David B. Rheingold, Rheingold, Valet & Rheingold, P.C., New York, NY; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Alexander Korizis, Plaintiff (1:04-md-01598-JSR): Catherine Ann Ryan, James N. Esdaile, Jr., Sarah E. O'Leary, Esdaile, Barrett & Esdaile, Boston, MA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Melvin C. Hartman, The Jacob D. Fuchsberg Law Firm, LLP, New York, NY; Robert Michael Hirsh, Duane Morris, LLP, New York, NY; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar **[**14]** Shin & Byrne PLLC, New York, NY.

For Debra Clark, as Personal Representative of the Estate of Kris Lawrence Wilson, deceased, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; J. Nixon Daniel, John F. Windham, Beggs & Lane, Pensacola, FL; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Timothy Bertsch, Plaintiff (1:04-md-01598-JSR): David B. Rheingold, Rheingold, Valet, Rheingold, Shkolnik & McCartney, L.L.P., New York, NY; John J. Evans, Specter, Specter, Evans & Manogue, P.C., Pittsburgh, PA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, **[**15]** New York, NY.

For Carlos Liera, Individually and as Personal Representative and Successor in Interest of the Estate of Andrea Murray Liera, Plaintiff (1:04-md-01598-JSR): Ian F. Dillon, Oakland, CA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Teddy Kambouris, Plaintiff (1:04-md-01598-JSR): David S. Ratner, Morelli Ratner PC, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Phillip Houghton, individually and as Administrator and on behalf of the Estate of Phillip Brent Houghton, Jr. and as next friend of Ashley Hunt, Plaintiff (1:04-md-01598-JSR): Jamal K. Alsaffar, Lance D. Sharp, Laura Bellegie Sharp, Austin, **[**16]** TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Robert Allen Valadez, Shelton & Valadez, P.C., San Antonio, TX; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Janessa Lynn Kaleialoha Dicus, an incapacitated person gal Karen Richardson, Plaintiff (1:04-md-01598-JSR): Emily Kawashima Waters, Ian L. Mattoch, Mark Francis Gallagher, Stuart Michael Kodish, Law Offices of Ian L. Mattoch, Honolulu, HI; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; David A Mazie, Nagel Rice & Mazie, LLP, Livingston, NJ.

For Karen Richardson, individually, Bryn Kalikolehua Dicus, a minor, nfr Gregory Dicus, Brylyn Laakeahoakalani Silva, a minor, nfr Keith Silva, Plaintiffs (1:04-md-01598-JSR): Emily Kawashima Waters, Ian L. Mattoch, Mark Francis Gallagher, Stuart **[**17]** Michael Kodish, Law Offices of Ian L. Mattoch, Honolulu, HI; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Joseph Stanely Michalowski, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; James Andrew Talbert, Jennifer A. Sullivan, Bozeman, Jenkins & Matthews, Pensacola, FL; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Pauline Filardi, individually and as personal representative of the Estate of Louis E. Filardi and as the Guardian Ad Litem for Louis M. Filardi and Laurin Filardi, Helen Alexander, Howard Alexander, Plaintiffs (1:04-md-01598-JSR): **[**18]** Anne Andrews, Andrews Kurth LLP, Dallas,

TX; James J. McHugh, Jr., The Beasley Firm, Philadelphia, PA; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Diana Harrod, James Harrod, Plaintiffs (1:04-md-01598-JSR): Alex Alvarez, Alex Alvarez PA, Coral Gables, Fl; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Joseph D. Welch, et al., Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Ronald David Rosengarten, Rosenfeld & Kaplan, LLP, New York, NY; Russell Scott Briggs, Fibich, Hampton & Leebron, **[**19]** Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Airika J. Ashment, Eric A. Ashment, Estate of, Tammy J. Larsen, Plaintiffs (1:04-md-01598-JSR): Eckley M. Keach, Robert E. Murdock, Las Vegas, NV; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Danny L. Hawkinson, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Sharon Elmaleh-Schoenman, Oshman & Mirisola, LLP, New York, NY; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman **[**20]** Sclar Shin & Byrne PLLC, New York, NY.

For Miranda Sledge, Plaintiff (1:04-md-01598-JSR): Christopher Einar Grell, Richard F. Rescho, Law Offices of Christopher E. Grell, Oakland, CA; Ian P. Dillion, Oakland, CA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Robert K. Shelquist, Lockridge, Grindal, Nauen, P.L.L.P., Minneapolis, MN; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; Anne Andrews, Andrews Kurth LLP, Dallas, TX.

For David Miller, Plaintiff (1:04-md-01598-JSR): J. Chandler Loupe, Loupe Law Firm, Baton Rouge, LA; Lee L. Coleman, Hughes & Coleman, Bowling Green, KY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Ramie Alfonzo Rodriguez, Plaintiff (1:04-md-01598-JSR): John M. Calimafde, Philip Charles Canelli, Morgan, Lewis & Bockius, **[**21]** LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Patrick Dean McMurtray, Thomas R. Frazer, II, Frazer Davidson, p.a., Jackson, MS; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Mark I. Parks, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Arlene N. Farolan, Kalinoski & Chaplinsky, Des Moines, IA; Keith D. Jacobson, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kenneth Brian Moll, Kenneth B. Moll & Associates, Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Thomas F. Ochs, Cedar Rapids, IA; Trent B. Miracle, SimmonsCooper, LLC, East **[**22]** Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Elizabeth M. Parks, Plaintiff (1:04-md-01598-JSR): Arlene N. Farolan, Kalinoski & Chaplinsky, Des Moines, IA; Keith D. Jacobson, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kenneth Brian Moll, Kenneth B. Moll & Associates, Chicago, IL; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Thomas F. Ochs, Cedar Rapids, IA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Mark Pizziferri, Plaintiff (1:04-md-01598-JSR): Darin M Colucci, Dino M. Colucci, Colucci, Colucci & Marcus, P.C., Milton, MA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Michael **[**23]** Reinmuth, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL;Virginia L. Borden , Silverman Sclar Shin & Byrne PLLC, New York, NY; Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY.

For Irma Rodriguez, individually, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; John Carleton Thornton, III, Andrews & Thornton, Santa Ana, CA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Beverly Ann Greenberg, Eliana Millan, Plaintiffs (1:04-md-01598-JSR): John Hasan Ruiz, John H. Ruiz, P.A., Miami, FL; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent **[**24]** B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For John Doe, Plaintiff (1:04-md-01598-JSR): Stanely Vernon Buky.

For Wachovia Bank, N.A., Plaintiff (1:04-md-01598-JSR): Bruce David Rasmussen, Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C., Charlottesville, VA; David Bagley Rheingold, Rheingold, Valet, Rheingold, Shkolnik & McCartney, LLP, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Paul D. Rheingold, Rheingold, Valet, Rheingold, Shkolnik & McCartney, LLP, McCartney, LLP, New York, NY; Paul R. Thomson, III, Michie, Hamlett, Lowry, Rasmussen & Tweel, P.C., Charlottesville, VA; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; William Harrison Cleaveland, Roanoke, VA.

For Changes International, Inc., Plaintiff (1:04-md-01598-JSR): Bruce R. Laxalt, Reno, NV; Denise Michelle Smith, Jeffrey F. Peck, Ulmer & Berne, Cincinnati, OH; Gregory V. Cortese, Holly Stoberski, Las **[**25]** Vegas, NV; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Changes International of Ft. Walton Beach, Inc., Plaintiff (1:04-md-01598-JSR): Christopher A. Glaser, Wright, Robinson, Osthimer & Tatum, Washington, DC; Jennifer J. Bouchard, Ulmer & Berne, L.L.P., Cincinnati, OH; Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Leslie W.

O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Michael Suffren, Ulmer & Berne, L.L.P., Cincinnati, OH; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; William Henry Robinson, Jr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA.

For Esther Carrero, Enrico Cruz, husband of Esther Carrero, Plaintiffs (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, **[**26]** O'leary, Craine & Love, Portland, OR; Manuel A. Reboso, Peter S. Baumberger, Rossman Baumberger REboso & Spier, P.A., Miami, Fl; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Lt. Col. Richard McMillan, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Joshua Alvaro Greve, Vivian Greve, Luis J. Hernandez, Jennifer Luis, Plaintiffs (1:04-md-01598-JSR): Jonathan R. Rosenn, Stanley M. Rosenblatt, P.A., Miami, Fl; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Brylyn Laakeahoakalani Silva, Plaintiff (1:04-md-01598-JSR): Ian **[**27]** L. Mattoch, Mark Francis Gallagher, Stuart Michael Kodish, Law Offices of Ian L. Mattoch, Honolulu, HI; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Jerry Garvin, Plaintiff (1:04-md-01598-JSR): Gregory S. Love, Fort Worth, TX; Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For James Petrovich, Jessica Petrovich, Plaintiffs (1:04-md-01598-JSR): Lenore Kramer, Kramer & Dunleavey, New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin **[**28]** & Byrne

PLLC, New York, NY.

For Margo A. Durrance, Sandra G. Singal, Mario Ochoa, Bobbie J. Barnett, Robert Donald Terrell, Gary Townsend, Teresa Villareal, Douglas Risley, Plaintiffs (1:04-md-01598-JSR): Edward Frances Blizzard, Joseph Scott Nabers, Rebecca Ann Briggs, Blizzard McCarthy & Nabers, Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Stephanie Turner, Plaintiff (1:04-md-01598-JSR): Keyser, Beverly Hayes Pace, Calvin S. Tregre, Janet Gilligan Abaray, Lopez, Hodes, Restaino, Milman & Skikos, Cincinnati, OH; David B. Massey, Davis, Polk et ano., New York, NY; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For George Winsor, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Neal **[**29]** Lewis Moskow, Ury & Moskow LLC, Fairfield, CT; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; Anne Andrews, Andrews Kurth LLP, Dallas, TX.

For John Schlafhauser, Shelli Schlafhauser, Plaintiffs (1:04-md-01598-JSR): J. Nixon Daniel, John F. Windham, Thomas F. Gonzalez, Beggs & Lane, Pensacola, FL; John C. Evans, Specter Specter Evans & Manogue, P.C., Pittsburgh, PA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Ruth J. English, Plaintiff (1:04-md-01598-JSR): Edward Frances Blizzard, Joseph Scott Nabers, Rebecca Ann Briggs, Blizzard McCarthy & Nabers, Houston, TX; Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Mark Reese Pharr, III, Galloway, Johnson, Tompkins, Burr & Smith, P.L.C., Lafayette, LA; Steven J. Skikos, Lopez, Hodes **[**30]** Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Sandra Lee Parker, Plaintiff (1:04-md-01598-JSR): Edward Frances Blizzard, Joseph Scott Nabers, Rebecca Ann Briggs, Blizzard McCarthy & Nabers, Houston, TX; Jay Hodges Henderson, Cruse Scott, Houston, TX; Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Mark

Reese Pharr, III, Galloway, Johnson, Tompkins, Burr & Smith, P.L.C., Lafayette, LA; Robert A. Schwartz, William Bailey Law Firm, L.L.P., Houston, TX; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Angie Gupilan, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Robert A Wiener, Brennan, Wiener & Simons, La Crescenta, CA; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin **[**31]** & Byrne PLLC, New York, NY.

For Josephine Cioppa, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; Christopher Adam Seeger, Seeger Weiss LLP, New York, NY.

For Attorney David Bruce Vermont, Plaintiff (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; David Bruce Vermont, Ashcraft & Gerel, LLP, Alexandria, VA.

For Charlene Gaston, Plaintiff (1:04-md-01598-JSR): Jeffrey W. Rickard, Ryan M. Hagan, William M. Audet, Alexander, Hawes & Audet, L.L.P., San Jose, CA; Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, **[**32]** NY.

For Susan Griffin, Lawrence Griffin, Plaintiffs (1:04-md-01598-JSR): Robert G. Rikard, James C. Anders, P.A. & Associates, Columbia, SC; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA.

For Jerry Farmer, Plaintiff (1:04-md-01598-JSR): Jodi K. McKelvin, Robert B. Roden, Shelby Roden LLC, Birmingham, AL; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA.

For Billy Sapp, Jeannette Sapp, Plaintiffs (1:04-md-01598-JSR): J. Nixon Daniel, John F. Windham, Thomas F. Gonzalez, Beggs & Lane, Pensacola, FL; Steven J. Skikos, Lopez, Hodes Law Firm, San Francisco, CA.

For Jerry Wood, Richard Geist, Flossie M. Thibodaux, Travis Wingfield, Karin Connolly, Plaintiffs

(1:04-md-01598-JSR): J Mark Kell, Lampin, Kell, Fagras, Linson & Custer, St. Peters, MO; Michael Leslie Hodges, Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Antoinette V. Troupe, Plaintiff (1:04-md-01598-JSR): Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Duane J. Rowe, Plaintiff (1:04-md-01598-JSR): Daniel N. Gallucci, Rode & Qualey., New York, NY; Dianne **[**33]** M. Nast, Roda & Nast, P.C., Lancaster, PA.

For Willard C. Westfall, Plaintiff (1:04-md-01598-JSR):Daniel N. Gallucci, Rode & Qualey., New York, NY; Dianne M. Nast, Roda & Nast, P.C., Lancaster, PA; Arnold Levin, Levin, Fishbein, Sedran & Berma, Philadelphia, PA.

For Debra Kline, Dennis Kline, Plaintiffs (1:04-md-01598-JSR): Arnold Levin, Levin, Fishbein, Sedran & Berma, Philadelphia, PA; Daniel N. Gallucci, Rode & Qualey., New York, NY; Dianne M. Nast, Roda & Nast, P.C., Lancaster, PA; Leonard V. Fodera, Silverman & Fodera, P.C., Philadelphia, PA.

For Sean Bigley, Plaintiff (1:04-md-01598-JSR): Debora A O'Neill; Jack A Meyerson.

For Kenneth Loewen, Plaintiff (1:04-md-01598-JSR): Dennis P. Brescoll, Birmingham, MI; Jack A Meyerson; Debora A O'Neill.

For Larry W. Langston, Jr., Plaintiff (1:04-md-01598-JSR): Annesley Hodges DeGaris, Cory, Watson, Crowder & Degaris, P.C., Birmingham, AL; Edward E. Angwin, Jason A. Stuckey, Gulas & Stuckey, P.C., Birmingham, AL.

For Sherry King Hitt, Plaintiff (1:04-md-01598-JSR): A. David Fawal, Archie Cleveland Lamb, Chris W. Cantrell, Law Offices of Archie Lamb, LLC, Birmingham, AL.

For Paul Wagner, Plaintiff (1: **[**34]** 04-md-01598-JSR): Edward Stirling Deacon, Wilcoxen, Callahan, Montgomery & Deacon, SACRAMENTO, CA.

For Sonia Haberer, Debbie Ramey, Jennifer Burton, Mark Schmidt, Cynthia Weeks, Plaintiffs (1:04-md-01598-JSR): Gayle M. Blatt, Herman, Mathis, Casey, Kitchens & Gerel, San Diego, CA.

For Denise Cadet, Plaintiff (1:04-md-01598-JSR): Darryn L. Silverstein, Silverstein, Silverstein & Silverstein, P.C., Aventura, FL; Patrice Ann Talisman, Hersch & Talisman, P.A., Miami, FL.

For Michael T. Carter, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein

LLP, San Francisco, CA;Keith D. Jacobson, Paige E. Barr, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Robert W. Deitz, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Horace J. Ferrell, Jaclyn **[**35]** Morgan, Plaintiffs (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Paige E. Barr, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Kimberly A. Fletcher, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Ronald Vincent Fiesta, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Robert Kundrat, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Kurt David Hyzy, Keith D. Jacobson, Paige E. Barr, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Nida Moss, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Gerald Portillo, Genevieve Romancik, Plaintiffs (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Paige E. Barr, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Kenneth **[**36]** B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Colby W. Stambaugh, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Roberta Stear, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Kevin Riggins, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas,

TX.

For Pamela Pappas, Plaintiff (1:04-md-01598-JSR): Cyril V. Weiner, Elizabeth C. Thomson, Weiner & Cox, PLC, Southfield, MI.

For Dawn Smith, Plaintiff (1:04-md-01598-JSR): Harry J Levant.

For Damon S. Violette, Theone Violette, Plaintiffs (1:04-md-01598-JSR): Leslie W. O'Leary, Williams, Dailey, O'leary, Craine & Love, Portland, OR; Michael L. Williams, Williams, Dailey, O'Leary, Craine **[**37]** & Lo, Portland, OR.

For Gerald Parnell, Plaintiff (1:04-md-01598-JSR): Frank Steven Pollock, Brownstein Vitale & Weiss, Philadelphia, PA.

For Marion Lester Singleton, Richard P. Kasko, Karen LeBlanc, Bobby Jack Edwards, Rebecca Schrader, Sheila Jackson, Dorothy Eileen Crisp, Plaintiffs (1:04-md-01598-JSR): Hubert Oxford, IV, Benckenstein & Oxford, L.L.P., Jefferson, TX; J. Robert Black, Lance Henry Lubel, Heard Robins Cloud Lubel & Greenwood, LLP, Houston, TX.

For Carrol Dodson, Plaintiff (1:04-md-01598-JSR): Hubert Oxford, IV, Benckenstein & Oxford, L.L.P., Jefferson, TX; J. Robert Black, Lance Henry Lubel, Heard Robins Cloud Lubel & Greenwood, LLP, Houston, TX; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Pamela Gale Sotoodeh, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Louis Bartus, Plaintiff (1:04-md-01598-JSR): John H. Kim, Gallagher, Lewis, Downey & Kim, Houston, TX.

For Anna Marie Bonner, Plaintiff (1:04-md-01598-JSR): David C. Zimmaro, Walters, Levine, Klingensmith & Thomison, P.A, Tampa, FL.

For Steve Summy, Plaintiff (1:04-md-01598-JSR): Richard D. Marrs, **[**38]** Richardson, Stoops, Richardson & Ward, PC, Tulsa, OK.

For John William Burns, Plaintiff (1:04-md-01598-JSR): Lewis O. Unglesby, Unglesby & Marionneaux, Baton Rouge, LA.

For Joy Christine Padgett, Plaintiff (1:04-md-01598-JSR): Richard Elder Crum, Steadman Stapleton Shealy, Jr., Cobb, Shealy, Crum & Derrick, PA, Dothan, AL.

For Margaret Chalmers, Kerry Chalmers, Kelvin Chalmers, Plaintiffs (1:04-md-01598-JSR):

Claudio Molteni, The Popham Law Firm, Kansas City, MO; Jeffrey M. Kuntz, Kansas City, MO; Thomas Philip Cartmell, Wagstaff & Cartmell, LLP, Kansas City, MO.

For Sandra M. Waters, Plaintiff (1:04-md-01598-JSR): Thomas Philip Cartmell, Wagstaff & Cartmell, LLP, Kansas City, MO.

For Rhea L. Mazola, Plaintiff (1:04-md-01598-JSR): Ronald Sidney Goldser, Zimmerman Reed, P.L.L.P., Minneapolis, MN.

For Tina S. Bush, Leo Waltman, Willie Marie Waltman, Plaintiffs (1:04-md-01598-JSR): Robert B. Roden, Shelby Roden LLC, Birmingham, AL.

For Bille Gene Goble, Jennifer Goble, Margret S. Guyton, Plaintiffs (1:04-md-01598-JSR): David E. Cherry, Campelll, Cherry, Harrison, Davis & Dove P.C., Waco, TX.

For Michael Scott Gregory, Plaintiff (1:04-md-01598-JSR): **[**39]** Christopher A. Roach, Berg & Androphy, Houston, TX.

For Deborah Smoot, Plaintiff (1:04-md-01598-JSR): Michelle A. Parfitt, Ashcraft & Gerel, L.L.P., Washington, DC; Susan Carole Minkin, Ashcraft & Gerel, LLP, Alexandria, VA.

For Dominica Ciocca, Plaintiff (1:04-md-01598-JSR): Debora A O'Neill.

For Heather Barrett, Plaintiff (1:04-md-01598-JSR): Charles A. Sturm, Cory Steven Fein, Michael A. Caddell, Caddell & Chapman, Houston, TX.

For Plaintiffs' Coordinating Counsel, Plaintiff (1:04-md-01598-JSR): Jonathan Paul Kieffer, Wagstaff & Cartmell, LLP, Kansas City, MO; Christopher Adam Seeger, Seeger Weiss LLP, New York, NY; Paul D. Rheingold, Rheingold, Valet, Rheingold, Shkolnik & McCartney, LLP, New York, NY.

For Mark L. Downing, Albert Stokes, Jr., Patricia Loewen, Plaintiffs (1:04-md-01598-JSR): Jena Borden, Simmons Firm, LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY; Debora A O'Neill; Dennis P. Brescoll, Birmingham, MI; Jack A Meyerson.

For Michael Underwood, Jeannie Brewer, Vidal Brewer Knight, Kevin Holleman, Plaintiffs (1:04-md-01598-JSR): Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX.

For **[**40]** Debra Salazar, Ricky Green, Anthony Hale McCall, Sr., Aaron Hinkle, Plaintiffs (1:04-md-01598-JSR): Christopher Adam Seeger, Seeger Weiss LLP, New York, NY.

For Sara Poling, Plaintiff (1:04-md-01598-JSR): Kent Mercier, Mercier Law Offices, Lafayette, LA.

For Jelena Malenica, Patrick Mattson, Ricky Sutherland, James Welsher, Kenneth Bell, Kenneth Bellew, James Broome, Vincent Coleman, Plaintiffs (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX.

For James Smith, Plaintiff (1:04-md-01598-JSR): Anne Andrews, Andrews Kurth LLP, Dallas, TX; Harry J Levant.

For Anthony Fenner, David J. Hall, Plaintiffs (1:04-md-01598-JSR): John Carleton Thornton, III, Andrews & Thornton, Santa Ana, CA.

For Jacquelyn Castillo, Albert Bale, Marcos Dias, Plaintiffs (1:04-md-01598-JSR): Keith D. Jacobson, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Julius Lohner, Plaintiff (1:04-md-01598-JSR): Keith D. Jacobson, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth **[**41]** B. Moll & Associates, Ltd., Chicago, IL US.

For Andrea Woldemar, Plaintiff (1:04-md-01598-JSR): Keith D. Jacobson, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Walter Perrine, Plaintiff (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Derrick Wells, Tiffany Wells, Plaintiffs (1:04-md-01598-JSR): Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA; Keith D. Jacobson, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Irene Talavera, Plaintiff (1:04-md-01598-JSR): J Mark Kell, Lampin, Kell, Fagras, Linson & Custer, St. Peters, MO; Jena Borden, Simmons Firm, LLC, East Alton, IL; Michael Leslie Hodges; Tor A. Hoerman, SimmonsCooper, Inc, East Alton, IL; Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For **[**42]** James Klawitter, Plaintiff (1:04-md-01598-JSR): J Mark Kell, Lampin, Kell, Fagras, Linson & Custer, St. Peters, MO; Jena Borden, Simmons Firm, LLC, East Alton, IL; Michael Leslie Hodges; Thomas W. Beven, Bevan & Associates, Northfield, OH; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL; Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Tracy R. Smoot, Rosalie Marks, Plaintiffs (1:04-md-01598-JSR): Susan Carole Minkin, Ashcraft & Gerel, LLP, Alexandria, VA.

For Barbara Dunham, Plaintiff (1:04-md-01598-JSR): Theodore M. Green, Wright, Green & Baughman, LLC, Lee's Summis, MO.

For Louis George Delk, Plaintiff (1:04-md-01598-JSR): Barry Lane Bobbitt, Bobbitt Law Firm, Dallas, TX; Frederick Leighton Durham, Kirk Pittard, Thurman & Andres, Dallas, TX.

For ms susie hardy, Plaintiff (1:04-md-01598-JSR): Jason Louis Solotaroff, Giskan & Solotaroff, New York, NY.

For James R. Tiskevich, Plaintiff (1:04-md-01598-JSR): Dennis Jim Kellogg, Shea Stokes & Carter, Ithaca, NY.

For Donica Aetna Parker, Plaintiff (1:04-md-01598-JSR): Keith D. Jacobson, Victoria Dizik Teremenko, **[**43]** Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For David J. Russell, Plaintiff (1:04-md-01598-JSR): Keith D. Jacobson, Pamela Gale Sotoodeh,Victoria Dizik Teremenko, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Richard James, Plaintiff (1:04-md-01598-JSR): Thomas K. Herren, Herren & Adams, Lexington, KY.

William T. Burton, Plaintiff (1:04-md-01598-JSR), Pro se.

Kathleen Tutka, Plaintiff (1:04-md-01598-JSR), Pro se.

Roy Douglas Murray, Plaintiff (1:04-md-01598-JSR), Pro se.

For Joyce Ann Schneider, Plaintiff (1:04-md-01598-JSR): David Howard Berg, Gabriel Adam Berg, Berg & Androphy, New York, NY; Fernando De Leon, Berg & Androphy, Houston, TX US; John Paul Venzke, Tamera Lee Venzke, Venzke Law Firm, Houston, TX; Mark A. Evetts,

Fernando Deleon, Berg & Androphy, Houston, TX; Martha Marie Eastman, Eastman Law Office, Louisville, KY.

For Tammy Iungerich, Plaintiff (1:04-md-01598-JSR): Douglas A. Merrow, Law Office of Douglas A. Morrow, Portage, MI; Paige E. Barr, Paige E. Barr, Kenneth B. Moll & Associates, Ltd. **[**44]** , Chicago, IL.

For Douglas Yarwood, Plaintiff (1:04-md-01598-JSR): Thomas Joseph Preuss, Wagstaff & Cartmell, LLP, Kansas City, MO.

For Matthew Hollimon, Plaintiff (1:04-md-01598-JSR): Charles Brenton Kugler, Daniel Sheehan & Associates, Dallas, TX; John D. Smallwood, Larry O. Norris, PA, Hattiesburg, MS US.

For Vicky Jarreau, May Briggs, Plaintiffs (1:04-md-01598-JSR): Benjamin A. White, Herrington & White, Pllc, Ridgeland, MS; Brian Kelly Herrington, Freese & Herrington, Jackson, MS.

For Karen Lott, Plaintiff (1:04-md-01598-JSR):Gayle M. Blatt , Herman, Mathis, Casey, Kitchens & Gerel, San Diego, CA.

For Lisa Marie Heilman, Plaintiff (1:04-md-01598-JSR): Frank Steven Pollock, Brownstein Vitale & Weiss, Philadelphia, PA.

For Ellen Matthews, Michael Matthews, Plaintiffs (1:04-md-01598-JSR): Anthony Scott Pinnie, Kenneth R. Schuster Associates, Media, PA.

For De'a Marie Olock, Demitri Olock, Dominick Olock, Pamela Olock, Plaintiffs (1:04-md-01598-JSR): Lawrence R. Cohan, Anapol Schwartz Weiss Cohan Feldman & Smalley, Philadelphia, PA.

For Keith E. Reid, Plaintiff (1:04-md-01598-JSR): Tamera Lee Venzke, Venzke Law Firm, Houston, TX.

Sharon **[**45]** Burton, Plaintiff (1:04-md-01598-JSR), Pro se.

Mary Murray, Plaintiff (1:04-md-01598-JSR), Pro se.

Thomas Michael Pettis, Plaintiff (1:04-md-01598-JSR), Pro se.

Chasity Pettis, Plaintiff (1:04-md-01598-JSR), Pro se.

For Paula Bloch, Plaintiff (1:04-md-01598-JSR): Ronald Vincent Fiesta, Sarah Crevier. Bullard,

Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Robert Dietz, Plaintiff (1:04-md-01598-JSR): Kurt D. Hyzy, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Mary Beth Thuernau, Plaintiff (1:04-md-01598-JSR): J Mark Kell, Lampin, Kell, Fagras, Linson & Custer, St. Peters, MO; Michael Leslie Hodges; Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY.

For Mark Thuernau, Donald Riordan, Alison Troutman, Plaintiffs (1:04-md-01598-JSR): J Mark Kell, Lampin, Kell, Fagras, Linson & Custer, St. Peters, MO; Michael Leslie Hodges; Jena Borden, Simmons Firm, LLC, East Alton, IL; Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY.

For Lynn Ann Matheny, Plaintiff (1:04-md-01598-JSR): **[**46]** John C. Evans, Megan L. Faust, Specter Specter Evans & Manogue, P.C., Pittsburgh, PA; Kathleen J. Fantazzi, Gold, Khonrey & Turak, Moundsville, WV.

For Paul Cross, Sherri Cross, Plaintiffs (1:04-md-01598-JSR): Deborah L. McHenry, Samuel A. Hrko, Scott S. Segal, Victor S. Woods, The Segal Law Firm, Charleston, WV.

James W. Jones, Plaintiff (1:04-md-01598-JSR), Pro se, Memphis, TN.

For David Davenport, Cindy Davenport, James L. Thomas, Plaintiffs (1:04-md-01598-JSR): Thomas Philip Cartmell, Wagstaff & Cartmell, LLP, Kansas City, MO.

For Margaret Parks, Plaintiff (1:04-md-01598-JSR): James Newton Edmonds, Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, Tulsa, OK; Mark W. Maguire, Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, Tulsa, OK US.

For Terry Shupe, Plaintiff (1:04-md-01598-JSR): Kenneth T. Fibich, II, Fibich, Hampton, Leebron & Garth, L.L.P., Houston, TX.

For Richard L. Garza, Plaintiff (1:04-md-01598-JSR): Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX.

For Sandra McGoldrick, Virginia Vaughn, Yvonne C. Kelly, Plaintiffs (1:04-md-01598-JSR): Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & **[**47]** Associates, Ltd., Chicago, IL US; Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Sarah Crevier. Bullard, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

Paul V. Wright, Plaintiff (1:04-md-01598-JSR), Pro se.

For Shannon Busby, Plaintiff (1:04-md-01598-JSR): Elizabeth Marie Pipkin, R.G. Taylor Ii, P.C. & Assoc., Houston, TX.

For Dalip Tung, Samar Tung, Plaintiffs (1:04-md-01598-JSR): Natalie Dawn Collins, Harold Christian Bode, Bode & Collins, P.L.C., Scottsdale, AZ US.

For Nancy Rhome, Plaintiff (1:04-md-01598-JSR): Dara Lovitz, Thomas R. Anapol, Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C., Philadelphia, PA.

For Huy Thai, Plaintiff (1:04-md-01598-JSR): James Newton Edmonds, Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, Tulsa, OK.

For Tommie M. Houck, Plaintiff (1:04-md-01598-JSR): Keith D. Jacobson, Pamela Gale Sotoodeh,Sarah Crevier. Bullard,Ronald Vincent Fiesta,Victoria Dizik Teremenko, , Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus,Anne Cisar Rudd, Kelly, Herlihy & Klein LLP, San Francisco, CA.

**[**48]** For Ronald Houck, Plaintiff (1:04-md-01598-JSR): David E. Carey, Brown Brown and Brown, PA, Bel Air, MD; Keith D. Jacobson, Pamela Gale Sotoodeh, Ronald Vincent Fiesta, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Vincent Davis, Plaintiff (1:04-md-01598-JSR): Gerald S. Sack, Sack Spector & Karsten, West Hartford, CT.

For Ellen Mayfield-Fleming, Conrad Pawlowski, Donna Rather, Derek Roaf, June Thomas, Gregory Van Buren, Sharon Williams, Plaintiffs (1:04-md-01598-JSR): Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Paige E. Barr, Pamela Gale Sotoodeh, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Fred T. Rather, Michael C. Ball, Plaintiffs (1:04-md-01598-JSR): Paige E. Barr, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For James Nagel, Plaintiff (1:04-md-01598-JSR): Sharon J. Arkin, Robinson, Calcagnie & Robinson, Newport Beach, CA.

For Cheryl McClure, Thomas Chapman, Plaintiffs (1:04-md-01598-JSR): Rachel Dawn Parrilli,

Atkinson, **[**49]** Haskins, Nellis, Brittingham, Gladd & Carwile, Tulsa, OK.

For Jennifer Reyes, Plaintiff (1:04-md-01598-JSR): Richard Warren Hunnicutt, III.

For Coy Van Parchman, Plaintiff (1:04-md-01598-JSR): Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX.

For Robbin Severin, Plaintiff (1:04-md-01598-JSR): Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Pamela Gale Sotoodeh, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Gregory L. Crosby, Vicky Crosby, Plaintiffs (1:04-md-01598-JSR): Randall E. Smith, Smith Elliott Smith & Garmey, P.A., Saco, ME.

For Xuihui Deng, Plaintiff (1:04-md-01598-JSR): Peter M. Brown, Dawsonbrown PS, Seattle, WA.

For Pamela A. Victor, Plaintiff (1:04-md-01598-JSR): Judy Lynn Feinberg, Judy L. Feinberg, P.C., Bethesda, MD.

For Jerry W. Keeley, Plaintiff (1:04-md-01598-JSR): Ronald Vincent Fiesta, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Sheila Keeley, Plaintiff (1:04-md-01598-JSR):Ronald Vincent Fiesta, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Emmitt Thrower, Plaintiff (1:04-md-01598-JSR): **[**50]** Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Pamela Gale Sotoodeh, Victoria Dizik Teremenko, Sarah Crevier. Bullard, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For James A. Bogart, Plaintiff (1:04-md-01598-JSR): William Anthony Fiasco, Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, Tulsa, OK.

For John Giordano, Plaintiff (1:04-md-01598-JSR): Larry I. Badash, Sahder, Sander, Block, Mineola, NY.

For Francine Lewicki, Plaintiff (1:04-md-01598-JSR): Christi Marie Carrano, Carrano & Carrano, L.L., North Haven, CT.

For Teresa Ball, Plaintiff (1:04-md-01598-JSR): Sarah Crevier. Bullard, Paige E. Barr, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Robert A Smith, Suzanne Smith, Plaintiffs (1:04-md-01598-JSR): Russell Haskew Rein, Aylstock, Witkin & Sasser, PLC, Pensacola, FL.

For Ms. Jacqueline Kutz, Plaintiff (1:04-md-01598-JSR): Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL.

For Chasity Cooper, Rose Cooper, William Cooper, Jr., Plaintiffs (1:04-md-01598-JSR): Elizabeth Marie Pipkin, James Collin Ferrell, R.G. Taylor Ii, P.C. & Assoc., Houston, TX.

For Michelle **[**51]** Lynne Burns, Lori Jenkins, Bethany Anne Jenkins, minor, Lori Jenkins, as Personal Representative of the Estate of Ronald M. Jenkins, Jr., deceased, Timothy Noah Jenkins, Plaintiffs (1:04-md-01598-JSR): Thomas F. Gonzalez, Beggs & Lane, Pensacola, FL.

For Julie Walker, Plaintiff (1:04-md-01598-JSR): David E. Cherry, Campell, Cherry, Harrison, Davis & Dove P.C., Waco, TX; Craig D Cherry, Campell Cherry Harrison Davis & Dove, Waco, TX; Gregory W. Turman, Snapka & Turman, Corpus Christi, TX; Kathryn Snapka, Snapka & Turman, LLP, Corpusa Christi, TX.

For Jami K. Bryant, Plaintiff (1:04-md-01598-JSR): David E. Cherry, Campell, Cherry, Harrison, Davis & Dove P.C., Waco, TX; Craig D Cherry, Campell Cherry Harrison Davis & Dove, Waco, TX; Gregory W. Turman, Snapka & Turman, Corpus Christi, TX; Kathryn Snapka, Richard Brian Waterhousè, Jr, Snapka Turman & Waterhouse, Corpus Christi, TX.

For Earl Bryant, Plaintiff (1:04-md-01598-JSR): David E. Cherry, Campell, Cherry, Harrison, Davis & Dove P.C., Waco, TX; Craig D Cherry, Campell Cherry Harrison Davis & Dove, Waco, TX; Gregory W. Turman, Snapka & Turman, Corpus Christi, TX; Kathryn Snapka, Richard Brian Waterhousè, Jr, Snapka Turman & Waterhouse, Corpus Christi, TX.

For Rhealene Robertson, **[**52]** Sharon Maddox, Brenda Graves, Plaintiffs (1:04-md-01598-JSR): Kurt D. Hyzy, Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, Ltd., Chicago, IL US; Pamela Gale Sotoodeh, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL.

For Melissa Cornett, Plaintiff (1:04-md-01598-JSR): Angela Pergrem Owens, Masten Childers, II, Michael Eugene Liska, Gary C. Johnson, P.S.C., Louisville, KY.

For Christine Felts, Clarence Lackowski, Plaintiffs (1:04-md-01598-JSR): Mark S. Baumkel, Provizer & Phillips, P.C, Bingham Farms, MI.

For David Brummel, Plaintiff (1:04-md-01598-JSR): George Phillip Lindner, Lindner, Speers &

Reuland, P.C., Aurora, IL.

For Lauren Floro, Plaintiff (1:04-md-01598-JSR): Diane Angela Dileo Noel, Paul Rocco Mastrocola, Robert J. O'Regan, Burns & Levinson, LLP, Boston, MA.

For Jennifer Shaffer, Plaintiff (1:04-md-01598-JSR): Holly Baer Kammerer, Burg Simpson Eldredge Hersh & Jardine, P.C, Englewood, CO.

For Bertwin Martin, Plaintiff (1:04-md-01598-JSR): Pamela Gale Sotoodeh, Victoria Dizik Teremenko, Kenneth B. Moll & Associates, Ltd., Chicago, IL; Tiffany K. Donnelly, Tracy A. Jurgus, Kenneth B. Moll & Associates, **[**53]** Ltd., Chicago, IL US.

For Delsie Stevens, Louis Stevens, Plaintiffs (1:04-md-01598-JSR): J. Chandler Loupe, Loupe Law Firm, Baton Rouge, LA.

For Joshua Theis, Plaintiff (1:04-md-01598-JSR): Michael T. Mullen, Sr, Paul B. Episcope, LLC, Chicago, IL.

For Steven E. Nash, Plaintiff (1:04-md-01598-JSR): Daniel A. Raniere, Aubuchon, Raniere & Panzeri, St. Louis, MO.

For Sherida L. Miller, Daniel Byrne, Deborah Byrne, James Ressel, Margaret Randle, Cynthia Reynolds, Marol Scheffert, Linda Thompson, Debbie Jo Starks, Pamela Patterson, Richard McAfee, King Markowski, Michelle Martin, Steven Harris, Marguerite Johnson, Plaintiffs (1:04-md-01598-JSR): Michael Leslie Hodges, Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL.

For Michael Ward, Plaintiff (1:04-md-01598-JSR): Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY; Trent B. Miracle, SimmonsCooper, LLC, East Alton, IL.

For Donald Wallen, Falayan Mitchell, Plaintiffs (1:04-md-01598-JSR): Michael Leslie Hodges, Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY; Trent B. Miracle, SimmonsCooper, **[**54]** LLC, East Alton, IL; Virginia L. Borden, Silverman Sclar Shin & Byrne PLLC, New York, NY.

For Karen Polys, Plaintiff (1:04-md-01598-JSR): Michael Leslie Hodges, Paul J. Hanly, Jr, Hanly Conroy Bierstein & Sheridan LLP, New York, NY.

Sally Louise Turner, Plaintiff (1:04-md-01598-JSR), Pro se, San Diego, CA.

David Nassar, Plaintiff (1:04-md-01598-JSR), Pro se.

For Gupreet Gyani, Raminder S. Oberoi, Plaintiffs (1:04-md-01598-JSR): Paul L. LaClair, The Gucciardo Law Firm, New York, NY.

Joey R. Carter, Plaintiff (1:04-md-01598-JSR), Pro se.

For Hope E. Cagle, Erika Foussadier, Deborah Freeman, Carolyn C. Jones, Leonard R. Lebrun, Darla K. Morrissey, Edward C. Watkins, Plaintiffs (1:04-md-01598-JSR): Paige E. Barr, Kenneth B. Moll & Associates, Ltd., Chicago, IL US.

For Edward Ammar, Plaintiff (1:04-md-01598-JSR): Joshua Asher Levy, Jay Halpern and Associates, P.A., Coral Gables, FL US.

For Scott Witwer, Angie Witwer, Plaintiffs (1:04-md-01598-JSR): Barry Edward Newman, Spohrer Wilner, Maxwell, and Matthews, Jacksonville, FL.

Cindy Plum, CINDY PLUM, Plaintiff (1:04-md-01598-JSR), Pro se, Pensacola, FL.

For Joaquinta Brooks, Joaquinta Brooks, **[**55]** Myrtle Hill, Plaintiffs (1:04-md-01598-JSR): Todd S. Hageman, Simon Passanante P.C, St. Louis, MO.

For Thomas Schneider, Sr., Individually and as Personal Representative of the Estate of Joyce Ann Schneider, Deceased, Plaintiff (1:04-md-01598-JSR): David Howard Berg, Gabriel Adam Berg, Beggs & Lane, Pensacola, FL.

For Ken Lilly, Consolidated Plaintiff (1:04-md-01598-JSR): Prince Thomas, Fox Rothschild, Attorneys at Law, New York, NY.

For Metabolife International, Inc., Defendant (1:04-md-01598-JSR): Anthony Lee Osborn, McCormick Barstow Sheppard Wayte and Carruth, Fresno, CA; Baxter Ward Banowsky, Scott Douglas Levine, Banowsky, Betz & Levine, P.C, Dallas, TX; Brian Douglas Equi, Jason Paul Herman, Larry Dean Smith, Cabaniss Smith Toole & Wiggins, P.L., Maitland, FL; Christina J. Marshall, Edward H. Blakemore, Sutter, O'connell Mannion & Farchione, Cleveland, OH; David Michael Dahlmeier, Foley & Mansfield, PLLP, Minneapolis, MN; Edward G. Bowron, Bowron, Latta & Wasden, P.C., Mobile, AL; Eric J Ward, Ward, Norris, Heller & Reidy, LLP, Rochester, NY; Eric A. Weiss, Marshall, Gerstein & Borun, Chicago, IL; Esther Rae DeCambra, Leah M. Gerbitz, Miller & Martin PLLC, Chattanooga, **[**56]** TN; Gregory Brian Smith Jackson, Miller & Martin PLLC, Nashville, TN; James W. Ozog, James Michael Rozak, James Robert Schachner, Wiedner & McAuliffe, Ltd., Chicago, IL; Jeffrey A. Johnson, Cosgrave, Vergeer, Kester, L.L.P., Portland, OR; John P. Kavanagh, Jr., Bowron, Latta & Wasden, P.C., Mobile, AL; John G. Mitchell, Securities & Exchange Commission, New York, NY; John Otho Payne, Huckabay,

Munson, Rowlett & Moore, P.A., Little Rock, AR; Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Lawrence C Maxwell, Baker, Donelson, Bearman, Caldwell & Berkowitz, Nashville, TN; Mark Clarence Hegarty, Shook Hardy & Bacon, LLP, Kansas City, MO; Michael Wilder Newport, Foley & Mansfield P.L.L.P, St Louis, MO; Michael L. Young, Theodore J MacDonald, Burroughs, Hepler, Broom, MacDonald, Hebrank & T, St. Louis, MO; Richard F. Scruggs, Scruggs, Millette, Lawson, Bozeman & Dent, P.A., Pascagoula, MS; Sidney A. Backstrom, Scruggs Law Firm, Oxford, MS; Thomas Paul Mannion, Mannion & Gray, Co. L.P.A., Cleveland, OH; Wayne C. Kreuscher, Barnes & Thornburg, Indianapolis, IN; Frederick Natale Salvo, III, Michael Scott Minyard, Baker Donelson Bearman Caldwell & Berkowitz, PC, Jackson, MS; Robert Gaylord **[**57]** Smith, Lewis Bribois Bisgaard & Smith, San Diego, CA.

For TL Administration Inc., Defendant (1:04-md-01598-JSR): Denise Michelle Smith, Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Rex Allen Littrell, Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For TL Administration Corp., Defendant (1:04-md-01598-JSR): Michael Peter Kessler, Weil, Gotshal & Manges LLP, New York, NY; Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH; Rex Allen Littrell, Ulmer and Berne, Columbus, OH.

For Twin Laboratories, Incorporated, Defendant (1:04-md-01598-JSR): Andrew S. Bolin, Macfarlane Ferguson & McMullen, Tampa, FL; Barry McDonough, McDonough, Hacking & Neumeier, Boston, MA; Bruce R. Laxalt, Reno, NV; Christopher A. Glaser, Wright, Robinson, Osthimer & Tatum, Washington, DC; Denise Michelle Smith, Jeffrey F. Peck, Joseph Paul Thomas, Michael Suffren, Ulmer & Berne, Cincinnati, OH; G. Byron Sims, Jeromy D. Hughes, Browns Sims, P.C., Houston, TX; Gayle L. Ballew, Dallas, TX; Gregory V. Cortese, Holly Stoberski, Las Vegas, NV; James M. Williams, Jennifer J. Bouchard, Joseph C. Klein, Ulmer Berne, LLP, Cincinnati, OH; Janet Goldberg McEnery, Macfarlane Ferguson & McMullen, Tampa, **[**58]** FL; John M. Bickel, Shuttleworth & Ingersoll, Cedar Rapids, IA; John H. Price, Honolulu, HI; Joseph John Saltarelli, Hunton & Williams, LLP, New York, NY U.S.A; Lewis A. Bartell, L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City, NY; Mark E. McLaughlin, Tampa, FL; Mary Lynn Tate, The Tate Law Firm, Abingdon, VA; Nancy A. Serventi, McDonough, Hacking, Neumeier & Lavoie, Boston, MA; Rex Allen Littrell, Ulmer and Berne, Columbus, OH; Rickey L. Faulkner, Longview, TX; Robert B. Beck, III, Leck & Associates, Santa Monica, CA; Stephen C. Merriam, Ulmer & Berne L.L.P., Cleveland, OH; Steven Jeffrey Rothman, Jones, Foster, Johnston & Stubbs, West Palm Beach, FL; Susan Y.M. Chock, Law Offices of John H. Price, Honolulu, Hi; William Henry Robinson, Jr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA.

For Kmart of Texas, LP, Defendant (1:04-md-01598-JSR): Richard C. Obiol, Civardi, Clair & Obiol, LLP, Rockville Centre, NY.

For Vera Kunisch, Defendant (1:04-md-01598-JSR): Joseph Paul Thomas, Ulmer & Berne,

Cincinnati, OH; Leonard M. Cascone, Cascone & Kluepfel, LLP, Uniondale, NY.

For Bob O'Leary Health Food Distributor Co., Inc., Defendant (1:04-md-01598-JSR): **[**59]** Paul Goodovitch, Jacobson & Schwartz, Rockville Centre, NY; Brian Nelson Casey, Taylor & Walker, P.C, Norfolk, VA.

For Navarro Discount Pharmacies, Defendant (1:04-md-01598-JSR): John Joseph Burke, Jr, Joseph John Ortego, Nixon Peabody, LLP, Garden City, NY.

For General Nutrition Companies, Inc., Defendant (1:04-md-01598-JSR): Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Rex Allen Littrell, Ulmer and Berne, Columbus, OH.

For Rexall Sundown, Inc., Defendant (1:04-md-01598-JSR): Jeffrey F. Peck, Ulmer & Berne, Cincinnati, OH.

For General Nutrition Center, GNC 1895, Defendant (1:04-md-01598-JSR): John H. Price, Honolulu, HI; Susan Y.M. Chock, Law Offices of John H. Price, Honolulu, Hi.

For John Does, 1-10, Defendant (1:04-md-01598-JSR): Russell Scott Briggs, Fibich, Hampton & Leebron, Houston, TX.

For United States, Defendant (1:04-md-01598-JSR): JD Roy Atchison, US Attorney, Pensacola, FL.

For Cytodyne Technologies, Inc., Defendant (1:04-md-01598-JSR): Charles A. Johnson, Hill, Rivkins & Hayden, L.L.P., Jersey City, NJ; Stephen R. Stern, Hoffinger Stern & Ross LLP, New York, NY.

For Interhealth Nutracueticals, Inc., Defendant (1:04-md-01598-JSR): **[**60]** Joseph John Saltarelli, Hunton & Williams, LLP, New York, NY U.S.A; Kimberly Letcher, Norma V. Garcia, Robert S. Beale, Sheppard Mullin Richter & Hampton LLP, Costa Messa, CA.

For N.V.E., Inc., Defendant (1:04-md-01598-JSR): Ellen W. Smith, Samuel J. Samaro, Pashman Stein, P.C., Hackensack, NJ; Steven J. Kirsch, Murnane, Conlin, White & Brandt, St. Paul, MN.

For Rella Bourne, Defendant (1:04-md-01598-JSR): Jennifer J. Bouchard, Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; William Henry Robinson, Jr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA.

For The Chemins Company Inc., Defendant (1:04-md-01598-JSR): Baxter Ward Banowsky, Scott Douglas Levine, Banowsky, Betz & Levine, P.C, Dallas, TX; Christian J. Ziegler, Ferdie F. Franklin, Lisa R. Ackley, Walsworth, Franklin, Bevins & McCall, Orange, CA; Daniel Ross

Mawhinney, Thompson & Bowie, LLP, Portland, ME; Edward Joseph Stolarski, Jr, Wilbraham, Lawler & Buba, Philadelphia, PA; John G. Mitchell, Securities & Exchange Commission, New York, NY; John Payne, Huckabay, Munson, Rowlett & Moore, Little Rock, AR; John Otho Payne, Huckabay, Munson, Rowlett & Moore, P.A., Little Rock, AR; Karen Margaret Sullivan, **[**61]** Walsworth, Franklin, Bevins & McCall LLP, Orange, CA; Mark Reese Pharr, III, Galloway, Johnson, Tompkins, Burr & Smith, P.L.C., Lafayette, LA; Theodore J MacDonald, Michael L. Young, Burroughs, Hepler, Broom, MacDonald, Hebrank & T, St. Louis, MO; Thomas Bernard Farrey, III, Burns & Farrey, Worcester, MA; James W. Ozog, Wiedner & McAuliffe, Ltd., Chicago, IL; Robert Gaylord Smith, Lewis Bribois Bisgaard & Smith, San Diego, CA.

For Vita Quest International, Inc., Defendant (1:04-md-01598-JSR): David Michael Macdonald, Dallas, TX; Steven A. Stadtmauer, Harris Beach, LLP, New York, NY.

For Wal-Mart Stores Texas, L.P., Defendant (1:04-md-01598-JSR): Baxter Ward Banowsky, Scott Douglas Levine, Banowsky, Betz & Levine, P.C, Dallas, TX; Darrell L. Barger, Hartline, Dacus, Barger, Dreyer & Kern, L.L.P., Corpus Christi, TX; David Lesley Jones, Michael G. Terry, Hartline Dacus, Corpus Christi, TX; Ramona Martinez, Cowles and Thompson, P.C., Dallas, TX; Robert Gaylord Smith, Lewis Bribois Bisgaard & Smith, San Diego, CA.

For Phoenix Laboratories, Inc., Defendant (1:04-md-01598-JSR): Bruce Daniel Ainbinder, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, NY; Eric Peter **[**62]** Blaha, Hoffinger Stern & Ross LLP, New York, NY.

For General Nutrition Corporation, Defendant (1:04-md-01598-JSR): Andrew S. Bolin, Macfarlane Ferguson & McMullen, Tampa, FL; Dennis L Kennedy, Lionel Sawyer & Collins, Las Vegas, NV; Gayle L. Ballew, Dallas, TX; Janet Goldberg McEnery, Macfarlane Ferguson & McMullen, Tampa, FL; Jeffrey F. Peck, Joseph Paul Thomas, Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH; Jezabel Llorente, Tew Cardenas, LLP, Miami, FL; John H. Price, Honolulu, HI; Leah A Ayala, Lionel Sawyer & Collins, Las Vegas, NV; Lewis A. Bartell, L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City, NY; Mark E. McLaughlin, Tampa, FL; Mary Lynn Tate, The Tate Law Firm, Abingdon, VA; Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; Rex A. Litrell, Ulmer & Berne, L.L.P., Colombus, OH; Rickey L. Faulkner, Longview, TX; Stephen C. Merriam, Ulmer & Berne L.L.P., Cleveland, OH; Steven Jeffrey Rothman, Jones, Foster, Johnston & Stubbs, West Palm Beach, FL; Susan Y.M. Chock, Law Offices of John H. Price, Honolulu, Hi; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Wal-Mart Stores East, LP, Defendant (1:04-md-01598-JSR): Thomas M. O'Connor, Brody, **[**63]** O'Connor & O'Connor, Esqs., Northport, NY.

For Changes International, Inc., Defendant (1:04-md-01598-JSR): Bruce R. Laxalt, Banowsky, Betz & Levine, P.C, Dallas, TX; Christopher A. Glaser, Wright, Robinson, Osthimer & Tatum,

Washington, DC; Gregory V. Cortese, Holly Stoberski, Las Vegas, NV; Jeffrey F. Peck, Denise Michelle Smith, Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Jennifer J. Bouchard, Ulmer Berne, LLP, Cincinnati, OH; Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; William Henry Robinson, Jr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA.

For GNC Franchising, Inc., NBTY, Inc., Defendants (1:04-md-01598-JSR): Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For RL Oldco, Inc., Defendant (1:04-md-01598-JSR): Jeffrey F. Peck, Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For R.S. Oldco, Inc., Defendant (1:04-md-01598-JSR): Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; Patrick. Lysaught, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO; Tiffany Reece **[**64]** Clark, Ulmer and Berne, Columbus, OH; Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH.

For Nature's Bounty, Inc., Defendant (1:04-md-01598-JSR): Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; Patrick. Lysaught, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO; Shannon Cook, Ulmer & Berme, LLP, Cincinnati, OH; Stephen C. Merriam, Ulmer & Berne L.L.P., Cleveland, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Muscletech Research and Development, Inc., Muscletech Research and Development, Inc., Defendant (1:04-md-01598-JSR): Howard Klein, Conrad O'Brien Gellman & Rohn PC, Philadelphia, PA; Jacquelyn J. Ager, Conrad O'Brien Gellman Y Rohn PC, Philadelphia, PA; Eric A. Weiss, Marshall, Gerstein & Borun, Chicago, IL; Robert Michael Hirsh, Duane Morris, LLP, New York, NY.

For Meijer, Inc., Defendant (1:04-md-01598-JSR): Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH.

For Wal-Mart Stores, Inc., Defendant (1:04-md-01598-JSR): Bradley S. Russell, Overland Park, KS; D. Patrick Kasson, Reminger & Reminger Co., L.P.A., Columbus, OH US; Don Doyle, Daw & Ray, Houston, TX; Eric J Ward, Ward, Norris, Heller & Reidy, LLP, Rochester, NY; Eva Marie **[**65]** Mannoia Weiler, Shook, Hardy & Bacon L.L.P, Irvine, CA; Frank C. LaScala, Frank C. Rothrock, Paul B. La Scala, Shook, Hardy & Bacon, L.L.P., Irvine, CA; J. David Wall, Bassett Law Firm, Fayetteville, AR; Jennifer Kincaid Adams, Woodward, Hobson & Fulton, LLP, Louisville, KY US; John Otho Payne, Huckabay, Munson, Rowlett & Moore, P.A., Little Rock, AR; Mark Clarence Hegarty, Shook Hardy & Bacon, LLP, Kansas City, MO; Michael L. Young, Burroughs, Hepler, Broom, MacDonald, Hebrank & T, St. Louis, MO; Peri H. Alkas, Daw & Ray, Houston, TX; Rebecca L. Didat, Richard H.C. Clay, Woodward, Hobson & Fulton, LLP, Louisville, KY US;

Theodore J MacDonald, Burroughs, Hepler, Broom, MacDonald, Hebrank & T, St. Louis, MO; Thomas M. O'Connor, Brody, O'Connor & O'Connor, Esqs., Northport, NY; Wayne C. Kreuscher, Barnes & Thornburg, Indianapolis, IN; Willie Ben Daw, III, Daw & Ray, P.C., Houston, TX; Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For FM, Inc., Fred Meyer Stores, Inc., Defendants (1:04-md-01598-JSR): Richard E. Morton, Borton, Petrini & Conron, San Francisco, CA.

For Herbalife International of America, Inc., Defendant **[**66]** (1:04-md-01598-JSR): Adam Benjamin Michaels, Goodwin Procter, LLP, New York, NY.

For R.S. Oldco, Inc., Defendant (1:04-md-01598-JSR): Patrick Lysaught, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For RL Oldco, Inc., Franchising Oldco, Inc. f/k/a GN Franchising, Inc., General Nutrition Distribution Company, Toby Williams, Defendants (1:04-md-01598-JSR): Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Traditional Medicinals, Inc., Defendant (1:04-md-01598-JSR): Thomas Francis Lucas, McKenna, Storer, Chicago, IL.

For Albertson's Inc., Defendant (1:04-md-01598-JSR): Baxter Ward Banowsky, Banowsky, Betz & Levine, P.C, Dallas, TX; Scott Douglas Levine, Banowsky, Betz & Levine, P.C, Dallas, TX; Stephen F. Dryden, Robinson Grayson & Dryden, P.A., Wilmington, DE.

For Advantage Marketing Systems, Inc., Defendant (1:04-md-01598-JSR): Beth Anne Fredericksen, M. Richard Mullins, Reid E. Robison, McAfee & Taft, A Professional Corporation, Oklahoma City, OK.

For Puritan's Pride, Inc., Defendant (1:04-md-01598-JSR): Michael Joseph Suffern, Ulmer and Berne, Columbus, OH.

For Natural Balance, **[**67]** Inc., Defendant (1:04-md-01598-JSR): Arthur Anton Povelones, Jr, John Samuel Favate, Hardin, Kundla, McKeon, Poletto & Polifroni, P.A., Springfield, NJ; Michael J Rust, Gray, Rust, St. Amand, Moffett & Brieske, L.L.P., Atlanta, GA; Daniel Joseph Morse, Hardin, Kundla, McKeon, Poletto, PA, New York, NY.

For A.G. Waterhouse, Defendant (1:04-md-01598-JSR): Robert Richard Brooks-Rigolosi, Segal McCambridge Singer & Mahoney, Ltd., New York, NY.

For Bally Total Fitness, Inc., Defendant (1:04-md-01598-JSR): Christine Coers-Mitchell, Derek J. Ashton, Cosgrave, Vergeer, Kester, L.L.P., Portland, OR; Jeffrey A. Johnson, Cosgrave, Vergeer, Kester, L.L.P., Portland, OR.

For Evergood Products Corporation, Defendant (1:04-md-01598-JSR): Eric Peter Blaha, Hoffinger Stern & Ross LLP, New York, NY.

For Stryka Botanics Co. Inc., Defendant (1:04-md-01598-JSR): Jeanne Anne Cygan, Ferro & Cuccia, New York, NY.

For General Nutrition Centers, GNC Corporation, Defendants (1:04-md-01598-JSR): Rex Allen Littrell, Ulmer and Berne, Columbus, OH.

For 21st Century Laboratories, Defendant (1:04-md-01598-JSR): Donna Hope Bakalor, Quirk and Bakalor, NY, NY.

For General Nutrition **[**68]** Corporation, Defendant (1:04-md-01598-JSR): Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH; Rex Allen Littrell, Ulmer and Berne, Columbus, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Twinlab Corporation, Defendant (1:04-md-01598-JSR): Andrew S. Bolin, Macfarlane Ferguson & McMullen, Tampa, FL; Bruce R. Lexalt, Reno, NV; Christopher A. Glaser, Wright, Robinson, Osthimer & Tatum, Washington, DC; Gregory V. Cortese, Holly Stoberski, Las Vegas, NV; Janet Goldberg McEnergy, Macfarlane Ferguson & McMullen, Tampa, FL; Jeffrey F. Peck, Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH; Jennifer J. Bouchard, Joseph C. Klein, Ulmer Berne, LLP, Cincinnati, OH; Lewis A. Bartell, L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City, NY; Mark E. McLaughlin, Tampa, FL; Mary Lynn Tate, The Tate Law Firm, Abingdon, VA; Michael Suffren, Ulmer and Berne, Columbus, OH; Robert B. Leck, III, Leck & Associates, Santa Monica, CA; William Henry Robinson, Jr., Ulmer & Berne, L.L.P., Cincinnati, OH.

For Twinlab Direct Inc., Defendant (1:04-md-01598-JSR): Christopher A. Glaser, Wright, Robinson, Osthimer & Tatum, Washington, DC; Jennifer J. Bouchard, Ulmer Berne, LLP, Cincinnati, **[**69]** OH; Michael Suffren, Ulmer and Berne, Columbus, OH; William Henry Robinson, Jr., Wright, Robinson, McCammon, Osthimer & Tatum, Richmond, VA; Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH.

For Trim International, Inc., Defendant (1:04-md-01598-JSR): Steven A. Stadtmauer, Harris Beach, LLP, New York, NY.

For HEB Grocery Company, L.P., Defendant (1:04-md-01598-JSR): Robert Allen Valadez, Shelton & Valadez, P.C., San Antonio, TX.

For Nitro 2 Go, Nitro 2 Go, Inc, Defendant (1:04-md-01598-JSR): Patrick Denis Geraghty, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, NY.

For General Nutrition Distribution, L.P., Defendant (1:04-md-01598-JSR): Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For NFC, Inc. d/b/a Nature Food Centers, Inc., Defendant (1:04-md-01598-JSR): Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH.

For Kabco Pharmaceuticals, Inc., Defendant (1:04-md-01598-JSR): Eric B. Hershberger, Columbus, OH; Bruce Daniel Ainbinder, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, NY.

For Vitalabs, Inc., Defendant (1:04-md-01598-JSR): Joseph Kenneth Poe, Rivkin, Radler, **[**70]** LLP, Uniondale, NY.

For Rite Aid Corporation, Defendant (1:04-md-01598-JSR): Jonathan Allan Klein, Kelly, Herlihy & Klein LLP, San Francisco, CA.

For California Creative Enterprises Inc., Sitrick and Company, Eckerd Drugs of Texas, Inc., Defendants (1:04-md-01598-JSR): Robert Gaylord Smith, Lewis Bribois Bisgaard & Smith, San Diego, CA.

For Walgreen Co., Defendant (1:04-md-01598-JSR): Baxter Ward Banowsky, Scott Douglas Levine, Banowsky, Betz & Levine, P.C, Dallas, TX; Sheila E. Carson, Lowenstein Sandler PC, Roseland, NJ; Elizabeth Rose Mandarano, Lester, Schwab, Katz and Dwyer LLP, New York, NY.

For BDI Pharmaceuticals, Defendant (1:04-md-01598-JSR): Erich Gleber, Segal McCambrige Singer & Mahoney, New York, NY.

For Nutramerica Corporation, Defendant (1:04-md-01598-JSR): Anne Marie Seibel, Brian Alexander Wahl, Bradley Arant Rose & White LLP, Birmingham, AL; Daniel W. McGrath, Philip R. Kujawa, Hinshaw & Culbertson LLP, Chicago, IL; John Richard Supple, Jr, Schuyler Blake Kraus, Hinshaw & Culbertson LLP, New York, NY.

For TrimSpa, Goen Technologies Corporation, Defendants (1:04-md-01598-JSR): Anne Marie Seibel, Bradley Arant Rose & White LLP, Birmingham, **[**71]** AL; Brian Alexander Wahl, Bradley Arant Rose & White LLP, Birmingham, AL; Eric A. Weiss, Marshall, Gerstein & Borun, Chicago, IL; Thomas Joseph Burke, Jr., Hall Prangle & Schoonveld, LLP, Chicago, IL; Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH; Michael Joseph Suffern, Ulmer and Berne,

Columbus, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Advanced Nutrient Science, LLC, Defendant (1:04-md-01598-JSR): Schuyler Blake Kraus, Hinshaw & Culbertson LLP, New York, NY.

For Prolab Nutrition, Defendant (1:04-md-01598-JSR): Dean Thomas Wellman, Piper, Wellman & Bowers, LEXINGTON, KY.

For Advocare, Inc., Defendant (1:04-md-01598-JSR): Charles Brenton Kugler, Daniel Joseph Sheehan, Michael L. Atchley, II, Michael McShan, Daniel Sheehan & Associates, Dallas, TX.

For NVE, Inc., Defendant (1:04-md-01598-JSR): Steven J. Kirsch, Murnane, Conlin, White & Brandt, St. Paul, MN.

For CVS Corporation, Defendant (1:04-md-01598-JSR): William J. Ricci, Lavin Coleman Finarelli & Gray, New York, NY.

For Whole Health Nutricenter, Inc., Iovate Health Sciences Group, Inc., Defendants (1:04-md-01598-JSR): Robert Michael Hirsh, Duane Morris, LLP, New York, NY.

**[**72]** For GNCI OLDCO, Inc. f/k/a General Nutrition Companies, Inc., APOLLO MANAGEMENT, L.P., Defendants (1:04-md-01598-JSR): Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH.

For Best of Health, formerly known as For Health's Sake, Defendant (1:04-md-01598-JSR): Joseph Leray McNamara, Copeland Cook Taylor & Bush, Ridgeland, MS.

For Nittany Pharmaceuticals, Defendant (1:04-md-01598-JSR): Daniel J. Dugan, David B. Picker, Spector Gadon & Rosen, Philadelphia, PA; Kerrie Lynnewagoner Boyle, Philip Gregory Haddad, MacCorkle, Lavender, Casey & Sweeney, Pllc, Morgantown, WV.

For Gold Line Nutritional, Inc., Defendant (1:04-md-01598-JSR): Kerrie Lynnewagoner Boyle, Philip Gregory Haddad, MacCorkle, Lavender, Casey & Sweeney, Pllc, Morgantown, WV.

For Alpine Health Products LLC, Defendant (1:04-md-01598-JSR): Baxter Ward Banowsky, Scott Douglas Levine, Banowsky, Betz & Levine, P.C, Dallas, TX; John Otho Payne, Huckabay, Munson, Rowlett & Moore, P.A., Little Rock, AR; Philip Harry Cohen, Greenberg Traurig, LLP, New York, NY.

For Salons Only, Inc., Defendant (1:04-md-01598-JSR): Michael L. Klein, Ramapo Town Hall, Suffern, NY.

For Body Dynamics, Inc., Defendant **[**73]** (1:04-md-01598-JSR): Erich Gleber, Segal McCambrige Singer & Mahoney, New York, NY.

For HVL, Incorporated, Defendant (1:04-md-01598-JSR): Jezabel Llorente, Tew Cardenas, LLP, Miami, FL; Lawrence A. Kellogg, Stuart Isaac Grossman, Tew Cardenas, LLP, Miami, FL; Christopher Michael Jacobs, Robert Jaeger Behling, Dapper, Baldasare, Benson & Kane, P.C., Pittsburgh, PA; Eric A. Weiss, Marshall, Gerstein & Borun, Chicago, IL; Robert Michael Hirsh, Duane Morris, LLP, New York, NY.

For Chattem, Inc., Defendant (1:04-md-01598-JSR): James A. Beakes, III, Miller & Miller, Pllc, Nashville, TN.

For Schnuck Markets Inc., Defendant (1:04-md-01598-JSR): Michael L. Young, Theodore J MacDonald, Burroughs, Hepler, Broom, MacDonald, Hebrank & T, St. Louis, MO; Robert L. Duckels, Greensfelder, Hemker, & Gale, P.C., St. Louis, MO.

For Fitness First, U.S.A. doing business as Extreme Forces/FitnessFirstUSA.com, Defendant (1:04-md-01598-JSR): Dabney Jefferson Carr, IV, Troutman Sanders LLP, Richmond, VA.

For Market America, Inc., Defendant (1:04-md-01598-JSR): Daniel James Mitchell, Sarah B. Tracy, Bernstein Shur Sawyer & Nelson, Portland, ME; Neil Louis Coscio, Fiedelman & McGraw, **[**74]** Jericho, NY.

For RS OLDCO, Inc. f/k/a Rexall Sundown, Inc., Defendant (1:04-md-01598-JSR): Patrick. Lysaught, Baker, Sterchi, Cowden & Rice, L.L.C., Kansas City, MO.

For Entrenet Nutritionals, Inc., Defendant (1:04-md-01598-JSR): Jeannine Louise Lee, Robert William Vaccaro, Flynn, Gaskins & Bennett, LLP, Minneapolis, MN.

For Fran's Health Natural Foods, Defendant (1:04-md-01598-JSR): Jennifer Snyder Heis, Ulmer & Berne, Cinncinnati, OH; Stephen C. Merriam, Ulmer & Berne L.L.P., Cleveland, OH.

For Novartis Consumer Health, Inc., Defendant (1:04-md-01598-JSR): Lori Blake Leskin, Kaye Scholer, LLP, New York, NY.

For Metabolife Int'l. Inc., Alpine Health Products LLC, Defendants (1:04-md-01598-JSR): Baxter W. Banowsky, Dallas, TX; Scott D. Levine, Banowsky, Betz & Levine, Dallas, TX.

For Chemins Company Inc, The, Defendant (1:04-md-01598-JSR): Baxter W. Banowsky, Banowsky, Betz & Levine, P.C, Dallas, TX; John Payne, Honolulu, HI; Scott D. Levine,

Banowsky, Betz & Levine, Dallas, TX.

For Metabolife International Inc., Chemins Company Inc., Alpine Health Products, LLC, Defendants (1:04-md-01598-JSR): Michael G. Terry, David Lesley Jones, Hartline Dacus, **[**75]** Corpus Christi, TX; Darrell Lee Barger, Hartline Dacus Barger Dreyer & Kern, Corpus Christi, TX.

For Europa Sports Products, Inc., Defendant (1:04-md-01598-JSR): James G. Munisteri, Gardere Wynne Sewell LLP, Houston, Tx.

For Experimental Applied Sciences, Inc., Defendant (1:04-md-01598-JSR): Lawrence Henry Cooke, II, Venable LLP, New York, NY.

For Supervalu, Inc., Defendant (1:04-md-01598-JSR): Louise A. Behrendt, Stich, Angell, Kreidler and Dodge P.A., Minneapolis, MN.

For Premier Marketing, Defendant (1:04-md-01598-JSR): Drew Brown, Jonathan A. Berkelhammer, Smith Moore LLP, Greensboro, NC.

For Vitamin Planet, Inc., Defendant (1:04-md-01598-JSR): Andrew Stewart Ashworth, Gabriel and Ashworth PLLC, Scottsdale, AZ.

For Murphy Oil USA, Inc., Defendant (1:04-md-01598-JSR): Mark Clarence Hegarty, Shook Hardy & Bacon, LLP, Kansas City, MO.

For Alimentation Couche-Tard, Inc., Defendant (1:04-md-01598-JSR): April L. Watson, Jack M. Alltmont, Sessions, Fishman, & Nathan, LLP, New Orleans, LA; Michael D. Meyer, Michael D. Meyer, Attorney At Law, New Orleans, LA.

For Kmart of Michigan, Inc., Defendant (1:04-md-01598-JSR): Joseph E. Kilpatrick, Jr., Kilpatrick, **[**76]** Williams & Meeks, L.L.P., Little Rock, AR.

For Wal-Mart Corporation, Defendant (1:04-md-01598-JSR): J. David Wall, Bassett Law Firm, Fayetteville, AR; Dennis L Kennedy, Lionel Sawyer & Collins, Las Vegas, NV; Leah A Ayala, Lionel Sawyer & Collins, Las Vegas, NV.

For Nutraceutical Corporation, Nutraceutical Corporation, Defendant (1:04-md-01598-JSR): Daniel J. Gerber, David A. Osso, Rumberger, Kirk & Caldwell, Orlando, FL.

For Timothy A. McLaughlin, Defendant (1:04-md-01598-JSR): Bernard R. Nevoral, Bernard R. Nevoral and Associates, Ltd., Bernard Roman Nevoral, David F. Szczecin, Bernard R. Nevoral and Associates Ltd, Chicago, IL; Thomas Edward Engel, Engel & McCarney, New York, NY.

For EAS, Inc., Abbott Laboratories, Defendants (1:04-md-01598-JSR): Brien M. Penn, Venable, L.L.P., Baltimore, MD US; Michael B. MacWilliams, Paul F. Strain, Venable LLP, Baltimore, MD.

For Sentry Supplement Company, Defendant (1:04-md-01598-JSR): Julianne Farnsworth, Farnsworth Law Firm LLC, Charleston, SC.

For Aim for Health, Inc., Defendant (1:04-md-01598-JSR): John Otho Payne, Huckabay, Munson, Rowlett & Moore, P.A., Little Rock, AR.

For Nu Lifestyles, LLC, Defendant **[**77]** (1:04-md-01598-JSR): Kevin R. Conners, Vorys Sater Seymour & Pease, Columbus, OH US.

For Lori Cohen, Great Neck Medical Group, Defendants (1:04-md-01598-JSR): Marcy Dorothy Sheinwold, Lewis Johs Avallone Aviles, LLP, Melville, NY.

For The Burgess Group Inc., Defendant (1:04-md-01598-JSR): Keith D. Silverstein, Silverstein, Hurwitz & Stern, LLP, New York, NY.

For Vitamin World, Inc., Defendant (1:04-md-01598-JSR): Mark A. Kinzie, Ryan G. Vacca, Stinson & Morrison, St. Louis, MO; Michael Joseph Suffern, Ulmer and Berne, Columbus, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Sam's East, Inc., Defendant (1:04-md-01598-JSR): Jeffrey F. Peck, Ulmer & Berne, Cincinnati, OH; Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Mike Walker, Defendant (1:04-md-01598-JSR): Jeffrey F. Peck, Ulmer & Berne, Cincinnati, OH.

For Raymond Finnie, Defendant (1:04-md-01598-JSR): Marc S. Wallis, Newman Bronson & Wallis, St. Louis, MO US; Mark I. Bronson, Newman Bronson & Wallis, St. Louis, MO.

For Sitrick and Company, Movant (1:04-md-01598-JSR): Robert Gaylord Smith, Lewis Bribois Bisgaard & Smith, San Diego, CA.

For Jennifer Shaffer Maxwell, Movant **[**78]** (1:04-md-01598-JSR): Scott J. Eldredge, Burg Simpson Eldredge Hersh & Jardine, P.C, Englewood, CO.

For TL Administration Corp., Changes International, Inc., ThirdParty Plaintiffs (1:04-md-01598-JSR): Joseph Paul Thomas, Ulmer & Berne, Cincinnati, OH.

For The Burgess Group Simply Weight Loss, ThirdParty Plaintiff (1:04-md-01598-JSR): Keith D. Silverstein, Silverstein, Hurwitz & Stern, LLP, New York, NY.

For Sportika Export, Inc., ThirdParty Defendant (1:04-md-01598-JSR): Robert F. Redmond, Jr., Williams Mullen, Richmond, VA.

For Bio-Mark International, Inc., ThirdParty Defendant (1:04-md-01598-JSR): Robert Gerald Chambers, Jr., Turner, Padget, Graham and Laney, Charleston, SC US.

For Mellissa Barr, Claimant (1:04-md-01598-JSR): Lisa J. Frisella, The Mogin Law Firm, P.C., San Diego, CA.

For Official Committee of Ephedra Claimants of TL Administration Corporation and TL Administration Inc., f/k/a Twinlab Corporation and Twin Laboratories Inc., Claimant (1:04-md-01598-JSR): David J. Molton, Brown Rudnick Berlack Israels, LLP, New York, NY.

For Ozan Cirak, Claimant (1:04-md-01598-JSR): John Daniel Goldsmith, Trennan, Kemker, etal., Tampa, FL.

For **[**79]** Wal-Mart Stores Inc., Cross Claimant (1:04-md-01598-JSR): Willie Ben Daw, III, Daw & Ray, P.C., Houston, TX.

For Kmart of Michigan, Inc., Cross Claimant (1:04-md-01598-JSR): Joseph E. Kilpatrick, Jr., Kilpatrick, Williams & Meeks, L.L.P., Little Rock, AR.

For Randall L. Heilman, ADR Provider (1:04-md-01598-JSR): Frank Steven Pollock, Brownstein Vitale & Weiss, Philadelphia, PA.

For Esquire Arnold Levin, ADR Provider (1:04-md-01598-JSR): Arnold Levin, Levin, Fishbein, Sedran & Berma, Philadelphia, PA.

For Basic Research LLC, ADR Provider (1:04-md-01598-JSR): Brian Eldridge, Kathleen Mary McDonough, Segal McCambrige Singer & Mahoney (Ill), Chicago, Il; Katherine Sleeker, Segal, McCambridge, Singer, Mahoney, Chicago, IL; Robert Richard Brooks-Rigolosi, Segal McCambridge Singer & Mahoney, Ltd., New York, NY.

For RSM Richter Inc., as Plaintiff and Foreign Representative of the Foreign Applicants, Bankruptcy Movant (1:04-md-01598-JSR): Daniel Joseph Guyder, Allen & Overy, LLP, New York, NY.

For Official Committee of Unsecured Creditors of Metabolife International, Inc., Interested Party

(1:04-md-01598-JSR): David J. Molton, Brown Rudnick Berlack Israels, LLP, **[**80]** New York, NY.

For Ad Hoc Committee of Tort Claimants, Interested Party (1:04-md-01598-JSR): William R. Baldiga, Brown Rudnick Berlack Israels LLP, Boston, MA.

For Annabelle & Celestin Jaramillo, Interested Party (1:04-md-01598-JSR): Joe L. McClaugherty, McClaugherty & Silver, P.C, Santa Fe, NM.

For Candace Ishman, Interested Party (1:04-md-01598-JSR): Genevieve Nichols, Coffey and Associates, St. Louis, MO.

For PCC, All Plaintiffs (1:04-md-01598-JSR): Robert G. Rikard, James C. Anders, P.A. & Associates, Columbia, SC; Thomas Philip Cartmell, Wagstaff & Cartmell, LLP, Kansas City, MO; Janet Gilligan Abaray, Lopez, Hodes, Restaino, Milman & Skikos, Cincinnati, OH.

For TL Administration Corp., ThirdParty Plaintiff (1:04-md-01598-JSR): Rex Allen Littrell, Ulmer and Berne, Columbus, OH.

For Changes International, Inc., TL Administration Inc., TL Administration Corp., ThirdParty Plaintiffs (1:04-md-01598-JSR): Tiffany Reece Clark, Ulmer and Berne, Columbus, OH.

For Vitalabs, Inc., Cross Claimant (1:04-md-01598-JSR): Frank James Raia, Rivkin, Radler, LLP, Uniondale, NY; Joseph Kenneth Poe, Rivkin, Radler, LLP, Uniondale, NY.

For Trim International, **[**81]** Inc., Vita Quest International, Inc., Cross Defendants (1:04-md-01598-JSR): Steven A. Stadtmauer, Harris Beach, LLP, New York, NY.

For Twinlab Direct, Inc. (d/b/a Changes International, Inc.), TL Administration Inc., ThirdParty Plaintiffs (1:04-md-01598-JSR): Denise Michelle Smith, Ulmer & Berne, Cincinnati, OH.

For Vitaquest International Inc., ThirdParty Defendant (1:04-md-01598-JSR): Steven A. Stadtmauer, Harris Beach, LLP, New York, NY.

For Kabco Pharmaceuticals, Inc., Cross Claimant (1:04-md-01598-JSR): James Patrick Donovan, Wilson ElserMoskowitz Edelman & Dicker LLP, White Plains, NY.

For Vitalabs, Inc., Cross Defendant (1:04-md-01598-JSR): Joseph Kenneth Poe, Rivkin, Radler, LLP, Uniondale, NY.

For GN Oldco Corp. f/k/a General Nutrition Corporation, Cross Claimant (1:04-md-01598-JSR):

Michael Joseph Suffern, Ulmer and Berne, Columbus, OH.

For Gold Line Nutritional, Inc., Cross Defendant (1:04-md-01598-JSR): Philip Gregory Haddad, MacCorkle, Lavender, Casey & Sweeney, Pllc, Morgantown, WV.

For Salons Only, Inc., Cross Claimant (1:04-md-01598-JSR): Michael L. Klein, Greenman, Lacy, Klein, O'harra & Heffron, Oceanside, CA.

For GMP Laboratories **[**82]** of America, Inc., a California Corporation, Cross Defendant (1:04-md-01598-JSR): Thomas Fitch Goodman, Gregory Brian Smith Jackson, Miller & Martin PLLC, Nashville, TN; James A. Beakes, III, Miller & Miller, Pllc, Nashville, TN.

For GMP Laboratories of America, Inc., a California Corporation, Counter Claimant (1:04-md-01598-JSR): Thomas Fitch Goodman.

**JUDGES:** JED S. RAKOFF, U.S.D.J.

**OPINION BY:** JED S. RAKOFF

**OPINION**

**[*334]** ***OPINION AND ORDER***

JED S. RAKOFF, U.S.D.J.

Before the substance known as ephedra was banned by the U.S. Food and Drug Administration in 2004, a Canadian-based company named Muscletech Research and Development, Inc. (here referred to, along with its subsidiaries, as "Muscletech") marketed products containing ephedra in the United States. Some of the consumers suffered severe injuries, such as heart attacks and strokes, and eventually more than thirty civil actions for personal injuries and wrongful deaths allegedly caused by ephedra were filed against Muscletech in state and federal courts in the United States. As part of the *In re Ephedra Products Liability Litigation,* the federal cases were subsequently transferred to this Court.

Early in 2006, Muscletech commenced **[**83]** an insolvency proceeding in Ontario Superior Court pursuant to Canada's Companies' Creditors Arrangement Act. The Ontario Court appointed RSM Richter, Inc. as Monitor, and the Monitor, in turn, appeared in this Court as the designated foreign representative of the Ontario Court. Acting pursuant to the recently enacted Chapter 15 of the Bankruptcy Code, 11 U.S.C. §§ 1501 *et seq.,* [1] this Court eventually granted, following several hearings, the Monitor's motion for an order recognizing the Canadian proceeding as a "foreign main proceeding," *i.e.,* "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502; *see* Order, Mar. 2, 2006. Thereafter, the state cases against Muscletech were transferred to this Court pursuant to 28 U.S.C. § 157(b)(5) and consolidated with

the previously transferred federal cases. *See* Case Management Order No. 25 P 4, May 22, 2006.

1 Chapter 15, which took effect in October 2005, was derived from the Model Law on Cross-Border Insolvency drafted by the United Nations Commission on International Trade Law ("UNCITRAL").

**[**84]** Meanwhile, in Canada, the Monitor and other interested parties negotiated a Claims Resolution Procedure (the "Procedure") designed to speedily assess and value all creditor claims, including the claims of the plaintiffs in the Muscletech actions in the United States, who by this time had filed claims and otherwise appeared in the Ontario insolvency proceeding. The Procedure was approved by the Ontario Court, with the consent of the vast majority of claimants, on June 8, 2006 (the "June 8 Order"). On June 16, 2006, the Monitor moved pursuant to 11 U.S.C. §§ 105(a) and 1521 for an order recognizing and enforcing the June 8 Order within the United States. Four claimants filed papers in opposition. On July 12, 2006, after briefing and oral argument, the Court granted the Monitor's motion, contingent on the Ontario Court's approving certain amendments to the Procedure designed to assure greater clarity and procedural fairness. The Ontario Court approved these amendments on August 1, 2006 (the "August 1 Order"). Accordingly, this Court now grants the Monitor's motion to recognize and enforce in the United States the August 1 Order approving the amended Procedure. The **[**85]** reasons for this ruling are as follows:

[HN1] Section 1521(a) of the Bankruptcy Code permits this Court, "[u]pon the recognition **[*335]** of a foreign proceeding," to grant, at the foreign representative's request, "any appropriate relief" "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). [HN2] Section 105(a) of the Bankruptcy Code similarly provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.* § 105(a). In the instant application, the Monitor asks the Court to recognize and enforce a foreign procedure that implements a claims resolution process that easily falls within the purview of §§ 105(a) and 1521(a).

[HN3] Section 1506 of the Bankruptcy Code provides, however, that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." The June 8 Order and the August 1 Order embodying the amended Procedure provide for mandatory mediation **[**86]** and, if the mediation results in a plan approved by specified majorities of creditors, for the estimation and liquidation of the remaining claims by a Claims Officer appointed by the Ontario Court. *See* Notice of Motion, Jun. 16, 2006, Exh. B (the June 8 Order); Notice of Entry, Aug. 1, 2006, Exh. A (the August 1 Order). Primarily on the basis of § 1506, the four objectors ask this Court to refuse to recognize and enforce the Procedure, arguing that it is manifestly contrary to the public policy of

the United States in that it deprives the objectors of due process and trial by jury.

As to due process, while most of the objectors' objections are frivolous, there were various paragraphs of the June 8 Order that conceivably could have been read as permitting the Claims Officer to refuse to receive evidence and to liquidate claims without granting interested parties an opportunity to be heard. At this Court's initiative, the Monitor proposed amendments to the June 8 Order that entirely cured these problems. The Ontario Court promptly adopted these amendments in its August 1 Order, and it is only as a result that this Court now gives its approval to recognition and enforcement of the **[**87]** Procedure.

As for the objection that enforcement of the Procedure effectively denies the objecting plaintiffs the right to jury trial that they would have retained if their cases went to trial in the United States, it may well be the case, as the Monitor argues, that the objectors waived this objection when they filed their claims in the Ontario Court and appeared there to argue the same objections they here make. [2] *See* Reply Mem. of Law of RSM Richter Inc. 7; Tr. 7/6/2006, at 54, 57-58. But the Court does not reach the waiver issue because it finds that, in any event, neither § 1506 nor any other law [3] prevents a United States **[*336]** court from giving recognition and enforcement to a foreign insolvency procedure for liquidating claims simply because the procedure alone does not include a right to jury.

2 Although it might also be argued that the objection to the denial of a jury trial is premature because, at this stage, the Claims Officer has not begun the liquidation process, the Court agrees with the objectors that denial of a jury trial impacts their bargaining position at every stage of the implementation of the Procedure.

**[**88]**

3 The objectors also purport to rely on 11 U.S.C. § 1507, which, however, adds nothing to the arguments made under § 1506. Although none of the objectors relied on, or even cited, 28 U.S.C. § 1411 -- which provides that, except in the case of involuntary bankruptcies, "this chapter and *title 11* do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim," 28 U.S.C. § 1411(a) (emphasis added) -- nevertheless, the Court, *sua sponte,* raised § 1411 at the time of oral argument and gave the objectors ample opportunity to address its relevance. *See* Tr., 7/6/2006, at 9-75.

In adopting Chapter 15, Congress instructed the courts that the exception provided therein for refusing to take actions "manifestly contrary to the public policy of the United States" should be "narrowly interpreted," as "[t]he word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the **[**89]** United States." H.R. Rep. No. 109-31(I),

at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172. This is the standard meaning accorded the word "manifestly" in international law when it refers to a nation's public policy. Indeed, the official Guide to the Enactment of the Model Law on Cross-Border Insolvency (from which Chapter 15 derives) expressly states that

> [t]he purpose of the expression "manifestly," used also in many other international legal texts as a qualifier of the expression "public policy," is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 [4] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

United Nations General Assembly, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, P 89, U.N. Doc A/CN.9/442 (1997). This takes on even added relevance when one recognizes that the House Judiciary Committee, in enacting Chapter 15, specifically indicated that the Guide "should be consulted for guidance as to the meaning and purpose of [Chapter 15's] provisions." H.R. Rep. No. 109-31(I), at 106 n.101, *as reprinted* **[**90]** *in* 2005 U.S.C.C.A.N. 169 n.101.

4 "Article 6" refers to Article 6 of the Model Law, from which section 1506 is taken virtually verbatim.

Determining what foreign procedures are "manifestly contrary to the public policy of the United States" is, moreover, familiar territory to federal courts, who have long had to confront similar issues when determining whether or not to enforce foreign judgments rendered on the basis of foreign proceedings that were plainly fair but that did not include some commonplace of American practice. As early as 1895, in the leading case of *Hilton v. Guyot,* 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895), the Supreme Court determined that a foreign judgment should generally be accorded comity if "its proceedings are according to the course of a civilized jurisprudence," *i.e.,* fair and impartial. *Hilton,* 159 U.S. at 205-06. More recently, in *Ackermann v. Levine,* 788 F.2d 830 (2d Cir. 1986), the Second Circuit expressly reaffirmed "[t]he narrowness of the **[**91]** public policy exception to enforcement [of foreign judgments]," adding that, "[a]s Judge Cardozo so lucidly observed: 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.'" *Ackermann,* 788 F.2d at 842 (quoting *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 110-11, 120 N.E. 198 (1918) (Cardozo, J.)).

Accordingly, federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign. Only last year, for example, the district court for the Northern District of Ohio granted summary judgment to a plaintiff seeking to enforce against a U.S. company a foreign judgment given by the Supreme Court of the Republic of Korea. **[*337]** *See Samyang Food Co. v. Pneumatic Scale Corp.,* 2005 U.S. Dist. LEXIS 25374, No. 05 Civ. 636, 2005 WL 2711526 (N.D. Ohio Oct. 21, 2005). Against defendant's argument that the Korean judgment should not be recognized because South Korea did not afford defendant a jury

trial, the district court held that all that was required was a fair and impartial hearing and that, despite the absence of jury trial, the Korean procedure was eminently **[**92]** fair. *Samyang Food,* 2005 U.S. Dist. LEXIS 25374, 2005 WL 2711526 at *6-*7. As the district court noted, "[t]he Korean judicial system provides substantially the same substantive and procedural due process protections as those afforded by Ohio," *viz.,* "notice, the right to . . . legal counsel, the right to present evidence and witnesses and to examine evidence offered against them, and a right to appeal to a higher court." *Samyang Food,* 2005 U.S. Dist. LEXIS 25374, 2005 WL 2711526 at *6. All these protections are likewise present in the Ontario Court.

Similarly, federal courts, in the Second Circuit and elsewhere, have regularly dismissed U.S. cases in favor of foreign forums despite the objection that the foreign forum provides no trial by jury. *See, e.g., Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir. 1991) (finding, in affirming forum non conveniens dismissal, that fact that Japan would not conduct jury trial to resolve dispute "does not render Japanese courts an inadequate forum"); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal,* 809 F.2d 195, 199, 202 (2d Cir. 1987) (affirming district court's forum non conveniens dismissal **[**93]** based on finding that Indian courts were adequate forum despite, *inter alia,* absence of juries).

Obviously, the constitutional right to a jury trial is an important component of our legal system, and § 1411 stresses its importance in the context of personal injury cases. But the notion that a fair and impartial verdict cannot be rendered in the absence of a jury trial defies the experience of most of the civilized world. Indeed, England, where the jury concept originated, has long since limited jury trials in civil proceedings to only those cases involving allegations of libel, slander, malicious prosecutions, fraud, and false imprisonment. *See* Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context,* 53 Am. J. Comp. L. 709, 712-13 (2005) (internal quotation omitted). The historic function of the jury to stand as a bulwark against government abuse plainly has limited application in the civil arena, and it is difficult to detect what unfairness a plaintiff suffers from having a civil case decided by a judge rather than a jury. Here, the objectors' primary claim of "prejudice" from the absence of a right to jury trial is simply **[**94]** that it will give them less of a bargaining position in negotiating a settlement of their claims than they would have if a jury -- which, unlike the Claims Officer, would have no knowledge of competing claims -- were asked to value their claims. *See* Tr., 7/6/2006, at 37, 40. Deprivation of such bargaining advantage hardly rises to the level of imposing on plaintiffs some fundamental unfairness.

In any event, the Procedure here in issue, as amended, plainly affords claimants a fair and impartial proceeding. Nothing more is required by § 1506 or any other law.

Accordingly, for the foregoing reasons, the Court hereby recognizes and enforces the Claims Resolution Procedure initially promulgated by the Ontario Superior Court on June 8, 2006 and amended and adopted by the Ontario Superior Court on August 1, 2006.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York

August 11, 2006

# TAB 4

**CITATION:** Hartford Computer Hardware, Inc. (Re), 2012 ONSC 964
**COURT FILE NO.:** CV-11-9514-00CL
**DATE:** 20120215

**SUPERIOR COURT OF JUSTICE – ONTARIO**
**(COMMERCIAL LIST)**



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

**APPLICATION OF HARTFORD COMPUTER HARDWARE, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED**

**AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION WITH RESPECT TO**

**RE:** **HARTFORD COMPUTER HARDWARE, INC., NEXICORE SERVICES, LLC, HARTFORD COMPUTER GROUP, INC. AND HARTFORD COMPUTER GOVERNMENT, INC., (COLLECTIVELY, THE "CHAPTER 11 DEBTORS"), Applicants**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Kyla Mahar and John Porter, for the Chapter 11 Debtors**

**Adrienne Glen, for FTI Consulting Canada, Inc., Information Officer**

**Jane Dietrich, for Avnet Inc.**

**HEARD &**
**ENDORSED: February 1, 2012**

**REASONS**
**RELEASED: February 15, 2012**

**ENDORSEMENT**

[1] Hartford Computer Hardware, Inc. ("Hartford"), on its own behalf and in its capacity as foreign representative of Chapter 11 Debtors (the "Foreign Representative") brought a motion under s. 49 of the *Companies' Creditors Arrangement Act* (the "*CCAA*") for recognition and implementing in Canada the following Orders of the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "U.S. Court") made in the proceedings commenced by the Chapter 11 Debtors:

(i) the Final Utilities Order;

(ii) the Bidding Procedures Order;

(iii) the Final DIP Facility Order.

(collectively, the U.S. Orders")

[2] On December 12, 2011, the Chapter 11 Debtors commenced the Chapter 11 proceeding. The following day, I made an order granting certain interim relief to the Chapter 11 Debtors, including a stay of proceedings. On December 15, 2011, the U.S. Court made an order authorizing Hartford to act as the Foreign Representative of the Chapter 11 Debtors. On December 21, 2011, I made two orders, an Initial Recognition Order and a Supplemental Order that, among other things:

(i) declared the Chapter 11 proceedings to be a "foreign main proceeding" pursuant to Part IV of the *CCAA*;

(ii) recognized Hartford as the Foreign Representative of the Chapter 11 Debtors;

(iii) appointed FTI as Information Officer in these proceedings;

(iv) granted a stay of proceedings;

(v) recognized and made effective in Canada certain "First Day Orders" of the U.S. Court including an Interim Utilities Order and Interim DIP Facility Order.

[3] On January 26, 2012, the U.S. Court made the U.S. Orders.

[4] The Foreign Representative is of the view that recognition of the U.S. Orders is necessary for the protection of the Chapter 11 Debtors' property and the interest of their creditors.

[5] The affidavit of Mr. Mittman and First Report of the Information Officer provide details with respect to the hearings in the U.S. Court on January 26, 2012 which resulted in the U. S. Court granting the U.S. Orders. The Utilities Order and the Bidding Procedures Order are relatively routine in nature and it is, in my view, appropriate to recognize and give effect to these orders.

[6] With respect to the Final DIP Facility Order, it is noted that paragraph 6 of this Order contains a partial "roll up" provision wherein all Cash Collateral in the possession or control of Chapter 11 Debtors on December 12, 2011 (the "Petition Date") or coming into their possession after the Petition Date is deemed to have been remitted to the Pre-petition Secured Lender for application to and repayment of the Pre-petition revolving debt facility with a corresponding borrowing under the DIP Facility.

[7] In making the Final DIP Facility Order, the Information Officer reports that the U.S. Court found that good cause had been shown for entry of the Final DIP Facility Order, as the Chapter 11 Debtors' ability to continue to use Cash Collateral was necessary to avoid immediate and irreparable harm to the Chapter 11 Debtors and their estates.

[8] The granting of the Final DIP Facility Order was supported by the Unsecured Creditors' Committee. Certain objections were filed but the Order was granted after the U.S. Court heard the objections.

[9] The Information Officer reports that Canadian unsecured creditors will be treated no less favourably than U.S. unsecured creditors. Further, since a number of Canadian unsecured creditors are employees of the Chapter 11 Debtors, these creditors benefit from certain priority claims which they would not be entitled to under Canadian insolvency proceedings.

[10] The Information Officer and Chapter 11 Debtors recognize that in *CCAA* proceedings, a partial "roll up" provision would not be permissible as a result of s. 11.2 of the *CCAA,* which expressly provides that a DIP charge may not secure an obligation that exists before the Initial Order is made.

[11] Section 49 of the *CCAA* provides that, in recognizing an order of a foreign court, the court may make any order that it considers appropriate, provided the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of the creditor or creditors.

[12] It is necessary, in my view, to emphasize that this is a motion to recognize an order made in the "foreign main proceeding". The Final DIP Facility Order was granted after a hearing in the U.S. Court. Further, it appears from the affidavit of Mr. Mittman that, as of the end of December 2011, the Chapter 11 Debtors had borrowed $1 million under the Interim DIP Facility. The Cash Collateral on hand as of the Petition Date was effectively spent in the Chapter 11 Debtors' operations and replaced with advances under the Interim DIP Facility in December 2011 such that all cash in the Chapter 11 Debtors' accounts as of the date of the Final DIP Facility Order were proceeds from the Interim DIP Facility.

[13] The Information Officer has reported that, in the circumstances, there will be no material prejudice to Canadian creditors if this court recognizes the Final DIP Facility, and that nothing is being done that is contrary to the applicable provisions of the *CCAA*. The Information Officer is of the view that recognition of the Final DIP Facility Order is appropriate in the circumstances.

[14] A significant factor to take into account is that the Final DIP Facility Order was granted by the U.S. Court. In these circumstances, I see no basis for this court to second guess the decision of the U.S. Court.

[15] Based on the foregoing, I have concluded that recognition of the Final DIP Facility Order is necessary for the protection of the debtor company's property and for the interests of the creditors.

[16] In making this determination, I have also taken into account the provisions of s. 61(2) of the *CCAA* which is the public policy exception. This section reads: "Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy".

[17] The public policy exception has its origins in the UNCITRAL Model Law on Cross-Border Insolvency. Article 6 of the Model Law provides: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State". It is also important to note that the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (paragraphs 86-89) makes specific reference to the fact that the public policy exceptions should be interpreted restrictively.

[18] I am in agreement with the commentary in the Guide to Enactment to the effect that s. 61(2) should be interpreted restrictively. The Final DIP Facility Order does not, in my view, raise any public policies issues.

[19] I am satisfied that it is appropriate to grant the requested relief. The motion is granted and an order has been signed in the form requested to give effect to the foregoing.

MORAWETZ J.

**Date:** February 15, 2012

# TAB 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| In re ASHAPURA MINECHEM LTD, | : | OPINION AND ORDER |
| Debtor. | : | Chapter 15 Case No. 11-14668 (JMP) |
| ARMADA (SINGAPORE) PTE LTD, | : | |
| Appellant, | : | |
| - against - | : | 12 Civ. 257 (SAS) |
| CHETAN SHAH, in his Capacity as the Foreign Representative of ASHAPURA MINECHEM LTD, | : | |
| Appellee. | : | |



SHIRA A. SCHEINDLIN, U.S.D.J.:

## I. INTRODUCTION

Appellant Armada (Singapore) Pte Ltd. ("Armada") appeals pursuant to section 158 of Title 28 of the United States Code from a Bench Decision of the Bankruptcy Court for the Southern District of New York granting Appellee Ashapura Minechem Ltd.'s ("Ashapura") petition for recognition as a foreign main proceeding of an insolvency proceeding voluntarily commenced in India by

Ashapura. For the reasons set forth below, the Bench Decision is affirmed.

## II. BACKGROUND

Appellee Chetan Shah is the Managing Director of Ashapura Minechem Ltd., a mining and industrial business headquartered in Mumbai, India.[1] He was appointed Foreign Representative by Ashapura's Board of Directors for the purpose of these U.S. proceedings.[2] The greater part of Ashapura's assets are situated in India, as are all of its employees.[3]

In the conduct of its business, Ashapura entered into maritime Contracts of Affreighment ("COAs") to ship minerals to foreign ports with several international shipping companies including Appellant Armada (Singapore) Pte Ltd. ("Armada"), based in Singapore, and Eitzen Bulk A/S ("Eitzen").[4] However, when the government of Gujarat, the Indian state where Ashapura conducts its mining activities, placed an indirect embargo on the export of bauxite, Ashapura failed to

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[1] *See In re Ashapura Minechem Ltd.*, No. 11 B. 14668, 2011 WL 5855475, at *1 (Bankr. S.D.N.Y. Nov. 22, 2011).

[2] *See* Amended Response Brief of Appellee Ashapura Minechem Ltd. ("Appellee Mem.") at 15.

[3] *See* Opening Brief of Appellant Armada (Singapore) Pte Ltd. ("Appellant Mem.") at 10.

[4] *See In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *2.

fulfill its part of the contracts.[5] Armada sought and in February 2010 obtained an arbitration award against Ashapura totaling sixty-five million dollars.[6] Eitzen obtained a separate award as well.[7] Ashapura opted not to defend these arbitrations on the ground that the contracts were void ab initio under the doctrine of force majeure.[8]

In June 2010, Armada filed a petition in the Southern District of New York for an order converting its arbitration award into a judgment against Ashapura.[9] The petition was granted and the court entered a judgment for Armada in excess of seventy million dollars.[10]

In May 2011, Ashapura initiated proceedings before India's Board for Industrial and Financial Reconstruction ("BIFR") to rehabilitate its finances under The Sick Industrial Companies Act ("SICA") of 1985.[11] That proceeding is still

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5 *See id.*; Appellee Mem. at 12.

6 *See* Appellee Mem. at 12.

7 *See id.*

8 *See In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *2.

9 *See* Petition for an Order Confirming Foreign Arbitral Awards, *Armada (Singapore) Pte Ltd. v. Ashapura Minechem Ltd.* ("*Armada*"), No. 10 Civ. 4856 (S.D.N.Y. June 22, 2010) (Docket No. 1).

10 *See* Order, *Armada* (July 29, 2010) (Docket No. 14).

11 *See* Appellee Mem. at 15.

pending before the BIFR.[12] Pursuant to section 22 of SICA, Ashapura obtained a stay of all actions and proceedings against it in India.[13] However, this foreign insolvency law has encountered mounting criticism and led to a repeal of the statute that governs the BIFR proceeding.[14] The SICA Repeal Act of 2003 would eliminate section 22 stays on unsecured creditors' collection efforts.[15] However, the current iteration of SICA will remain in force until the Indian legislature formally enacts implementing legislation for SICA's substitute.[16] The Indian legislature had not done so by the time the Bankruptcy Court made its ruling and the parties have not notified this Court of any change.

In October 2011, Ashapura's Board of Directors authorized Shah to seek relief in bankruptcy court under Chapter 15 of Title 11.[17] Shah's initial request for a preliminary injunction against creditor claims was denied.[18]

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12 *See In re Ashapura*, 2011 WL 5855475, at *1.

13 *See* Appellant Mem. at 11.

14 *See In re Ashapura*, 2011 WL 5855475, at *1.

15 *See* Recognition Hearing Transcript ("Tr.") 93:23-94:4, Nov. 18, 2011.

16 *See In re Ashapura*, 2011 WL 5855475, at *1.

17 *See* Appellee Mem. at 15.

18 *See* Appellant Mem. at 14.

Subsequently, Shah filed a petition for recognition of the SICA proceeding as a "foreign proceeding" or "foreign main proceeding" pursuant to Chapter 15 of Title 11.[19] A hearing was held on November 18, 2011 during which an Indian attorney at law Mayur Bhatt testified on behalf of Ashapura.[20] Bhatt is Ashapura's counsel in the BIFR proceedings and has experience handling other SICA cases.[21] Armada did not call any witnesses, but instead offered various exhibits into evidence that were downloaded from internet sites.[22]

Following that hearing, the bankruptcy court granted recognition as a foreign main proceeding and relief pursuant to section 1521(a) to Ashapura and granted a stay against the order enforcing the arbitration award – rulings which Armada now appeals.[23]

## III. LEGAL STANDARD

### A. Appellate Jurisdiction

This court has jurisdiction to hear appeals from final orders issued by

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19 *See In re Ashapura*, 2011 WL 5855475, at *1.

20 *See* Tr. 7:23-25.

21 *See id.* 7:25-8:1.

22 *See In re Ashapura*, 2011 WL 5855475, at *4.

23 *See id.* at *5.

the Bankruptcy Court under sections 158(a)(1) and 1334 of Title 28.[24]

**B. Standard of Review**

A district court functions as an appellate court in reviewing judgments rendered by bankruptcy courts.[25] Findings of fact are reviewed for clear error[26] whereas findings that involve questions of law, or mixed questions of fact and law, are reviewed de novo.[27] Credibility determinations by bankruptcy courts are reviewed for clear error, as are decisions resting on physical or documentary evidence or inference from other facts.[28] A finding of fact is clearly erroneous if the court is "'left with the definite and firm conviction that a mistake has been

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[24] *See In re Fairfield Sentry Ltd.*, No. 10 Civ. 7311, 2011 U.S. Dist. LEXIS 105770, at *7 (S.D.N.Y. Sept. 15, 2011) (treating a Chapter 15 recognition as a final order for purposes of appeal). *Accord In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 327 (S.D.N.Y. 2008) (affirming denial of recognition as a "final" order).

[25] *See In re Sanshoe Worldwide Corp.*, 993 F.2d 300, 305 (2d Cir. 1993).

[26] *See* Fed. R. Bankr. P. 8013 ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."). *Accord In re Cody, Inc.*, 338 F.3d 89, 94 (2d Cir. 2003).

[27] *See In re Bear Stearns*, 389 B.R. at 333.

[28] *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1308 (5th Cir. 1985) (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985)).

committed.'"[29]

**C.Recognition of a Foreign Insolvency Proceeding**

Chapter 15 of Title 11 governs all cross-border insolvency disputes, and specifically petitions for the recognition of foreign insolvency proceedings in the United States.[30] The purpose of Chapter 15 is "to incorporate the Model Law on Cross-Border Insolvency," adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997.[31] "Recognition [under section 1517] is not a rubber stamp exercise, and any such presumption is rebuttable upon the Court's examination of any and all relevant facts."[32]

As a threshold matter, the appointed representative of a foreign debtor seeking recognition must establish that the proceeding is a "foreign proceeding" under the meaning of section 101(23).[33] The foreign representative thus carries the

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[29] *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1388 (2d Cir. 1990) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

[30] *See* 11 U.S.C. § 1501(b) (2005).

[31] *Id.* § 1501(a).

[32] *In re Gold & Honey, Ltd.*, 410 B.R. 357, 366 (Bankr. E.D.N.Y. 2009) (quotation marks omitted).

[33] *See* 11 U.S.C. §§ 1501(b)(1), 1515(a), 1517(a). *Accord In re ABC Learning Centres Ltd.*, 445 B.R. 318, 327 (Bankr. D. Del. 2010) ("As a threshold matter, this Court must first determine whether the Liquidation Proceedings are 'foreign proceedings' as defined by [section] 101(23), as only 'foreign proceedings' are eligible for recognition under [c]hapter 15."); *In re Betcorp Ltd.*,

burden of proving each of seven criteria:

> (i) [the existence of] a proceeding; (ii) that is either judicial or administrative; (iii) that is collective in nature; (iv) that is in a foreign country; (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation.[34]

Failure to meet the burden of proof on any one of the definitional elements requires denial of the petition.[35]

### 1. A Collective Proceeding

To be entitled to Chapter 15 recognition, petitioner must prove that the proceeding at issue was collective in nature. First and foremost, "[a] collective proceeding is one that considers the rights and obligations of *all* creditors"[36] – that

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400 B.R. 266, 275 (Bankr. D. Nev. 2009) ("As a preliminary matter . . . the court must determine whether [debtor]'s winding up is a 'foreign proceeding' within the meaning of [section] 101(23).").

[34] *In re Betcorp Ltd.*, 400 B.R. at 277. *See* 11 U.S.C. § 101(23) (defining a "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation").

[35] *See In re Betcorp Ltd.*, 400 B.R. at 276-77.

[36] *Id.* at 281 (emphasis added) (holding that a voluntary winding up "fits this 'collective' criterion," whereas "a receivership remedy instigated at the request, and for the benefit, of a single secured creditor" does not). *Accord In re*

is for the general benefit of creditors.

> [T]he word 'collective' . . . contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action. . . . In determining whether a particular foreign action is collective . . . it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding as defined in, for example, orders of a foreign tribunal overseeing the action.[37]

"A collective proceeding is designed to provide equitable treatment to creditors, by treating similarly situated creditors in the same way, and to maximize the value of the debtor's assets for the benefit of all creditors . . . . "[38] Indeed, among Chapter 15's objectives is the "fair and efficient administration of cross-border insolvencies

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*British Am. Ins. Co.*, 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010) ("For a proceeding to be collective within the meaning of section 101(23), it must be instituted for the benefit of creditors generally rather than for a single creditor or class of creditors."); *In re ABC Learning Centres Ltd.*, 445 B.R. at 328 (citing as a provision of the foreign insolvency statute that evinced the collective nature of the proceeding in question "[section] 501 (liquidator has a duty to consider the rights of all creditors in distributing the corporation's property)"); *In re Bd. of Dirs. of Hopewell Int'l Ins., Ltd.*, 275 B.R. 699, 707 (S.D.N.Y. 2002) (deeming a "scheme of arrangement" for creditors to file claims collective in nature because all creditors could object to the scheme); *In re Gold & Honey, Ltd.*, 410 B.R. at 368 (finding a proceeding non-collective that was "more akin to a[n] individual creditor's replevin or repossession action than it is to a reorganization or liquidation by an independent trustee").

[37] *In re British Am. Ins. Co.*, 425 B.R. at 902.

[38] U.N. Comm'n on Int'l Law, Legislative Guide on Insolvency Law, ¶ 35 (2005) http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

that protects the interests of all creditors."[39] Further, UNCITRAL's Guide to Enactment "suggests that a foreign proceeding must contemplate the 'involvement of creditors collectively.'"[40] However, to be for the general benefit of creditors, a proceeding need not ensure that all creditors receive a share of the distribution.[41]

Other characteristics of a collective proceeding include: adequate notice to creditors under applicable foreign law,[42] provisions for the distribution of assets according to statutory priorities,[43] and a statutory mechanism for creditors to

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[39] 11 U.S.C. § 1501.

[40] *In re British Am. Ins. Co.*, 425 B.R. at 902 (quoting U.N. Comm'n on Int'l Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, ¶ 23 (1997) http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf).

[41] *See id.* at 903 ("[The judicial manager] ultimately projects that general creditors of BAICO will receive no distribution in the eventual winding up of the company due to the priority accorded to policyholders under Bahamas law. However, by addressing the potential distribution to other creditors [the judicial manager] acknowledges his overall duty to creditors in general.").

[42] *See In re ABC Learning Centres Ltd.*, 445 B.R. at 329 ("The notice provided to creditors is a proper consideration when assessing the collective nature of a proceeding.").

[43] *See, e.g., id.* at 328 (citing as another statutory provision that evinced a proceeding's collective nature "[section] 555 (subject to priorities, preferences, etc., debts and claims rank equally and are to be paid pro rata)"). *Accord In re Gold & Honey, Ltd.*, 410 B.R. at 372 (noting that one of the "most fundamental policies and purposes of the automatic stay" is "[to] provid[e] for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities"); U.N. Comm'n on Int'l Law, Model Law on Cross-Border Insolvency: The Judicial Perspective, ¶ 66 (2012) ("The notion of a 'collective'

seek court review of the proceeding.[44] However, the standard for notice is not a demanding one.[45]

### 2. Debtor's Assets and Affairs Subject to Foreign Court's Control or Supervision

Petitioner must also prove that the debtor's assets and affairs are subject to a foreign court's jurisdiction. Section 1502 of the Bankruptcy Code defines "foreign court" as "a judicial *or other* authority competent to control or supervise a foreign proceeding."[46] The body conducting the proceeding can be

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insolvency proceeding is based on the ability of a single insolvency representative to control the realization of assets for the purposes of pro rata distribution among all creditors (*subject to domestic statutory priorities*)." (emphasis added)).

[44] *See In re ABC Learning Centres Ltd.*, 445 B.R. at 329 ("[Section] 1321 of the Act provides that a person including creditors aggrieved by any act, omission or decision of . . . a liquidator may appeal to an Australian court and the court may confirm, reverse or modify the act or decision . . . ." (quotation marks omitted)).

[45] *See In re British Am. Ins. Co.*, 425 B.R. at 902 (finding a foreign proceeding alleged to be for the sole benefit of a single class of creditors a collective proceeding, even though unsecured creditors did not receive notice of actions brought before the court, because they would receive notice at the winding up phase and they were statutorily allowed to be heard in the judicial management process). *Accord In re ABC Learning Centres Ltd.*, 445 B.R. at 329 (finding that notice was adequate where it was proper under the relevant foreign statute and the creditor had actual notice of the creditor's meeting as well as the ability to appeal the outcome of the proceeding at the Australian court).

[46] 11 U.S.C. § 1502 (emphasis added).

considered a foreign court.[47] Case law confirms that this is a dual requirement – both the debtor's assets *and* affairs must be subject to judicial control or supervision in the proceeding.[48] Ashapura does not contest the duality of this requirement.[49]

Supervision or control of the company's affairs is not a demanding standard. The foreign court need not control the day-to-day operations of the debtor.[50] It is sufficient, for instance, that the body monitor compliance with the repayment plan negotiated between the debtor and creditors.[51] One court has held that the mere fact that a commission was granted authority from a Spanish court to recover a set-off from an arbitration proceeding for distribution to creditors "plainly demonstrate[d] that the [court] maintains control of [both the debtor's] assets *and affairs*."[52] By contrast, the fact that actions in a foreign court related to the

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47 *See In re Tradex Swiss AG*, 384 B.R. 34, 42 (Bankr. D. Mass. 2008) ("Even if the decree of the [Swiss Federal Banking Commission] were not subject to appeal to the Swiss Federal Administrative Court . . . the SFBC itself comes within the definition of a foreign court.").

48 *See In re Gold & Honey, Ltd.*, 410 B.R. at 371 (denying recognition when the party demonstrated control over debtor's assets but not affairs).

49 *See* Appellee Mem. at 21.

50 *See In re Oversight and Control Commission of Avanzit* ("*Avanzit*"), *S.A.*, 385 B.R. 525, 531-32 (Bankr. S.D.N.Y. 2008).

51 *See id.* at 536.

52 *Id.* at 534 (emphasis added).

proceeding are typically initiated by interested parties and that liquidators proceed with most of their duties without court involvement was found "not [to] undermine the . . . court['s] supervisory role."[53]

### 3. Proceeding Under a Law Related to Insolvency

Petitioner also carries the burden of proving that the SICA filing was a proceeding "authorized or conducted under a law related to insolvency or the adjustment of debts."[54] The proceeding, therefore, must be authorized by a statute that deals with corporate insolvency or the adjustment of corporate debts. The fact that a proceeding has a "unified structure of the external administration provisions" favors a finding that the statute meets this criterion.[55] For instance, the fact that "several sub-parts of [c]hapter 5 [of the Australian Corporations Act] . . . combined with the statutory ability of [the Act] to shift among various forms of dissolution given changing circumstances[] demonstrate[s] that the winding up is achieved

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[53] *In re ABC Learning Centres Ltd.*, 445 B.R. at 332 ("Most actions in a U.S. Bankruptcy Court are upon the motion of an interested party and are not undertaken sua sponte, U.S. Bankruptcy Courts also give deference to business judgments and do not direct the daily activities of debtors, and the majority of U.S. bankruptcies proceed with minimal court involvement.").

[54] *Id.* at 327.

[55] *In re Betcorp Ltd.*, 400 B.R. at 282.

under a law relating to insolvency or the adjustment of debts."[56]

**4. Public Policy Exception**

Finally, under Chapter 15, a court may "refus[e] to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[57] Parties opposing the recognition of proceedings generally bear the burden of proof on applying public policy exceptions.[58]

A prerequisite to applying section 1506 is that there exist a conflict between foreign and U.S. law – however "that fact alone is not dispositive."[59] While Title 11 does not define what is "manifestly contrary" to U.S. public policy, case law prescribes that this public policy exception should be construed narrowly. It "is intended to be invoked only under exceptional circumstances concerning

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[56] *Id.*

[57] 11 U.S.C. § 1506.

[58] *See Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 356 (S.D.N.Y. 2007) (holding that the party opposing enforcement of an arbitration award carries the burden of proving that its enforcement would violate public policy pursuant to the public policy exception of the New York Arbitration Convention), *aff'd*, 584 F.3d 396 (2d Cir. 2009) .

[59] *Qimonda AG v. Qimonda AG (In re Qimonda)*, 433 B.R. 547, 568 (E.D. Va. 2010) (quotation marks and citation omitted).

matters of fundamental importance for the United States."[60] Indeed, only one published decision had found recognition to violate U.S. public policy since Chapter 15 was enacted at the time the Bankruptcy Court made its decision – and only two since.[61]

Courts have adhered to two principles in determining whether a fundamental policy is at risk: "[d]eference to a foreign proceeding should not be afforded in a [c]hapter 15 proceeding where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections"[62] and "[a]n action should not be taken in a [c]hapter 15 proceeding where taking such action would frustrate a U.S. court's ability to administer the [c]hapter 15 proceeding and/or would impinge severely a U.S. constitutional or

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60 *Lavie v. Ran* (*In re Ran*), 607 F.3d 1017, 1021 (5th Cir. 2010). *Accord Ackermann v. Levine*, 788 F.2d 830, 842 (2d Cir. 1986); *In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) ("[T]hose courts that have considered the public policy exception codified in [section] 1506 have uniformly read it narrowly and applied it sparingly."); *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006).

61 *See In re Gold & Honey, Ltd.*, 410 B.R. at 368 (however as the Bankruptcy Court decision being appealed noted, this case is unique in that the bank in question "proceeded in the Israeli Receivership Proceeding in spite of and in the face of [the] Court's Stay Order"); *In re Vitro, S.A.B. de C.V.*, No. 11 B. 33335, 2012 WL 2138112, at *13 (Bankr. N.D. Tex. June 13, 2012) (where the rehabilitation scheme wholly extinguished third-party claims).

62 *In re Qimonda*, 433 B.R. at 570.

statutory right . . . ."[63]

As to the first principle, Ashapura is correct that the mere absence of certain procedural or constitutional rights does not by itself satisfy section 1506. For instance, section 1506 does not bar recognition of a proceeding that lacks a right to a jury.[64] By contrast, denial of the opportunity to be heard and refusal to receive evidence *can* violate public policy.[65] In *In re Metcalfe*, for instance, the court granted comity to a Canadian proceeding that included third-party releases "that arguably could not be granted in a U.S. bankruptcy proceeding" because "the Canadian court had statutory authority to grant such relief, the question of the Canadian court's jurisdiction had been fully litigated and carefully considered in Canada, including on appeal, and the procedures used in Canada meet our fundamental standards of fairness."[66]

## IV. DISCUSSION

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[63] *Id.*

[64] *See In re Ephedra*, 349 B.R. at 335-36 ("Federal courts have enforced against U.S. citizens foreign judgments rendered by foreign courts for whom the very idea of a jury trial is foreign.").

[65] *See id.* at 335 (ultimately rejecting these due process arguments "because the Ontario Court adopted amendments to the Canadian order that cured the due process problems").

[66] *In re Toft*, 453 B.R. 186, 194 (Bankr. S.D.N.Y. 2011) (citing *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010)).

Armada contends that Ashapura has not carried the burden of proving several of the requirement of section 101(23).[67] Namely, Armada claims that Ashapura failed to demonstrate that (1) the SICA proceeding was collective in nature, (2) Ashapura's assets and affairs were subject to the control or supervision of the BIFR, and (3) Ashapura's SICA filing is a proceeding under a law related to insolvency.[68] Further, Armada contends that recognizing the BIFR proceeding violates public policy. I disagree.

### A. Ashapura Met Its Burden of Proving that the BIFR Proceeding Was Collective in Nature

The main test of whether a proceeding is collective is whether *all* creditors' interests were considered in the proceeding. The Bankruptcy Court found that the SICA statute does not provide a formal mechanism for participation by unsecured creditors.[69] Nonetheless, the Court found that "in practice unsecured creditors were given a voice."[70]

Armada insisted at the November 18 hearing that "[l]earned authorities on Indian law . . . say that there are no rights for unsecured creditors to participate

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67 *See* Appellant Mem. at 16.

68 *See id.*

69 *See In re Ashapura*, 2011 WL 5855475, at *3.

70 *Id.*

in a SICA reorganization . . . while a stay is in effect, precluding unsecured creditors from taking action that they would otherwise be taking."[71] Armada further contended that the proceeding is "a two part or a closed-door affair, unless the BIFR chooses to make it different."[72]

However, Ashapura insisted that whatever their statutory rights, *in practice* creditors "have the right to negotiate the scheme of arrangement – or scheme of rehabilitation"[73] and that "[a]ll unsecured creditors have the right to object to the scheme of arrangement when it is put before the BIFR to be . . . confirmed or sanctioned."[74]

Bhatt, Ashapura's witness, testified that unsecured creditors can "make an application to implead themselves as a party to the proceedings."[75] In fact, according to Bhatt, most of the unsecured creditors *have* filed written submissions to the BIFR in this proceeding.[76] While creditors' participation in the proceedings is at the BIFR's discretion, Bhatt named at least three unsecured creditors that have

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71 Tr. 25:2-8.

72 *Id.* 154:22-23.

73 *Id.* 10:19-20.

74 *Id.* 10:23-11:1.

75 *Id.* 45:8-9.

76 *See id.* 45:11-14.

been impleaded into this proceeding.[77] Bhatt's testimony is corroborated by Exhibit 2, introduced by Ashapura, that summarized BIFR proceedings held in July 2011.[78] That exhibit showed that a number of creditors, including Eitzen, were present at the hearing.[79] Moreover, creditors can appeal the BIFR's refusal of impleader to a higher judicial authority.[80] Bhatt also testified that unsecured creditors have the right to object to the rehabilitation or distribution scheme once they are impleaded or if they are refused participation, they have the right to appeal it once it has been formulated.[81] Finally, even if unsecured creditors do not actively participate at all, they have a right to receive distribution under the scheme.[82]

The Bankruptcy Court found that the evidence adduced by Armada at the hearing – internet printouts – merely highlighted criticisms of SICA, without demonstrating that the process itself was not collective.[83] While Armada insists that the Court was wrongly influenced by Bhatt's testimony, that is a credibility

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77 *See id.* 45:18-22.

78 *See id.* 52:23-53:9.

79 *See id.* 62:8-14.

80 *See id.* 48:5-9.

81 *See id.* 48:1-9.

82 *See id.* 48:24-49:2.

83 *See In re Ashapura*, 2011 WL 5855475, at *4.

determination which I may only review for clear error. Armada introduced into evidence a report by the Organisation for Economic Co-operation and Development stating that "[p]rovisions of SICA have been abused by errant debtors to seek protection and moratoria from recovery proceedings."[84] Nonetheless, the Bankruptcy Court found that the proceeding in question considered the interests of all the creditors. Given the evidence in the record and the fact that Armada did not call any witness to counter Bhatt's testimony, I cannot say with firm conviction that the Bankruptcy Court was mistaken to find Bhatt's testimony that creditors had a voice in this proceeding credible. I therefore agree with the Bankruptcy Court that this proceeding considered the interests of all creditors *in practice.*

The remaining legal question is whether, given the lack of a *formal* statutory mechanism for creditor participation, the Bankruptcy Court was correct to conclude from the fact that creditors participated in this proceeding in practice that it was collective in nature. The law is clear that "[i]n determining whether a particular foreign action is collective . . . it is appropriate to consider both the law governing the foreign action and the parameters of the particular proceeding."[85] What matters is not just what statutory mechanisms exist but also how involved

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84 *Id.* 108:2-4.

85 *In re British Am. Ins. Co.*, 425 B.R. at 902.

creditors are in practice. Therefore, the fact that other SICA proceedings may not fairly involve all creditors does not diminish the collective nature of the proceeding being evaluated here.

Further, as the Bankruptcy Court stated during the hearing, "even if there were no opportunity by practice and custom for unsecured creditors to participate, I think this may still be a collective proceeding, because it involves parties other than just one class of creditor or just one party-in-interest."[86]

The other relevant factors in the analysis – notice, appellate review and statutory priorities for the distribution of assets – also favor a conclusion that the proceeding was collective. As far as notice is concerned, the Bankruptcy Court did not make any explicit findings but impliedly held that notice was adequate under applicable law.[87] The record suggests that when a SICA proceeding has been filed, it is published online, although creditors are not given individual notice.[88] According to section 18.3 of SICA, once a scheme proposal has been prepared, it is sent in draft form "to any . . . company concerned" as well as published in

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86 Tr. 157:15-19.

87 *See In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *3.

88 *See* Tr. 104:19-20.

newspapers, though the latter remains at the BIFR's discretion.[89] This combination of actual notice and notice proper under applicable local law certainly meets the low standard of *In re British American Ins. Co.* and *In re ABC Learning Centres Ltd.*

As far as appellate review is concerned, the Bankruptcy Court found that there was a formal mechanism for court review of adverse determinations. Creditors "ha[ve] the ability to appeal adverse determinations made by the BIFR . . . within the Indian judicial system."[90] Given Bhatt's testimony to that effect[91] this finding was not clearly erroneous.

As for statutory priorities, Ashapura again asserted at the hearing that creditors have "a right [at the winding up stage] to a distribution pari passu with other unsecured creditors to the extent of the allowed amounts of their claim. Just like in the United States, they do come after secured creditors and . . . various governmental parties."[92] Bhatt testified that at the winding up stage, "the proceeding gets transferred to a court and the court applies priorities set forth in

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89 *Id.*

90 *In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *3.

91 *See* Tr. 48:8-9 ("From BIFR, you can always appeal to the appellate authority.").

92 *Id.* 11:2-6.

[s]ection 529(a) of the company's act."[93] Despite the fact that there is no distribution requirement if there is no winding up and notwithstanding Indian case law cited by Armada,[94] the Bankruptcy Court's finding that distribution generally occurs according to statutory priorities is not clearly erroneous.

Ultimately, the Bankruptcy Court concluded that "the availability of appellate review and the ability of creditors to participate before the BIFR demonstrate that systematically SICA functions as a collective process that allows for creditor participation."[95] I agree.

### B. Ashapura Met Its Burden of Proving that Its Assets and Affairs Are Subject to the Control or Supervision of a Foreign Court

Because the Bankruptcy Court omitted to address this element of the statute in its decision, I consider this factor de novo.

#### 1. BIFR Is a Court Under the Meaning of This Statute

Ashapura claims that BIFR constitutes a court under the meaning of this statute because it is "an administrative board which exercises powers similar to a court in India and oversees the possible rehabilitation of debtors under its

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93 *Id.* 117:1-3.

94 *See* Reply Brief of Appellant Armada (Singapore) Pte Ltd ("Reply Mem.") at 5-6.

95 *In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *3.

authority . . . similar to the way that bankruptcy courts oversee Chapter 11 cases in the United States."[96] Armada does not contest this point. Relying on *In re Tradex*, I find that BIFR comes within the definition of a foreign court.[97]

### 2. BIFR Had Control or Supervision over Ashapura's Assets and Affairs

Armada does not dispute that BIFR controlled Ashapura's "assets" during the SICA proceeding, only that Ashapura's "affairs" were left unsupervised.[98] Armada is correct that the only references to the record cited by Ashapura on this issue concern the debtor's "assets" – not its "affairs."[99] Ashapura's argument that the BIFR oversees "the process of approving the plan of rehabilitation"[100] similarly fails to establish that BIFR oversaw Ashapura's affairs.

Armada argued at the hearing that because Ashapura is an international

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[96] Appellee Mem. at 21-22. *See also* Declaration of Rajesh Bohra ("Bohra Decl.") at 7 ("The BIFR is considered a civil court.").

[97] Moreover, before BIFR can order the winding up of "sick" company, it must first get approval from the High Court of India. *See* Bohra Decl. at 11.

[98] *See* Appellant Mem. at 18. *Accord* Tr. 26:11-12 ("Its assets, no doubt, are subject to the control of the BIFR.").

[99] *See* Reply Mem. at 9 (citing Appellee Mem. at 21 ("The BIFR is considered . . . custodian of all the assets of the sick industrial company . . . . Once the company is before the BIFR . . . the company cannot sell its assets without prior permission of the BIFR." (quotation marks omitted))).

[100] Appellee Mem. at 21.

company "with affairs in many countries"[101] and "the BIFR doesn't have extraterritorial reach"[102] "[o]nly the Indian affairs can be possibly subject to supervision of the BIFR."[103] This argument is meritless because every company applying for Chapter 15 recognition has assets worldwide and would therefore fail to satisfy this element.[104]

By contrast, Ashapura is correct that the fact that the SICA proceeding "leaves the Foreign Representative and Ashapura Board of Directors in control of its business and operations"[105] is not inconsistent with supervision by a foreign court because the foreign court need not direct the day-to-day operations of a debtor to meet that standard. Again, as the court in *In re ABC Learning Centres Ltd.* pointed out, "the majority of U.S. bankruptcies proceed with minimal court involvement."[106] Much like the commission in *In re Oversight and Control Commission of Avanzit*, the BIFR has the authority "to suspend the operation of

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101 Tr. 161:1-2.

102 *Id.* 123:22-23.

103 *Id.* 161:1-3.

104 I note that Armada omits this argument from its brief.

105 Appellee Mem. at 21 (quotation marks omitted).

106 *In re ABC Learning Centres Ltd.*, 445 B.R. at 332.

contracts, settlements and awards under [section] 22(3) of SICA."[107] Further, section 24 of SICA regulates against fraudulent and preferential transfers, including through a set of guidelines of conduct that BIFR imposes on a company once it is declared "sick."[108] These address not only the debtor's assets but, on the face of it, its affairs, including company management.[109] Though Ashapura did not raise this evidence in its brief, it did enter it into the record before the Bankruptcy Court.[110] Given the low legal standard for supervision over a debtor's affairs, I conclude that Ashapura did meet its burden of proving that the BIFR had supervision or control over Ashapura's affairs and assets.

### C. Ashapura Met Its Burden of Proving that the SICA Filing Is a Proceeding Under a Law Related to Insolvency

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107 Bohra Decl. at 8.

108 *See id.* at 10.

109 *See id.* (citing Board for Indus. & Fin. Reconstruction, Guidelines for Preparation of Rehabilitation Scheme, ¶ 10 (2008), *available at* http://bifr.nic.in/guidelines_for_rehabilitation_scheme.pdf ("The company/promoter(s) can induct strategic investor(s)/copromoter(s), but the company/existing promoter(s) would ensure that such induction of strategic investor(s)/co-promoter(s) does not entail change of management (COM) of the company. The company/promoter(s) would furnish the details of such strategic investor(s)/co-promoter(s) along with the copies of MOU(s)/agreement(s) entered into with them.")).

110 *See* Bohra Decl. at 10.

The Bankruptcy Court asserted that SICA "on its face, constitutes a law that relates to insolvency or adjustment of debt within the meaning of [s]ection 101(23)."[111] I agree. There is no doubt that SICA deals with corporate insolvency and the adjustment of corporate debts. Moreover, SICA includes a structure of external administration provision – a SICA proceeding arranges a scheme of rehabilitation.[112] Just as in *In re Betcorp*, BIFR has the statutory ability to alternate between various remedial measures as warranted by the circumstances.[113] In fact, Armada appears to concede the point in its reply brief by failing to further address this element. In sum, Ashapura has met its burden on this element.

### D. Armada Did Not Meet Its Burden of Showing that the Public Policy Exception Under Section 1506 Applies

Armada carried the burden of proof on demonstrating that granting recognition was manifestly contrary to U.S. policy under the meaning of section 1506. The Bankruptcy Court found that Armada did not meet that burden: "none of the evidence offered by [Armada] succeeded in proving [that] key point in

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111 *In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *1.

112 Declaration of Mayur Bhatt, ¶ 15.

113 *See* Bohra Decl. at 7 ("A number of measures, which can be considered rehabilitation/revival/restructuring in nature, have been provided in section 18 of SICA, and the Operating Agency . . . may consider the various such measures while preparing the draft rehabilitation scheme . . . .").

dispute."[114] Notwithstanding Armada's insistence at the hearing that fundamental principles are violated by the Bankruptcy Court's recognition, its arguments are duplicative of those made under the "collective" element. Nothing in the case law suggests that if the proceeding is collective in nature its recognition can be deemed to be against public policy – nor do the facts warrant such a finding.

## V. CONCLUSION

For the foregoing reasons, the decision of the Bankruptcy Court is AFFIRMED. The Clerk of the Court is directed to close this appeal [docket # 1] and this case.

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[114] *In re Ashapura Minechem Ltd.*, 2011 WL 5855475, at *8.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
June 28, 2012

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# TAB 6

*Case Name:*

# Canwest Global Communications Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36. as amended AND IN THE MATTER OF a Proposed Plan of Compromise or Arrangement of Canwest Global Communications Corp. and the other applicants listed on schedule "A"**

**[Editor's note:
Schedule "A" was not attached to the copy received by LexisNexis Canada and therefore is not included in the judgment.]**

**[2009] O.J. No. 4286**

59 C.B.R. (5th) 72

2009 CanLII 55114

2009 CarswellOnt 6184

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

**S.E. Pepall J.**

October 13, 2009.

(60 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Affiliated debtor companies -- Application by Canwest Global for relief under the Companies' Creditors Arrangement Act and to have the stay of proceedings and other provisions extend to several partnerships allowed -- Applicant Canwest Global owned CMI which was insolvent -- CMI Entities and Ad Hoc Committee of noteholders had agreed on terms of a going concern recapitalization transaction -- Stay under Act was extended to several partnerships that were intertwined with the applicants' ongoing operations -- DIP and administration charges approved -- Applicants were also permitted to pay pre-filing liabilities to their critical suppliers.*

Application by Canwest Global for relief under the Companies' Creditors Arrangement Act and to have the stay of

proceedings and other provisions extend to several partnerships. The applicants were affiliated debtor companies with total claims against them exceeding $5 million. The partnerships were intertwined with the applicants' ongoing operations. Canwest was a leading Canadian media company. Canwest Global owned 100 per cent of CMI. CMI had direct or indirect ownership interests in all of the other CMI Entities. The CMI Entities generated the majority of their revenue from the sale of advertising. Fuelled by a deteriorating economic environment, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. CMI breached certain of the financial covenants in its secured credit facility. The stay of proceedings was sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual pre-packaged recapitalization transaction. The CMI Entities and an Ad Hoc Committee of noteholders had agreed on the terms of a going concern recapitalization transaction which was intended to form the basis of the plan. The applicants anticipated that a substantial number of the businesses operated by the CMI Entities would continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. Certain steps designed to implement the recapitalization transaction had already been taken prior to the commencement of these proceedings.

HELD: Application allowed. The CMI Entities were unable to satisfy their debts as they come due and were insolvent. Absent these proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. It was just and convenient to grant the relief requested with respect to the partnerships. The operations and obligations of the partnerships were so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. The DIP charge for up to $100 million was appropriate and required having regard to the debtors' cash-flow statement. The administration charge was also approved. Notice had been given to the secured creditors likely to be affected by the charge, the amount was appropriate, and the charge should extend to all of the proposed beneficiaries. The applicants were also permitted to pay pre-filing liabilities to their critical suppliers.

**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. c. 36, s. 11, s. 11(2), s. 11.2, s. 11.2(1), s. 11.52

**Counsel:**

Lyndon Barnes, Edward Sellers and Jeremy Dacks, for the Applicants.

Alan Merskey, for the Special Committee of the Board of Directors.

David Byers and Maria Konyukhova,> for the Proposed Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick, for Ad Hoc Committee of Noteholders.

Edmond Lamek, for the Asper Family.

Peter H. Griffin and Peter J. Osborne, for the Management Directors and Royal Bank of Canada.

Hilary Clarke, for Bank of Nova Scotia,

Steve Weisz, for CIT Business Credit Canada Inc.

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**REASONS FOR DECISION**

S.E. PEPALL J.:--

Relief Requested

**1** Canwest Global Communications Corp. ("Canwest Global"), its principal operating subsidiary, Canwest Media Inc. ("CMI"), and the other applicants listed on Schedule "A" of the Notice of Application apply for relief pursuant to the *Companies' Creditors Arrangement Act.*[1] The applicants also seek to have the stay of proceedings and other provisions extend to the following partnerships: Canwest Television Limited Partnership ("CTLP"), Fox Sports World Canada Partnership and The National Post Company/La Publication National Post ("The National Post Company"). The businesses operated by the applicants and the aforementioned partnerships include (i) Canwest's free-to-air television broadcast business (ie. the Global Television Network stations); (ii) certain subscription-based specialty television channels that are wholly owned and operated by CTLP; and (iii) the National Post.

**2** The Canwest Global enterprise as a whole includes the applicants, the partnerships and Canwest Global's other subsidiaries that are not applicants. The term Canwest will be used to refer to the entire enterprise. The term CMI Entities will be used to refer to the applicants and the three aforementioned partnerships. The following entities are not applicants nor is a stay sought in respect of any of them: the entities in Canwest's newspaper publishing and digital media business in Canada (other than the National Post Company) namely the Canwest Limited Partnership, Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., and Canwest (Canada) Inc.; the Canadian subscription based specialty television channels acquired from Alliance Atlantis Communications Inc. in August, 2007 which are held jointly with Goldman Sachs Capital Partners and operated by CW Investments Co. and its subsidiaries; and subscription-based specialty television channels which are not wholly owned by CTLP.

**3** No one appearing opposed the relief requested.

Backround Facts

**4** Canwest is a leading Canadian media company with interests in twelve free-to-air television stations comprising the Global Television Network, subscription-based specialty television channels and newspaper publishing and digital media operations.

**5** As of October 1, 2009, Canwest employed the full time equivalent of approximately 7,400 employees around the world. Of that number, the full time equivalent of approximately 1,700 are employed by the CMI Entities, the vast majority of whom work in Canada and 850 of whom work in Ontario.

**6** Canwest Global owns 100% of CMI. CMI has direct or indirect ownership interests in all of the other CMI Entities. Ontario is the chief place of business of the CMI Entities.

**7** Canwest Global is a public company continued under the *Canada Business Corporations Act*[2]. It has authorized capital consisting of an unlimited number of preference shares, multiple voting shares, subordinate voting shares, and non-voting shares. It is a "constrained-share company" which means that at least 66 2/3% of its voting shares must be beneficially owned by Canadians. The Asper family built the Canwest enterprise and family members hold various classes of shares. In April and May, 2009, corporate decision making was consolidated and streamlined.

**8** The CMI Entities generate the majority of their revenue from the sale of advertising (approximately 77% on a consolidated basis). Fuelled by a deteriorating economic environment in Canada and elsewhere, in 2008 and 2009, they experienced a decline in their advertising revenues. This caused problems with cash flow and circumstances were exacerbated by their high fixed operating costs. In response to these conditions, the CMI Entities took steps to improve cash flow and to strengthen their balance sheets. They commenced workforce reductions and cost saving measures, sold certain interests and assets, and engaged in discussions with the CRTC and the Federal government on issues of concern.

**9** Economic conditions did not improve nor did the financial circumstances of the CMI Entities. They experienced significant tightening of credit from critical suppliers and trade creditors, a further reduction of advertising

commitments, demands for reduced credit terms by newsprint and printing suppliers, and restrictions on or cancellation of credit cards for certain employees.

**10** In February, 2009, CMI breached certain of the financial covenants in its secured credit facility. It subsequently received waivers of the borrowing conditions on six occasions. On March 15, 2009, it failed to make an interest payment of US$30.4 million due on 8% senior subordinated notes. CMI entered into negotiations with an ad hoc committee of the 8% senior subordinated noteholders holding approximately 72% of the notes (the "Ad Hoc Committee"). An agreement was reached wherein CMI and its subsidiary CTLP agreed to issue US$105 million in 12% secured notes to members of the Ad Hoc Committee. At the same time, CMI entered into an agreement with CIT Business Credit Canada Inc. ("CIT") in which CIT agreed to provide a senior secured revolving asset based loan facility of up to $75 million. CMI used the funds generated for operations and to repay amounts owing on the senior credit facility with a syndicate of lenders of which the Bank of Nova Scotia was the administrative agent. These funds were also used to settle related swap obligations.

**11** Canwest Global reports its financial results on a consolidated basis. As at May 31, 2009, it had total consolidated assets with a net book value of $4.855 billion and total consolidated liabilities of $5.846 billion. The subsidiaries of Canwest Global that are not applicants or partnerships in this proceeding had short and long term debt totalling $2.742 billion as at May 31, 2009 and the CMI Entities had indebtedness of approximately $954 million. For the 9 months ended May 31, 2009, Canwest Global's consolidated revenues decreased by $272 million or 11% compared to the same period in 2008. In addition, operating income before amortization decreased by $253 million or 47%. It reported a consolidated net loss of $1.578 billion compared to $22 million for the same period in 2008. CMI reported that revenues for the Canadian television operations decreased by $8 million or 4% in the third quarter of 2009 and operating profit was $21 million compared to $39 million in the same period in 2008.

**12** The board of directors of Canwest Global struck a special committee of the board ("the Special Committee") with a mandate to explore and consider strategic alternatives in order to maximize value. That committee appointed Thomas Strike, who is the President, Corporate Development and Strategy Implementation of Canwest Global, as Recapitalization Officer and retained Hap Stephen, who is the Chairman and CEO of Stonecrest Capital Inc., as a Restructuring Advisor ("CRA").

**13** On September 15, 2009, CMI failed to pay US$30.4 million in interest payments due on the 8% senior subordinated notes.

**14** On September 22, 2009, the board of directors of Canwest Global authorized the sale of all of the shares of Ten Network Holdings Limited (Australia) ("Ten Holdings") held by its subsidiary, Canwest Mediaworks Ireland Holdings ("CMIH"). Prior to the sale, the CMI Entities had consolidated indebtedness totalling US$939.9 million pursuant to three facilities. CMI had issued 8% unsecured notes in an aggregate principal amount of US$761,054,211. They were guaranteed by all of the CMI Entities except Canwest Global, and 30109, LLC. CMI had also issued 12% secured notes in an aggregate principal amount of US$94 million. They were guaranteed by the CMI Entities. Amongst others, Canwest's subsidiary, CMIH, was a guarantor of both of these facilities. The 12% notes were secured by first ranking charges against all of the property of CMI, CTLP and the guarantors. In addition, pursuant to a credit agreement dated May 22, 2009 and subsequently amended, CMI has a senior secured revolving asset-based loan facility in the maximum amount of $75 million with CIT Business Credit Canada Inc. ("CIT"). Prior to the sale, the debt amounted to $23.4 million not including certain letters of credit. The facility is guaranteed by CTLP, CMIH and others and secured by first ranking charges against all of the property of CMI, CTLP, CMIH and other guarantors. Significant terms of the credit agreement are described in paragraph 37 of the proposed Monitor's report. Upon a CCAA filing by CMI and commencement of proceedings under Chapter 15 of the Bankruptcy Code, the CIT facility converts into a DIP financing arrangement and increases to a maximum of $100 million.

**15** Consents from a majority of the 8% senior subordinated noteholders were necessary to allow the sale of the Ten Holdings shares. A Use of Cash Collateral and Consent Agreement was entered into by CMI, CMIH, certain consenting

noteholders and others wherein CMIH was allowed to lend the proceeds of sale to CMI.

**16** The sale of CMIH's interest in Ten Holdings was settled on October 1, 2009. Gross proceeds of approximately $634 million were realized. The proceeds were applied to fund general liquidity and operating costs of CMI, pay all amounts owing under the 12% secured notes and all amounts outstanding under the CIT facility except for certain letters of credit in an aggregate face amount of $10.7 million. In addition, a portion of the proceeds was used to reduce the amount outstanding with respect to the 8% senior subordinated notes leaving an outstanding indebtedness thereunder of US$393.25 million.

**17** In consideration for the loan provided by CMIH to CMI, CMI issued a secured intercompany note in favour of CMIH in the principal amount of $187.3 million and an unsecured promissory note in the principal amount of $430.6 million. The secured note is subordinated to the CIT facility and is secured by a first ranking charge on the property of CMI and the guarantors. The payment of all amounts owing under the unsecured promissory note are subordinated and postponed in favour of amounts owing under the CIT facility. Canwest Global, CTLP and others have guaranteed the notes. It is contemplated that the debt that is the subject matter of the unsecured note will be compromised.

**18** Without the funds advanced under the intercompany notes, the CMI Entities would be unable to meet their liabilities as they come due. The consent of the noteholders to the use of the Ten Holdings proceeds was predicated on the CMI Entities making this application for an Initial Order under the CCAA. Failure to do so and to take certain other steps constitute an event of default under the Use of Cash Collateral and Consent Agreement, the CIT facility and other agreements. The CMI Entities have insufficient funds to satisfy their obligations including those under the intercompany notes and the 8% senior subordinated notes.

**19** The stay of proceedings under the CCAA is sought so as to allow the CMI Entities to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of noteholders have agreed on the terms of a going concern recapitalization transaction which is intended to form the basis of the plan. The terms are reflected in a support agreement and term sheet. The recapitalization transaction contemplates amongst other things, a significant reduction of debt and a debt for equity restructuring. The applicants anticipate that a substantial number of the businesses operated by the CMI Entities will continue as going concerns thereby preserving enterprise value for stakeholders and maintaining employment for as many as possible. As mentioned, certain steps designed to implement the recapitalization transaction have already been taken prior to the commencement of these proceedings.

**20** CMI has agreed to maintain not more than $2.5 million as cash collateral in a deposit account with the Bank of Nova Scotia to secure cash management obligations owed to BNS. BNS holds first ranking security against those funds and no court ordered charge attaches to the funds in the account.

**21** The CMI Entities maintain eleven defined benefit pension plans and four defined contribution pension plans. There is an aggregate solvency deficiency of $13.3 million as at the last valuation date and a wind up deficiency of $32.8 million. There are twelve television collective agreements eleven of which are negotiated with the Communications, Energy and Paperworkers Union of Canada. The Canadian Union of Public Employees negotiated the twelfth television collective agreement. It expires on December 31, 2010. The other collective agreements are in expired status. None of the approximately 250 employees of the National Post Company are unionized. The CMI Entities propose to honour their payroll obligations to their employees, including all pre-filing wages and employee benefits outstanding as at the date of the commencement of the CCAA proceedings and payments in connection with their pension obligations.

Proposed Monitor

**22** The applicants propose that FTI Consulting Canada Inc. serve as the Monitor in these proceedings. It is clearly qualified to act and has provided the Court with its consent to act. Neither FTI nor any of its representatives have served

in any of the capacities prohibited by section of the amendments to the CCAA.

Proposed Order

**23** I have reviewed in some detail the history that preceded this application. It culminated in the presentation of the within application and proposed order. Having reviewed the materials and heard submissions, I was satisfied that the relief requested should be granted.

**24** This case involves a consideration of the amendments to the CCAA that were proclaimed in force on September 18, 2009. While these were long awaited, in many instances they reflect practices and principles that have been adopted by insolvency practitioners and developed in the jurisprudence and academic writings on the subject of the CCAA. In no way do the amendments change or detract from the underlying purpose of the CCAA, namely to provide debtor companies with the opportunity to extract themselves from financial difficulties notwithstanding insolvency and to reorganize their affairs for the benefit of stakeholders. In my view, the amendments should be interpreted and applied with that objective in mind.

(a) Threshhold Issues

**25** Firstly, the applicants qualify as debtor companies under the CCAA. Their chief place of business is in Ontario. The applicants are affiliated debtor companies with total claims against them exceeding $5 million. The CMI Entities are in default of their obligations. CMI does not have the necessary liquidity to make an interest payment in the amount of US$30.4 million that was due on September 15, 2009 and none of the other CMI Entities who are all guarantors are able to make such a payment either. The assets of the CMI Entities are insufficient to discharge all of the liabilities. The CMI Entities are unable to satisfy their debts as they come due and they are insolvent. They are insolvent both under the *Bankruptcy and Insolvency Act*[3] definition and under the more expansive definition of insolvency used in Re Stelco[4]. Absent these CCAA proceedings, the applicants would lack liquidity and would be unable to continue as going concerns. The CMI Entities have acknowledged their insolvency in the affidavit filed in support of the application.

**26** Secondly, the required statement of projected cash-flow and other financial documents required under section 11(2) of the CCAA have been filed.

(b) Stay of Proceedings

**27** Under section 11 of the CCAA, the Court has broad jurisdiction to grant a stay of proceedings and to give a debtor company a chance to develop a plan of compromise or arrangement. In my view, given the facts outlined, a stay is necessary to create stability and to allow the CMI Entities to pursue their restructuring.

(b) Partnerships and Foreign Subsidiaries

**28** The applicants seek to extend the stay of proceedings and other relief to the aforementioned partnerships. The partnerships are intertwined with the applicants' ongoing operations. They own the National Post daily newspaper and Canadian free-to-air television assets and certain of its specialty television channels and some other television assets. These businesses constitute a significant portion of the overall enterprise value of the CMI Entities. The partnerships are also guarantors of the 8% senior subordinated notes.

**29** While the CCAA definition of a company does not include a partnership or limited partnership, courts have repeatedly exercised their inherent jurisdiction to extend the scope of CCAA proceedings to encompass them. See for example Re Lehndorff General Partners Ltd.[5]; Re Smurfit-Stone Container Canada Inc.[6]; and *Re Calpine Canada Energy Ltd.*[7]. In this case, the partnerships carry on operations that are integral and closely interrelated to the business of the applicants. The operations and obligations of the partnerships are so intertwined with those of the applicants that irreparable harm would ensue if the requested stay were not granted. In my view, it is just and convenient to grant the relief requested with respect to the partnerships.

**30** Certain applicants are foreign subsidiaries of CMI. Each is a guarantor under the 8% senior subordinated notes, the CIT credit agreement (and therefore the DIP facility), the intercompany notes and is party to the support agreement and the Use of Cash Collateral and Consent Agreement. If the stay of proceedings was not extended to these entities, creditors could seek to enforce their guarantees. I am persuaded that the foreign subsidiary applicants as that term is defined in the affidavit filed are debtor companies within the meaning of section 2 of the CCAA and that I have jurisdiction and ought to grant the order requested as it relates to them. In this regard, I note that they are insolvent and each holds assets in Ontario in that they each maintain funds on deposit at the Bank of Nova Scotia in Toronto. See in this regard *Re Cadillac Fairview*[8] and *Re Global Light Telecommunications Ltd.*[9]

(c) DIP Financing

**31** Turning to the DIP financing, the premise underlying approval of DIP financing is that it is a benefit to all stakeholders as it allows the debtors to protect going-concern value while they attempt to devise a plan acceptable to creditors. While in the past, courts relied on inherent jurisdiction to approve the terms of a DIP financing charge, the September 18, 2009 amendments to the CCAA now expressly provide jurisdiction to grant a DIP financing charge. Section 11.2 of the Act states:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*aa*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

**32** In light of the language of section 11.2(1), the first issue to consider is whether notice has been given to secured creditors who are likely to be affected by the security or charge. Paragraph 57 of the proposed order affords priority to the DIP charge, the administration charge, the Directors' and Officers' charge and the KERP charge with the following exception: "any validly perfected purchase money security interest in favour of a secured creditor or any statutory encumbrance existing on the date of this order in favour of any person which is a "secured creditor" as defined in the CCAA in respect of any of source deductions from wages, employer health tax, workers compensation, GST/QST, PST payables, vacation pay and banked overtime for employees, and amounts under the Wage Earners' Protection Program that are subject to a super priority claim under the BIA". This provision coupled with the notice that was provided satisfied me that secured creditors either were served or are unaffected by the DIP charge. This approach is both consistent with the legislation and practical.

**33** Secondly, the Court must determine that the amount of the DIP is appropriate and required having regard to the debtors' cash-flow statement. The DIP charge is for up to $100 million. Prior to entering into the CIT facility, the CMI Entities sought proposals from other third party lenders for a credit facility that would convert to a DIP facility should the CMI Entities be required to file for protection under the CCAA. The CIT facility was the best proposal submitted. In this case, it is contemplated that implementation of the plan will occur no later than April 15, 2010. The total amount of cash on hand is expected to be down to approximately $10 million by late December, 2009 based on the cash flow forecast. The applicants state that this is an insufficient cushion for an enterprise of this magnitude. The cash-flow statements project the need for the liquidity provided by the DIP facility for the recapitalization transaction to be finalized. The facility is to accommodate additional liquidity requirements during the CCAA proceedings. It will enable the CMI Entities to operate as going concerns while pursuing the implementation and completion of a viable plan and will provide creditors with assurances of same. I also note that the proposed facility is simply a conversion of the pre-existing CIT facility and as such, it is expected that there would be no material prejudice to any of the creditors of the CMI Entities that arises from the granting of the DIP charge. I am persuaded that the amount is appropriate and required.

**34** Thirdly, the DIP charge must not and does not secure an obligation that existed before the order was made. The only amount outstanding on the CIT facility is $10.7 in outstanding letters of credit. These letters of credit are secured by existing security and it is proposed that that security rank ahead of the DIP charge.

**35** Lastly, I must consider amongst others, the enumerated factors in paragraph 11.2(4) of the Act. I have already addressed some of them. The Management Directors of the applicants as that term is used in the materials filed will continue to manage the CMI Entities during the CCAA proceedings. It would appear that management has the confidence of its major creditors. The CMI Entities have appointed a CRA and a Restructuring Officer to negotiate and implement the recapitalization transaction and the aforementioned directors will continue to manage the CMI Entities during the CCAA proceedings. The DIP facility will enhance the prospects of a completed restructuring. CIT has stated that it will not convert the CIT facility into a DIP facility if the DIP charge is not approved. In its report, the proposed Monitor observes that the ability to borrow funds from a court approved DIP facility secured by the DIP charge is crucial to retain the confidence of the CMI Entities' creditors, employees and suppliers and would enhance the prospects of a viable compromise or arrangement being made. The proposed Monitor is supportive of the DIP facility and charge.

**36** For all of these reasons, I was prepared to approve the DIP facility and charge.

(d) Administration Charge

**37** While an administration charge was customarily granted by courts to secure the fees and disbursements of the professional advisors who guided a debtor company through the CCAA process, as a result of the amendments to the

CCAA, there is now statutory authority to grant such a charge. Section 11.52 of the CCAA states:

> (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate -- in respect of the fees and expenses of
>
> > (*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
> >
> > (*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
> >
> > (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**38** I must therefore be convinced that (1) notice has been given to the secured creditors likely to be affected by the charge; (2) the amount is appropriate; and (3) the charge should extend to all of the proposed beneficiaries.

**39** As with the DIP charge, the issue relating to notice to affected secured creditors has been addressed appropriately by the applicants. The amount requested is up to $15 million. The beneficiaries of the charge are: the Monitor and its counsel; counsel to the CMI Entities; the financial advisor to the Special Committee and its counsel; counsel to the Management Directors; the CRA; the financial advisor to the Ad Hoc Committee; and RBC Capital Markets and its counsel. The proposed Monitor supports the aforementioned charge and considers it to be required and reasonable in the circumstances in order to preserve the going concern operations of the CMI Entities. The applicants submit that the above-note professionals who have played a necessary and integral role in the restructuring activities to date are necessary to implement the recapitalization transaction.

**40** Estimating quantum is an inexact exercise but I am prepared to accept the amount as being appropriate. There has obviously been extensive negotiation by stakeholders and the restructuring is of considerable magnitude and complexity. I was prepared to accept the submissions relating to the administration charge. I have not included any requirement that all of these professionals be required to have their accounts scrutinized and approved by the Court but they should not preclude this possibility.

(e) Critical Suppliers

**41** The next issue to consider is the applicants' request for authorization to pay pre-filing amounts owed to critical suppliers. In recognition that one of the purposes of the CCAA is to permit an insolvent corporation to remain in business, typically courts exercised their inherent jurisdiction to grant such authorization and a charge with respect to the provision of essential goods and services. In the recent amendments, Parliament codified the practice of permitting the payment of pre-filing amounts to critical suppliers and the provision of a charge. Specifically, section 11.4 provides:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical

supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**42** Under these provisions, the Court must be satisfied that there has been notice to creditors likely to be affected by the charge, the person is a supplier of goods or services to the company, and that the goods or services that are supplied are critical to the company's continued operation. While one might interpret section 11.4 (3) as requiring a charge any time a person is declared to be a critical supplier, in my view, this provision only applies when a court is compelling a person to supply. The charge then provides protection to the unwilling supplier.

**43** In this case, no charge is requested and no additional notice is therefore required. Indeed, there is an issue as to whether in the absence of a request for a charge, section 11.4 is even applicable and the Court is left to rely on inherent jurisdiction. The section seems to be primarily directed to the conditions surrounding the granting of a charge to secure critical suppliers. That said, even if it is applicable, I am satisfied that the applicants have met the requirements. The CMI Entities seek authorization to make certain payments to third parties that provide goods and services integral to their business. These include television programming suppliers given the need for continuous and undisturbed flow of programming, newsprint suppliers given the dependency of the National Post on a continuous and uninterrupted supply of newsprint to enable it to publish and on newspaper distributors, and the American Express Corporate Card Program and Central Billed Accounts that are required for CMI Entity employees to perform their job functions. No payment would be made without the consent of the Monitor. I accept that these suppliers are critical in nature. The CMI Entities also seek more general authorization allowing them to pay other suppliers if in the opinion of the CMI Entities, the supplier is critical. Again, no payment would be made without the consent of the Monitor. In addition, again no charge securing any payments is sought. This is not contrary to the language of section 11.4 (1) or to its purpose. The CMI Entities seek the ability to pay other suppliers if in their opinion the supplier is critical to their business and ongoing operations. The order requested is facilitative and practical in nature. The proposed Monitor supports the applicants' request and states that it will work to ensure that payments to suppliers in respect of pre-filing liabilities are minimized. The Monitor is of course an officer of the Court and is always able to seek direction from the Court if necessary. In addition, it will report on any such additional payments when it files its reports for Court approval. In the circumstances outlined, I am prepared to grant the relief requested in this regard.

(f) Directors' and Officers' Charge

**44** The applicants also seek a directors' and officers' ("D &O") charge in the amount of $20 million. The proposed charge would rank after the administration charge, the existing CIT security, and the DIP charge. It would rank pari passu with the KERP charge discussed subsequently in this endorsement but postponed in right of payment to the extent of the first $85 million payable under the secured intercompany note.

**45** Again, the recent amendments to the CCAA allow for such a charge. Section 11.51 provides that:

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers

appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

**46** I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

**47** The proposed Monitor reports that the amount of $20 million was estimated taking into consideration the existing D&O insurance and the potential liabilities which may attach including certain employee related and tax related obligations. The amount was negotiated with the DIP lender and the Ad Hoc Committee. The order proposed speaks of indemnification relating to the failure of any of the CMI Entities, after the date of the order, to make certain payments. It also excludes gross negligence and wilful misconduct. The D&O insurance provides for $30 million in coverage and $10 million in excess coverage for a total of $40 million. It will expire in a matter of weeks and Canwest Global has been unable to obtain additional or replacement coverage. I am advised that it also extends to others in the Canwest enterprise and not just to the CMI Entities. The directors and senior management are described as highly experienced, fully functional and qualified. The directors have indicated that they cannot continue in the restructuring effort unless the order includes the requested directors' charge.

**48** The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protection against liabilities they could incur during the restructuring: *Re General Publishing Co.*[10] Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and is reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approved the request.

(g) Key Employee Retention Plans

**49** Approval of a KERP and a KERP charge are matters of discretion. In this case, the CMI Entities have developed KERPs that are designed to facilitate and encourage the continued participation of certain of the CMI Entities' senior executives and other key employees who are required to guide the CMI Entities through a successful restructuring with a view to preserving enterprise value. There are 20 KERP participants all of whom are described by the applicants as being critical to the successful restructuring of the CMI Entities. Details of the KERPs are outlined in the materials and the proposed Monitor's report. A charge of $5.9 million is requested. The three Management Directors are seasoned executives with extensive experience in the broadcasting and publishing industries. They have played critical roles in the restructuring initiatives taken to date. The applicants state that it is probable that they would consider other employment opportunities if the KERPs were not secured by a KERP charge. The other proposed participants are also described as being crucial to the restructuring and it would be extremely difficult to find replacements for them.

**50** Significantly in my view, the Monitor who has scrutinized the proposed KERPs and charge is supportive. Furthermore, they have been approved by the Board, the Special Committee, the Human Resources Committee of

Canwest Global and the Ad Hoc Committee. The factors enumerated in *Re Grant Forest*[11] have all been met and I am persuaded that the relief in this regard should be granted.

**51** The applicants ask that the Confidential Supplement containing unredacted copies of the KERPs that reveal individually identifiable information and compensation information be sealed. Generally speaking, judges are most reluctant to grant sealing orders. An open court and public access are fundamental to our system of justice. Section 137(2) of the *Courts of Justice Act* provides authority to grant a sealing order and the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*[12] provides guidance on the appropriate legal principles to be applied. Firstly, the Court must be satisfied that the order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk. Secondly, the salutary effects of the order should outweigh its deleterious effects including the effects on the right to free expression which includes the public interest in open and accessible court proceedings.

**52** In this case, the unredacted KERPs reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERPs has been disclosed and the individual personal information adds nothing. It seems to me that this second branch of the test has been met. The relief requested is granted.

Annual Meeting

**53** The CMI Entities seek an order postponing the annual general meeting of shareholders of Canwest Global. Pursuant to section 133 (1)(b) of the CBCA, a corporation is required to call an annual meeting by no later than February 28, 2010, being six months after the end of its preceding financial year which ended on August 31, 2009. Pursuant to section 133 (3), despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.

**54** CCAA courts have commonly granted extensions of time for the calling of an annual general meeting. In this case, the CMI Entities including Canwest Global are devoting their time to stabilizing business and implementing a plan. Time and resources would be diverted if the time was not extended as requested and the preparation for and the holding of the annual meeting would likely impede the timely and desirable restructuring of the CMI Entities. Under section 106(6) of the CBCA, if directors of a corporation are not elected, the incumbent directors continue. Financial and other information will be available on the proposed Monitor's website. An extension is properly granted.

Other

**55** The applicants request authorization to commence Chapter 15 proceedings in the U.S. Continued timely supply of U.S. network and other programming is necessary to preserve going concern value. Commencement of Chapter 15 proceedings to have the CCAA proceedings recognized as "foreign main proceedings" is a prerequisite to the conversion of the CIT facility into the DIP facility. Authorization is granted.

**56** Canwest's various corporate and other entities share certain business services. They are seeking to continue to provide and receive inter-company services in the ordinary course during the CCAA proceedings. This is supported by the proposed Monitor and FTI will monitor and report to the Court on matters pertaining to the provision of inter-company services.

**57** Section 23 of the amended CCAA now addresses certain duties and functions of the Monitor including the provision of notice of an Initial Order although the Court may order otherwise. Here the financial threshold for notice to creditors has been increased from $1000 to $5000 so as to reduce the burden and cost of such a process. The proceedings will be widely published in the media and the Initial Order is to be posted on the Monitor's website. Other

meritorious adjustments were also made to the notice provisions.

**58** This is a "pre-packaged" restructuring and as such, stakeholders have negotiated and agreed on the terms of the requested order. That said, not every stakeholder was before me. For this reason, interested parties are reminded that the order includes the usual come back provision. The return date of any motion to vary, rescind or affect the provisions relating to the CIT credit agreement or the CMI DIP must be no later than November 5, 2009.

**59** I have obviously not addressed every provision in the order but have attempted to address some key provisions. In support of the requested relief, the applicants filed a factum and the proposed Monitor filed a report. These were most helpful. A factum is required under Rule 38.09 of the Rules of Civil Procedure. Both a factum and a proposed Monitor's report should customarily be filed with a request for an Initial Order under the CCAA.

Conclusion

**60** Weak economic conditions and a high debt load do not a happy couple make but clearly many of the stakeholders have been working hard to produce as desirable an outcome as possible in the circumstances. Hopefully the cooperation will persist.

S.E. PEPALL J.

cp/e/qlafr/qljxr/qljxh/qlaxr/qlaxw/qlcal/qlced

1 *R.S.C. 1985, c. C. 36, as amended*

2 R.S.C. 1985, c.C.44.

3 R.S.C. 1985, c. B-3, as amended.

4 *(2004), 48 C.B.R. (4th) 299; leave to appeal refused, [2004] O.J. No. 1903, 2004 CarswellOnt 2936 (C.A.).*

5 *(1993), 9 B.L.R. (2d) 275.*

6 [2009] O.J. No. 349.

7 (2006), 19 C.B.R. (5th) 187.

8 (1995), 30 C.B.R. (3d) 29.

9 (2004), 33 B.C.L.R. (4th) 155.

10 *(2003), 39 C.B.R. (4th) 216.*

11 [2009] O.J. No. 3344. That said, given the nature of the relationship between a board of directors and senior management, it may not always be appropriate to give undue consideration to the principle of business judgment.

12 [2002] 2 S.C.R. 522.

# TAB 7

**CITATION:** Timminco Limited (Re), 2012 ONSC 506
**COURT FILE NO.:** CV-12-9539-00CL
**DATE:** 20120202

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**(COMMERCIAL LIST)**



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

**RE:** **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **A. J. Taylor, M. Konyukhova and K. Esaw, for the Applicants**

**D.W. Ellickson, for Communications, Energy and Paperworkers' Union of Canada**

**C. Sinclair, for United Steelworkers' Union**

**K. Peters, for AMG Advance Metallurgical Group NV**

**M. Bailey, for Superintendent of Financial Services (Ontario)**

**S. Weisz, for FTI Consulting Canada Inc.**

**A. Kauffman, for Investissement Quebec**

**HEARD:** **January 12, 2012**
**RELEASED:** **January 16, 2012**
**REASONS:** **February 2, 2012**

## ENDORSEMENT

[1] This motion was heard on January 12, 2012. On January 16, 2012, the following endorsement was released:

Motion granted. Reasons will follow. Order to go subject to proviso that the Sealing Order is subject to modification, if necessary, after reasons provided.

[2] These are those reasons.

**Background**

[3] On January 3, 2012, Timminco Limited ("Timminco") and Bécancour Silicon Inc. ("BSI") (collectively, the "Timminco Entities") applied for and obtained relief under the *Companies' Creditors Arrangement Act* (the "CCAA").

[4] In my endorsement of January 3, 2012, (*Timminco Limited (Re)*, 2012 ONSC 106), I stated at [11]: "I am satisfied that the record establishes that the Timminco Entities are insolvent and are 'debtor companies' to which the CCAA applies".

[5] On the initial motion, the Applicants also requested an "Administration Charge" and a "Directors' and Officers' Charge" ("D&O Charge"), both of which were granted.

[6] The Timminco Entities requested that the Administration Charge rank ahead of the existing security interest of Investissement Quebec ("IQ") but behind all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise, including any deemed trust created under the *Ontario Pension Benefit Act* (the "PBA") or the *Quebec Supplemental Pensions Plans Act* (the "QSPPA") (collectively, the "Encumbrances") in favour of any persons that have not been served with this application.

[7] IQ had been served and did not object to the Administration Charge and the D&O Charge.

[8] At [35] of my endorsement, I noted that the Timminco Entities had indicated their intention to return to court to seek an order granting super priority ranking for both the Administration Charge and the D&O Charge ahead of the Encumbrances.

[9] The Timminco Entities now bring this motion for an order:

(a) suspending the Timminco Entities' obligations to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administration Charge and the D&O Charge;

(c) approving key employee retention plans (the "KERPs") offered by the Timminco Entities to certain employees deemed critical to a successful restructuring and a charge on the current and future assets, undertakings and properties of the Timminco Entities to secure the Timminco Entities' obligations under the KERPs (the "KERP Charge"); and

(d) sealing the confidential supplement (the "Confidential Supplement") to the First Report of FTI Consulting Canada Inc. (the "Monitor").

[10] If granted, the effect of the proposed Court-ordered charges in relation to each other would be:

- first, the Administration Charge to the maximum amount of $1 million;
- second, the KERP Charge (in the maximum amount of $269,000); and
- third, the D&O Charge (in the maximum amount of $400,000).

[11] The requested relief was recommended and supported by the Monitor. IQ also supported the requested relief. It was, however, opposed by the Communications, Energy and Paperworkers' Union of Canada ("CEP"). The position put forth by counsel to CEP was supported by counsel for the United Steelworkers' Union ("USW").

[12] The motion materials were served on all personal property security registrants in Ontario and in Quebec: the members of the Pension Plan Committees for the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan; the Financial Services Commission of Ontario; the Regie de Rentes du Quebec; the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union; and La Section Locale 184 de Syndicat Canadien des Communications, De L'Energie et du Papier; and various government entities, including Ontario and Quebec environmental agencies and federal and provincial taxing authorities.

[13] Counsel to the Applicants identified the issues on the motion as follows:

(a) Should this court grant increased priority to the Administration Charge and the D&O Charge?

(b) Should this court grant an order suspending the Timminco Entities' obligations to make the pension contributions with respect to the pension plans?

(c) Should this court approve the KERPs and grant the KERPs Charge?

(d) Should this court seal the Confidential Supplement?

[14] It was not disputed that the court has the jurisdiction and discretion to order a super priority charge in the context of a CCAA proceeding. However, counsel to CEP submits that this is an extraordinary measure, and that the onus is on the party seeking such an order to satisfy the court that such an order ought to be awarded in the circumstances.

[15] The affidavit of Peter A.M. Kalins, sworn January 5, 2012, provides information relating to the request to suspend the payment of certain pension contributions. Paragraphs 14-28 read as follows:

> 14. The Timminco Entities sponsor the following three pension plans (collectively, the "**Pension Plans**"):

(a) the Retirement Pension Plan for The Haley Plant Hourly Employees of Timminco Metals, A Division of Timminco Limited (Ontario Registration Number 0589648) (the "**Haley Pension Plan**");

(b) the Régime de rentes pour les employés non syndiqués de Silicium Bécancour Inc. (Québec Registration Number 26042) (the "**Bécancour Non-Union Pension Plan**"); and

(c) the Régime de rentes pour les employés syndiqués de Silicium Bécancour Inc. (Québec Registration Number 32063) (the "**Bécancour Union Pension Plan**").



*Haley Pension Plan*

15. The Haley Pension plan, sponsored and administered by Timminco, applies to former hourly employees at Timminco's magnesium facility in Haley, Ontario.

16. The Haley Pension Plan was terminated effective as of August 1, 2008 and accordingly, no normal cost contributions are payable in connection with the Haley Pension Plan. As required by the Ontario *Pension Benefits Act* (the "**PBA**"), a wind-up valuation in respect of the Haley Pension Plan was filed with the Financial Services Commission of Ontario ("**FSCO**") detailing the plan's funded status as of the wind-up date, and each year thereafter. As of August 1, 2008, the Haley Pension Plan was in a deficit position on a wind-up basis of $5,606,700. The PBA requires that the wind-up deficit be paid down in equal annual installments payable annually in advance over a period of no more than five years.

17. As of August 1, 2010, the date of the most recently filed valuation report, the Haley Pension Plan had a wind-up deficit of $3,922,700. Contributions to the Haley Pension Plan are payable annually in advance every August 1. Contributions in respect of the period from August 1, 2008 to July 31, 2011 totalling $4,712,400 were remitted to the plan. Contributions in respect of the period from August 1, 2011 to July 31, 2012 were estimated to be $1,598,500 and have not been remitted to the plan.

18. According to preliminary estimates calculated by the Haley Pension Plan's actuaries, despite Timminco having made contributions of approximately $4,712,400 during the period from August 1, 2008 to July 31, 2011, as of August 1, 2011, the deficit remaining in the Haley Pension Plan is $3,102,900.

*Bécancour Non-Union Pension Plan*

19. The Bécancour Non-Union Pension Plan, sponsored by BSI, is an on-going pension plan with both defined benefit ("**DB**") and defined contribution provisions. The plan has four active members and 32 retired and deferred vested members (including surviving spouses).

20. The most recently filed actuarial valuation of the Bécancour Non-Union Pension Plan performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Non-Union Pension Plan was $3,239,600.

21. In 2011, normal cost contributions payable to this plan totaled approximately $9,525 per month (or 16.8% of payroll). Amortization payments owing to this plan totaled approximately $41,710 per month. All contributions in respect of the plan were paid when due in accordance with the Québec *Supplemental Pension Plans Act* (the "**QSPPA**") and regulations.



*Bécancour Union Pension Plan*

22. The BSI-sponsored Bécancour Union Pension Plan is an on-going DB pension plan with two active members and 98 retired and deferred vested members (including surviving spouses).

23. The most recently filed actuarial valuation performed for funding purposes was performed as of September 30, 2010. As of September 30, 2010, the solvency deficit in the Bécancour Union Pension Plan was $7,939,500.

24. In 2011, normal cost contributions payable to the plan totaled approximately $7,083 per month (or 14.7% of payroll). Amortization payments owing to this plan totaled approximately $95,300 per month. All contributions in respect of the plan were paid when due in accordance with the QSPPA and regulations.

25. BSI unionized employees have the option to transfer their employment to QSLP, under the form of the existing collective bargaining agreement. In the event of such transfer, their pension membership in the Bécancour Union Pension Plan will be transferred to the Quebec Silicon Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). Also, in the event that any BSI non-union employees transfer employment to QSLP, their pension membership in the Bécancour Non-Union Pension Plan would be transferred to the Quebec Silicon Non-Union Pension Plan (as defined and described in greater detail in the Initial Order Affidavit). I am advised by Andrea Boctor of Stikeman Elliott LLP, counsel to the Timminco Entities, and do verily believe that if all of the active members of the Bécancour Union Pension Plan and the Bécancour Non-Union Pension Plan transfer their employment to QSLP, the Régie des rentes du Québec would have the authority to order that the plans be wound up.

*Pension Plan Deficiencies and the Timminco Entities' CCAA Proceedings*

26. The assets of the Pension Plans have been severely impacted by market volatility and decreasing long-term interest rates in recent years, resulting in increased deficiencies in the Pension Plans. As a result, the special payments payable with respect to the Haley Plan also increased. As at 2010, total annual special payments for the final three years of the wind-up of the Haley Pension Plan were $1,598,500 for 2010, $1,397,000 for 2011 and $1,162,000 for 2012, payable in advance annually every August 1. By contrast, in 2011 total annual special payments to the Haley Pension Plan for the remaining two years of the wind-up increased to $1,728,700 for each of 2011 and 2012.

*Suspension of Certain Pension Contributions*

27. As is evident from the Cashflow Forecast, the Timminco Entities do not have the funds necessary to make any contributions to the Pension Plans other than (a) contributions in respect of normal cost, (b) contributions to the defined contribution provision of the BSI Non-Union Pension Plan, and (c) employee contributions deducted from pay (together, the "**Normal Cost Contributions**"). Timminco currently owes approximately $1.6 million in respect of special payments to the Haley Pension Plan. In addition, assuming the Bécancour Non-Union Pension Plan and the Bécancour Union Pension Plan are not terminated, as at January 31, 2012, the Timminco Entities will owe approximately $140,000 in respect of amortization payments under those plans. If the Timminco Entities are required to make the pension contributions other than Normal Cost Contributions (the "**Pension Contributions**"), they will not have sufficient funds to continue operating and will be forced to cease operating to the detriment of their stakeholders, including their employees and pensioners.

28. The Timminco Entities intend to make all normal cost contributions when due. However, management of the Timminco Entities does not anticipate an improvement in their cashflows that would permit the making of Pension Contributions with respect to the Pension Plans during these CCAA proceedings.

**The Position of CEP and USW**

[16] Counsel to CEP submits that the super priority charge sought by the Timminco Entities would have the effect of subordinating the rights of, *inter alia*, the pension plans, including the statutory trusts that are created pursuant to the QSPPA. In considering this matter, I have proceeded on the basis that this submission extends to the PBA as well.

[17] In order to grant a super priority charge, counsel to CEP, supported by USW, submits that the Timminco Entities must show that the application of provincial legislation "would frustrate the company's ability to restructure and avoid bankruptcy". (See *Indalex (Re)*, 2011 ONCA 265 at para. 181.)

[18] Counsel to CEP takes the position that the evidence provided by the Timminco Entities falls short of showing the necessity of the super priority charge. Presently, counsel contends that the Applicants have not provided any plan for the purpose of restructuring the Timminco Entities and, absent a restructuring proposal, the affected creditors, including the pension plans, have no

reason to believe that their interests will be protected through the issuance of the orders being sought.

[19] Counsel to CEP takes the position that the Timminco Entities are requesting extraordinary relief without providing the necessary facts to justify same. Counsel further contends that the Timminco Entities must "wear two hats" and act both in their corporate interest and in the best interest of the pension plan and cannot simply ignore their obligations to the pension plans in favour of the corporation. (See *Indalex (Re), supra*, at para. 129.)

[20] Counsel to CEP goes on to submit that, where the "two hats" gives rise to a conflict of interest, if a corporation favours its corporate interest rather than its obligations to its fiduciaries, there will be consequences. In *Indalex (Re), supra*, the court found that the corporation seeking CCAA protection had acted in a manner that revealed a conflict with the duties it owed the beneficiaries of pension plans and ordered the corporation to pay the special payments it owed the plans (See *Indalex (Re), supra,* at paras. 140 and 207.)

[21] In this case, counsel to CEP submits that, given the lack of evidentiary support for the super priority charge, the risk of conflicting interests and the importance of the Timminco Entities' fiduciary duties to the pension plans, the super priority charge ought not to be granted.

[22] Although counsel to CEP acknowledges that the court has the discretion in the context of the CCAA to make orders that override provincial legislation, such discretion must be exercised through a careful weighing of the facts before the court. Only where the applicant proves it is necessary in the context and consistent with the objects of the CCAA may a judge make an order overriding provincial legislation. (*See Indalex (Re), supra,* at paras. 179 and 189.)

[23] In the circumstances of this case, counsel to CEP argues that the position of any super priority charge ordered by the court should rank after the pension plans.

[24] CEP also takes the position that the Timminco Entities' obligations to the pension plans should not be suspended. Counsel notes that the Timminco Entities have contractual obligations through the collective agreement and pension plan documents to make contributions to the pension plans and, as well, the Timminco Entities owe statutory duties to the beneficiaries of the pension funds pursuant to the QSPPA. Counsel further points out that s. 49 of the QSPPA provides that any contributions and accrued interest not paid into the pension fund are deemed to be held in trust for the employer.

[25] In addition, counsel takes the position that the Court of Appeal for Ontario in *Indalex (Re), supra*, confirmed that, in the context of Ontario legislation, all of the contributions an employee owes a pension fund, including the special payments, are subject to the deemed trust provision of the PBA.

[26] In this case, counsel to CEP points out that the special payments the Timminco Entities seek to suspend in the amount of $95,300 per month to the Bécancour Union Pension Plan, and of $47,743 to the Silicium Union Pension Plan, are payments that are to be held in trust for the beneficiaries of the pension plans. Thus, they argue that the Timminco Entities have a fiduciary

obligation to the beneficiaries of the pension plans to hold the funds in trust. Further, the Timminco Entities' request to suspend the special payments to the Bécancour Union Pension Plan and the Quebec Silicon Union Pension Plan reveals that its interests are in conflict.

[27] Counsel also submits that the Timminco Entities have not pointed to a particular reason, other than generalized liquidity problems, as to why they are unable to make special payments to their pension plans.

[28] With respect to the KERPs, counsel to CEP acknowledges that the court has the power to approve a KERP, but the court must only do so when it is convinced that it is necessary to make such an order. In this case, counsel contends that the Timminco Entities have not presented any meaningful evidence on the propriety of the proposed KERPs. Counsel notes that the Timminco Entities have not named the KERPs recipients, provided any specific information regarding their involvement with the CCAA proceeding, addressed their replaceability, or set out their individual bonuses. In the circumstances, counsel submits that it would be unfair and inequitable for the court to approve the KERPs requested by the Timminco Entities.

[29] Counsel to CEP's final submission is that, in the event the KERPs are approved, they should not be sealed, but rather should be treated in the same manner as other CCAA documents through the Monitor. Alternatively, counsel to CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

**The Position of the Timminco Entities**

[30] At the time of the initial hearing, the Timminco Entities filed evidence establishing that they were facing severe liquidity issues as a result of, among other things, a low profit margin realized on their silicon metal sales due to a high volume, long-term supply contract at below market prices, a decrease in the demand and market price for solar grade silicon, failure to recoup their capital expenditures incurred in connection with the development of their solar grade operations, and the inability to secure additional funding. The Timminco Entities also face significant pension and environmental remediation legacy costs, and financial costs related to large outstanding debts.

[31] I accepted submissions to the effect that without the protection of the CCAA, a shutdown of operations was inevitable, which the Timminco Entities submitted would be extremely detrimental to the Timminco Entities' employees, pensioners, suppliers and customers.

[32] As at December 31, 2011, the Timminco Entities' cash balance was approximately $2.4 million. The 30-day consolidated cash flow forecast filed at the time of the CCAA application projected that the Timminco Entities would have total receipts of approximately $5.5 million and total operating disbursements of approximately $7.7 million for net cash outflow of approximately $2.2 million, leaving an ending cash position as at February 3, 2012 of an estimated $157,000.

[33] The Timminco Entities approached their existing stakeholders and third party lenders in an effort to secure a suitable debtor-in-possession ("DIP") facility. The Timminco Entities

existing stakeholders, Bank of America NA, IQ, and AMG Advance Metallurgical Group NV, have declined to advance any funds to the Timminco Entities at this time. In addition, two third-party lenders have apparently refused to enter into negotiations regarding the provision of a DIP Facility.[1]

[34] The Monitor, in its Second Report, dated January 11, 2012, extended the cash forecast through to February 17, 2012. The Second Report provides explanations for the key variances in actual receipts and disbursements as compared to the January 2, 2012 forecast.

[35] There are some timing differences but the Monitor concludes that there are no significant changes in the underlying assumptions in the January 10, 2012 forecast as compared to the January 2, 2012 forecast.

[36] The January 10 forecast projects that the ending cash position goes from positive to negative in mid-February.

[37] Counsel to the Applicants submits that, based on the latest cash flow forecast, the Timminco Entities currently estimate that additional funding will be required by mid-February in order to avoid an interruption in operations.

[38] The Timminco Entities submit that this is an appropriate case in which to grant super priority to the Administration Charge. Counsel submits that each of the proposed beneficiaries will play a critical role in the Timminco Entities' restructuring and it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

[39] Statutory Authority to grant such a charge derives from s. 11.52(1) of the CCAA. Subsection 11.52(2) contains the authority to grant super-priority to such a charge:

> 11.52(1) Court may order security or charge to cover certain costs — On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> > (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

[1] In a subsequent motion relating to approval of a DIP Facility, the Timminco Entities acknowledged they had reached an agreement with a third-party lender with respect to providing DIP financing, subject to court approval. Further argument on this motion will be heard on February 6, 2012.

> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) Priority — This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[40] Counsel also submits that the Timminco Entities require the continued involvement of their directors and officers in order to pursue a successful restructuring of their business and/or finances and, due to the significant personal exposure associated with the Timminco Entities' liabilities, it is unlikely that the directors and officers will continue their services with the Timminco Entities unless the D&O Charge is granted.

[41] Statutory authority for the granting of a D&O charge on a super priority basis derives from s. 11.51 of the CCAA:

> 11.51(1) Security or charge relating to director's indemnification — On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> (2) Priority — The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) Restriction — indemnification insurance — The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) Negligence, misconduct or fault — The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

## Analysis

### (i) Administration Charge and D&O Charge

[42] It seems apparent that the position of the unions' is in direct conflict with the Applicants' positions.

[43] The position being put forth by counsel to the CEP and USW is clearly stated and is quite understandable. However, in my view, the position of the CEP and the USW has to be considered in the context of the practical circumstances facing the Timminco Entities. The Timminco Entities are clearly insolvent and do not have sufficient reserves to address the funding requirements of the pension plans.

[44] Counsel to the Applicants submits that without the relief requested, the Timminco Entities will be deprived of the services being provided by the beneficiaries of the charges, to the company's detriment. I accept the submissions of counsel to the Applicants that it is unlikely that the advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements. I also accept the evidence of Mr. Kalins that the role of the advisors is critical to the efforts of the Timminco Entities to restructure. To expect that the advisors will take the business risk of participating in these proceedings without the security of the charge is neither reasonable nor realistic.

[45] Likewise, I accept the submissions of counsel to the Applicants to the effect that the directors and officers will not continue their service without the D&O Charge. Again, in circumstances such as those facing the Timminco Entities, it is neither reasonable nor realistic to expect directors and officers to continue without the requested form of protection.

[46] It logically follows, in my view, that without the assistance of the advisors, and in the anticipated void caused by the lack of a governance structure, the Timmico Entities will be directionless and unable to effectively proceed with any type or form of restructuring under the CCAA.

[47] The Applicants argue that the CCAA overrides any conflicting requirements of the QSPPA and the BPA.

[48] Counsel submits that the general paramountcy of the CCAA over provincial legislation was confirmed in *ATB Financial v. Metcalf & Mansfield Alternative Investment II Corp.*, (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at para. 104. In addition, in *Nortel Networks Corporation (Re)*, the Court of Appeal held that the doctrine of paramountcy applies either where a provincial and a federal statutory position are in conflict and cannot both be complied with, or where complying with the provincial law will have the effect of frustrating the purpose of the federal law and therefore the intent of Parliament. See *Nortel Networks Corporation (Re)*, (2009), 59 C.B.R. (5th) 23 (Ont. C.A.).

[49] It has long been stated that the purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors, with the purpose of allowing the business to continue. As the Court of Appeal for Ontario stated in *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5, at para. 36:

> In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme...

[50] Further, as I indicated in *Nortel Networks Corporation (Re)*, (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), this purpose continues to exist regardless of whether a company is actually restructuring or is continuing operations during a sales process in order to maintain maximum value and achieve the highest price for the benefit of all stakeholders. Based on this reasoning, the fact that Timminco has not provided any plan for restructuring at this time does not change the analysis.

[51] The Court of Appeal in *Indalex Ltd. (Re)* (2011), 75 C.B.R. (5th) 19 (Ont. C.A.) confirmed the CCAA court's ability to override conflicting provisions of provincial statutes where the application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. The Court stated, *inter alia*, as follows (beginning at paragraph 176):

> The CCAA court has the authority to grant a super-priority charge to DIP lenders in CCAA proceedings. I fully accept that the CCAA judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the PBA. ...
>
> ...
>
> What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in CCAA proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the CCAA judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy.

[52] The Timminco Entities seek approval to suspend Special Payments in order to maintain sufficient liquidity to continue operations for the benefit of all stakeholders, including employees and pensioners. It is clear that based on the January 2 forecast, as modified by the Second Report, the Timminco Entities have insufficient liquidity to make the Special Payments at this time.

[53] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA granting, in the present case, super priority over the Encumbrances for the Administration Charge and the D&O Charge, even if such an order conflicts with, or overrides, the QSPPA or the PBA.

[54] Further, the Timminco Entities submit that the doctrine of paramountcy is properly invoked in this case and that the court should order that the Administration Charge and the D&O Charge have super priority over the Encumbrances in order to ensure the continued participation of the beneficiaries of these charges in the Timminco Entities' CCAA proceedings.

[55] The Timminco Entities also submit that payment of the pension contributions should be suspended. These special (or amortization) payments are required to be made to liquidate a going concern or solvency deficiency in a pension plan as identified in the most recent funding valuation report for the plan that is filed with the applicable pension regulatory authority. The requirement for the employer to make such payments is provided for under applicable provincial pension minimum standards legislation.

[56] The courts have characterized special (or amortization) payments as pre-filing obligations which are stayed upon an initial order being granted under the CCAA. (See *AbitibiBowater Inc.*, (Re) (2009) 57 C.B.R. (5th) 285 (Q.S.C.); *Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5th) 217 (Ont. S.C.J.).

[57] I accept the submission of counsel to the Applicants to the effect that courts in Ontario and Quebec have addressed the issue of suspending special (or amortization) payments in the context of a CCAA restructuring and have ordered the suspension of such payments where the failure to stay the obligation would jeopardize the business of the debtor company and the company's ability to restructure.

[58] The Timminco Entities also submit that there should be no director or officer liability incurred as a result of a court-ordered suspension of payment of pension contributions. Counsel references *Fraser Papers*, where Pepall J. stated:

> Given that I am ordering that the special payments need not be made during the stay period pending further order of the Court, the Applicants and the officers and directors should not have any liability for failure to pay them in that same period. The latter should be encouraged to remain during the CCAA process so as to govern and assist with the restructuring effort and should be provided with protection without the need to have recourse to the Director's Charge.

[59] Importantly, *Fraser Papers* also notes that there is no priority for special payments in bankruptcy. In my view, it follows that the employees and former employees are not prejudiced by the relief requested since the likely outcome should these proceedings fail is bankruptcy, which would not produce a better result for them. Thus, the "two hats" doctrine from *Indalex (Re), supra*, discussed earlier in these reasons at [20], would not be infringed by the relief requested. Because it would avoid bankruptcy, to the benefit of both the Timminco Entities and beneficiaries of the pension plans, the relief requested would not favour the interests of the corporate entity over its obligations to its fiduciaries.

[60] Counsel to the Timminco Entities submits that where it is necessary to achieve the objective of the CCAA, the court has the jurisdiction to make an order under the CCAA

suspending the payment of the pension contributions, even if such order conflicts with, or overrides, the QSPPA or the PBA.

[61] The evidence has established that the Timminco Entities are in a severe liquidity crisis and, if required to make the pension contributions, will not have sufficient funds to continue operating. The Timminco Entities would then be forced to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[62] On the facts before me, I am satisfied that the application of the QSPPA and the PBA would frustrate the Timminco Entities ability to restructure and avoid bankruptcy. Indeed, while the Timminco Entities continue to make Normal Cost Contributions to the pension plans, requiring them to pay what they owe in respect of special and amortization payments for those plans would deprive them of sufficient funds to continue operating, forcing them to cease operations to the detriment of their stakeholders, including their employees and pensioners.

[63] In my view, this is exactly the kind of result the CCAA is intended to avoid. Where the facts demonstrate that ordering a company to make special payments in accordance with provincial legislation would have the effect of forcing the company into bankruptcy, it seems to me that to make such an order would frustrate the rehabilitative purpose of the CCAA. In such circumstances, therefore, the doctrine of paramountcy is properly invoked, and an order suspending the requirement to make special payments is appropriate (see *ATB Financial* and *Nortel Networks Corporation (Re)*).

[64] In my view, the circumstances are such that the position put forth by the Timminco Entities must prevail. I am satisfied that bankruptcy is not the answer and that, in order to ensure that the purpose and objective of the CCAA can be fulfilled, it is necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those of QSPPA and the PBA.

[65] There is a clear inter-relationship between the granting of the Administration Charge, the granting of the D&O Charge and extension of protection for the directors and officers for the company's failure to pay the pension contributions.

[66] In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue CCAA proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

[67] If bankruptcy results, the outcome for employees and pensioners is certain. This alternative will not provide a better result for the employees and pensioners. The lack of a desirable alternative to the relief requested only serves to strengthen my view that the objectives of the CCAA would be frustrated if the relief requested was not granted.

[68] For these reasons, I have determined that it is both necessary and appropriate to grant super priority to both the Administrative Charge and D&O Charge.

[69] I have also concluded that it is both necessary and appropriate to suspend the Timminco Entities' obligations to make pension contributions with respect to the Pension Plans. In my view, this determination is necessary to allow the Timminco Entities to restructure or sell the business as a going concern for the benefit of all stakeholders.

[70] I am also satisfied that, in order to encourage the officers and directors to remain during the CCAA proceedings, an order should be granted relieving them from any liability for the Timminco Entities' failure to make pension contributions during the CCAA proceedings. At this point in the restructuring, the participation of its officers and directors is of vital importance to the Timminco Entities.



**(ii) The KERPs**

[71] Turning now to the issue of the employee retention plans (KERPs), the Timminco Entities seek an order approving the KERPs offered to certain employees who are considered critical to successful proceedings under the CCAA.

[72] In this case, the KERPs have been approved by the board of directors of Timminco. The record indicates that in the opinion of the Chief Executive Officer and the Special Committee of the Board, all of the KERPs participants are critical to the Timminco Entities' CCAA proceedings as they are experienced employees who have played central roles in the restructuring initiatives taken to date and will play critical roles in the steps taken in the future. The total amount of the KERPs in question is $269,000. KERPs have been approved in numerous CCAA proceedings where the retention of certain employees has been deemed critical to a successful restructuring. See *Nortel Networks Corporation (Re)*, (2009) O.J. No. 1044 (S.C.J.), *Grant Forest Products Inc. (Re)*, (2009) 57 C.B.R. (5th) 128 (Ont. S.C.J.) [Commercial List], and *Canwest Global Communications Corp. (Re)*, (2009) 59 C.B.R. (5th) 72 (Ont. S.C.J.).

[73] In *Grant Forest Products*, Newbould J. noted that the business judgment of the board of directors of the debtor company and the monitor should rarely be ignored when it comes to approving a KERP charge.

[74] The Monitor also supports the approval of the KERPs and, following review of several court-approved retention plans in CCAA proceedings, is satisfied that the KERPs are consistent with the current practice for retention plans in the context of a CCAA proceeding and that the quantum of the proposed payments under the KERPs are reasonable in the circumstances.

[75] I accept the submissions of counsel to the Timminco Entities. I am satisfied that it is necessary, in these circumstances, that the KERPs participants be incentivized to remain in their current positions during the CCAA process. In my view, the continued participation of these experienced and necessary employees will assist the company in its objectives during its restructuring process. If these employees were not to remain with the company, it would be

necessary to replace them. It is reasonable to conclude that the replacement of such employees would not provide any substantial economic benefits to the company. The KERPs are approved.

[76] The Timminco Entities have also requested that the court seal the Confidential Supplement which contains copies of the unredacted KERPs, taking the position that the KERPs contain sensitive personal compensation information and that the disclosure of such information would compromise the commercial interests of the Timminco Entities and harm the KERPs participants. Further, the KERPs participants have a reasonable expectation that their names and salary information will be kept confidential. Counsel relies on *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 at para. 53 where Iacobucci J. adopted the following test to determine when a sealing order should be made:

> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
>
> (b) 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.

[77] CEP argues that the CCAA process should be open and transparent to the greatest extent possible and that the KERPs should not be sealed but rather should be treated in the same manner as other CCAA documents through the Monitor. In the alternative, counsel to the CEP submits that a copy of the KERPs should be provided to the Respondent, CEP.

[78] In my view, at this point in time in the restructuring process, the disclosure of this personal information could compromise the commercial interests of the Timminco Entities and cause harm to the KERP participants. It is both necessary and important for the parties to focus on the restructuring efforts at hand rather than to get, in my view, potentially side-tracked on this issue. In my view, the Confidential Supplement should be and is ordered sealed with the proviso that this issue can be revisited in 45 days.

**Disposition**

[79] In the result, the motion is granted. An order shall issue:

(a) suspending the Timminco Entities' obligation to make special payments with respect to the pension plans (as defined in the Notice of Motion);

(b) granting super priority to the Administrative Charge and the D&O Charge;

(c) approving the KERPs and the grant of the KERP Charge;

(d) authorizing the sealing of the Confidential Supplement to the First Report of the Monitor.

MORAWETZ J.

**Date:** February 2, 2012

# TAB 8

# SUPERIOR COURT

## (Commercial division)

***The Companies' Creditors Arrangement Act***



CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-038474-108

DATE: 15 October 2010

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**UNDER THE PRESIDENCY OF: THE HONOURABLE ROBERT MONGEON, J.S.C.**

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IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:

**WHITE BIRCH PAPER HOLDING COMPANY**
**-and-**
**WHITE BIRCH PAPER COMPANY**
**-and-**
**STADACONA GENERAL PARTNER INC.**
**-and-**
**BLACK SPRUCE PAPER INC.**
**-and-**
**F.F. SOUCY GENERAL PARATNER INC.**
**-and-**
**3120772 NOVA SCOTI COMPAPNY**
**-and-**
**ARRIMAGE DE GROS CACOUNA INC.**
**-and-**
**PAPIER MASSON LTÉE**

Petitioners

**-and-**
**ERNST & YOUNG INC.**

Monitor

**-and-**
**STADACONA LIMITED PARTNERSHIP**
**-and-**
**F.F. SOUCY LIMITED PARTNERSHIP**

JM1838

**-and-**
**F.F. SOUCY INC. & PARTNERS, LIMITED PARTNERSHIP**
Mises-en-cause
**-and-**
**SERVICE D'IMPARTITION INDUSTRIEL INC.**
**-and-**
**KSH SOLUTIONS INC.**
**-and-**
**BD WHITE BIRCH INVESTMENT LLC**
Intervenant
**-and-**
**SIXTH AVENUE INVESTMENT CO. LLC**
**DUNE CAPITAL LLC**
**DUNE CAPITAL INTERNATIONAL LTD**
Opposing parties



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**REASONS FOR JUDGMENT GIVEN ORALLY ON SEPTEMBER 24, 2010**

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## BACKGROUND

[1] On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

[2] On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

[3] On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process ("SISP") for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

[4] The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC ("BDWB"). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

[5] BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

[6] On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

[7] On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

[8] My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010[1].

[9] No appeal was lodged with respect to my decision of September 10, 2010.

[10] On September 17, 2010, Sixth Avenue Investment Co. LLC ("Sixth Avenue") submitted a qualified bid.

[11] On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US$236,052,825.00.

[12] BDWB's bid consists of:

i) US$90 million in cash allocated to the current assets of the WB Group;

[1] See my Order of September 10, 2010.

ii) $4.5 million of cash allocated to the fixed assets;

iii) $78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;

iv) miscellaneous additional charges to be assumed by the purchaser.



[13] Sixth Avenue's bid was equivalent to the BDWB winning bid less US$500,000.00, that is to say US$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of $78 million whilst Sixth Avenue offered an additional $78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

[14] The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

[15] On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

[16] As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of $438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

[17] BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also "Majority Lenders" under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to t he First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

[18] Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not "Majority Lenders" and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process[2].

[2] For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

[19] The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder[3] (Sixth Avenue).

[20] In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40] to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

[21] Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the "Majority Lender" may direct the "Agents" to support such credit bid in favour of such "Majority Lenders". Conversely, this position is not available to the "Minority Lenders". This reasoning has not been seriously challenged before me.

[22] The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

[23] On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

**REASONS (delivered orally on September 24, 2010)**

[24] I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a "Stalking Horse" bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a "Stalking Horse" bidder. In this context, a Motion to approve the "Stalking Horse" Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

[25] I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever

[3] Sometimes referred to as the "bitter bidder" or "disgruntled bidder" See Re: *Abitibi Bowater* [2010] QCCS 1742 (Gascon J.)

by any of the interested stakeholders except for the two construction lien holders KSH[4] and SIII[5] who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.



[26] The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

[27] Today, the Motion of the Debtors is principally contested by a group which was identified as the "Sixth Avenue" bidders and more particularly, identified in paragraph 20 of the Motion now before me. The "Stalking Horse" bidder, of course, is the Black Diamond group identified as "BD White Birch Investment LLC". The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the "Sixth Avenue" bid which was for a lesser dollar amount ($500,000.00), for a larger cash amount (approximately $78,000,000.00 more cash) and for a different allocation of the purchase price.

[28] Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the "Black Diamond" winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

[29] The main argument of "Sixth Avenue" as averred, sometimes referred to as the "bitter bidder", comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of $78,000,000.00 in arriving at its total offer of $236,052,825.00.

[30] If I take the comments of "Sixth Avenue", the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the "Black Diamond" bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

> **"24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the "DIP Agent") and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent"), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid**

[4] KSH Solutions Inc.
[5] Service d'Impartition Industriel Inc.

**submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law."**

[31] The words "and other applicable law" could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec.[6]

[32] The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

> **13. "Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the**

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[6] The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows:

> **689. The purchase price must be paid within five days, at the expiry of which time interest begins to run. Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.**
>
> **730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding.**
> **When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.**

See also Denis Ferland and Benoit Emery, 4ème edition, volume 2 (Éditions Yvon Blais (2003)):

> **"La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot «créance», contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi."**

See, finally, *Montreal Trust vs Jori Investment Inc.* (J.E. 80-220 (C.S.)), *Eugène Marcoux Inc. v. Côté (1990) R.J.Q. 1221 (C.A.)*

> **First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.**



[33] I draw from these excerpts that when the "Stalking Horse" bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid[7].

[34] Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

[35] Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

[36] Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the "Black Diamond" winning bid should prevail and the "Sixth Avenue" bid, the bitter bidder, should fail.

[37] I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

[38] Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that,

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[7] The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.
See paragraphs 24, 25 and 26 of BDWB's Intervention.
As for the right to credit bid in a sale by auction under the CCAA, see Re: *Maax Corporation* (QSC. no. 500-11-033561-081, July 10, 2008, , Buffoni J.)
See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

[39] Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

[40] The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

[41] The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

[42] It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

[43] The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

[44] I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than

the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

[45] I now wish to address the question of Section 36 CCAA.

[46] In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

[47] Section 36 CCAA reads as follows:

> **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.**
>
> **(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.**
>
> **(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.**
>
> **(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that**
>
> **(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and**

**(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.**

**(5) For the purpose of subsection (4), a person who is related to the company includes**

**(*a*) a director or officer of the company;**

**(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and**

**(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).**

**(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.**

**(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.**

**2005, c. 47, s. 131; 2007, c. 36, s. 78.**

**(added underlining)**

[48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

[49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

[50] Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest* [2002], CarswellOnt 3509, and she writes at paragraph 13:

> **"The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it** (and this is the case here). **Sufficient efforts were made to attract the best possible bid** (this was done here through the process, I don't have to review this in detail); **the SISP was widely publicized** (I am given

> to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one "Stalking Horse" bidder); **ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy** (this was all done in the present case.) **The logical extension of that conclusion is that the AHC Transaction is as well** (and, of course, understand that the words "preferable to a bankruptcy" must be added to this last sentence). **The effect of the proposed sale on other interested parties is very positive.** (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) **Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.**



[51] Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

[52] In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

[53] In *Nortel Networks*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009, CarswellOnt 4838, at paragraph 35):

> **"The duties of the Court in reviewing a proposed sale of assets are as follows:**
>
> > **1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;**
> >
> > **2) It should consider the interests of all parties;**
> >
> > **3) It should consider the efficacy and integrity of the process by which offers have been obtained;**

**4) and it should consider whether there has been unfairness in the working out of the process."**

[54] I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

[55] I will make no comment as to the standing of the "bitter bidder". Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

[56] I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

[57] There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the "Stalking Horse" bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the suggestion of "Sixth Avenue", to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

[58] I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

**Attorney**:
I believe, Mister Justice, that KSH and SIII have.....their satisfaction with the wording. I believe also that Dow Jones, who's present, .....their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

**The Court:**
Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

**Attorney:**
I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

**The Court:**
Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is **granted,** in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of "Sixth Avenue" is **dismissed** without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is **granted**, without costs.

ROBERT MONGEON, J.S.C.

Counsel and parties present: see attendance list annexed to the Procès-Verbal

Date of hearing: 24 September 2010

# TAB 9

*Case Name:*

# Nortel Networks Corp. (Re)

**RE:IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**
**AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants**
**APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended**

**[2009] O.J. No. 3169**

55 C.B.R. (5th) 229

2009 CanLII 39492

2009 CarswellOnt 4467

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

**G.B. Morawetz J.**

Heard: June 29, 2009.
Judgment: June 29, 2009.
Released: July 23, 2009.

(59 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Motion by applicants for approval of bidding procedure and Sale Agreement allowed -- Applicants had been granted CCAA protection and were involved in insolvency procedures in four other countries -- Bidding procedures set deadline for entry and involved auction -- Sale Agreement was for some of applicants' business units -- Neither proposal involved formal plan of compromise with creditors or vote, but CCAA was flexible and could be broadly interpreted to ensure objective of preserving business was met -- Proposal was warranted, beneficial and there was no viable alternative.*

Motion by the applicants for the approval of their proposed bidding process and Sale Agreement. The applicants had been granted CCAA protection and were involved in insolvency proceedings in four other countries. The Monitor approved of the proposal. The bidding process set a deadline for bids and involved an auction. The Sale Agreement was for some of the applicants' business units. The applicants argued the proposal was the best way to preserve jobs and company value. The purchaser was to assume both assets and liabilities. There was no formal plan for compromise with creditors or vote planned.

HELD: Motion allowed. The CCAA was flexible and could be broadly interpreted to ensure that its objectives of preserving the business were achieved. The proposal was warranted and beneficial and there was no viable alternative. A sealing order was also made with respect to Appendix B, which contained commercially sensitive documents.

**Statutes, Regulations and Rules Cited:**

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4)

**Counsel:**

Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al.

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor.

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF.

S. Philpott, for the Former Employees.

K. Zych, for Noteholders.

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund.

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors.

Arthur O. Jacques and Tom McRae, for Felske and Sylvain (de facto Continuing Employees' Committee).

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited.

A. Kauffman, for Export Development Canada.

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM.

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**ENDORSEMENT**

G.B. MORAWETZ J.:--

**INTRODUCTION**

**1** On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

**2** I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

**3** An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

**4** The following are my reasons for granting these orders.

**5** The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

**6** The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

**7** The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

**BACKGROUND**

**8** The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

**9** At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

**10** The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

**11** In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

**12** On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its

CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

**13** In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and
(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

**14** Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;
(b) full value cannot be realized by continuing to operate the Business through a restructuring; and
(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

**15** Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

**16** In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

**17** The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

**18** The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

**19** The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

**20** The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

**21** Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

**22** Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

**23** The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

**ISSUES AND DISCUSSION**

**24** The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

**25** The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

**26** Counsel to the Applicants submitted a detailed factum which covered both issues.

**27** Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

**28** The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

**29** The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.), at paras. 44, 61, leave to appeal refused, [2008] S.C.C.A. No. 337. ("ATB Financial").

**30** The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

**31** However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

**32** In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

**33** Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA

is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 165 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

**34** Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

**35** Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar Financial Services Ltd. v. Hardrock Paving Co.* (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

**36** In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ... we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

**37** Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

**38** Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees.

*Re PSINet Limited, supra*, at para. 3.

**39** In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

**40** I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

**41** Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) 1, (Alta. Q.B.) at para. 75.

**42** Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale ... be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

**43** In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

**44** I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

**45** The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership*, 2009 BCCA 319.

**46** At paragraphs 24-26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may

grant whenever an insolvent company wishes to undertake a "restructuring" ... Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged ...
26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary ...

**47** It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

**48** I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

**49** I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?
(b) will the sale benefit the whole "economic community"?
(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
(d) is there a better viable alternative?

I accept this submission.

**50** It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision

is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

**51** Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

(a) Nortel has been working diligently for many months on a plan to reorganize its business;
(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
(g) the value of the Business is likely to decline over time.

**52** The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

**53** Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

**DISPOSITION**

**54** The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

**55** Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

**56** I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

**57** Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

**58** In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

**59** Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that,

if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

G.B. MORAWETZ J.

cp/e/qllxr/qlpxm/qlltl/qlaxw/qlced

# TAB 10

*Case Name:*

# Brainhunter Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Brainhunter Inc., Brainhunter Canada Inc., Brainhunter (Ottawa) Inc., Protec Employment Services Ltd., Treklogic Inc., Applicants**

**[2009] O.J. No. 5578**

62 C.B.R. (5th) 41

2009 CarswellOnt 8207

Court File No. 09-8482-00CL

Ontario Superior Court of Justice
Commercial List

**G.B. Morawetz J.**

Heard: December 11, 2009.
Judgment: December 18, 2009.

(25 paras.)

*Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Motion by the debtors for an extension of the stay period, approval of the bid process and approval of the stalking horse plan of arrangement allowed -- Proposed purchaser under the stalking horse was an insider and a related party -- Applicants proposed to sell business as a going concern -- A sales transaction was warranted at this time and that the sale would be of benefit to the economic community -- No creditor opposed sale.*

Motion by the debtors for an extension of the stay period, approval of the bid process and approval of the stalking horse plan of arrangement. The applicants submitted that, absent the certainty that the applicants' business would continue as a going concern which was created by the stalking horse plan and the bid process, substantial damage would result to the applicants' business due to the potential loss of clients, contractors and employees. The proposed purchaser under the stalking horse was an insider and a related party. A Special Committee, the advisors, the key creditor groups and the Monitor all supported the applicants' process.

HELD: Motion allowed. The bid process and the stalking horse were approved. There was a distinction between the

approval of the sales process and the approval of a sale. The applicants established that a sales transaction was warranted at this time and that the sale would be of benefit to the economic community. No better alternative had been put forward. In addition, no creditor had come forward to object to a sale of the business. It was not appropriate or necessary for the court to substitute its business judgment for that of the applicants. The applicants were acting in good faith and with due diligence and the circumstances made the granting of an extension appropriate.

**Statutes, Regulations and Rules Cited:**

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

**Counsel:**

Jay Swartz and Jim Bunting, for the Applicants.

G. Moffat, for Deloitte & Touche Inc., Monitor.

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser.

Edmond Lamek, for the Toronto-Dominion Bank.

D. Dowdall, for Noteholders.

D. Ullmann, for Procom Consultants Group Inc.

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**ENDORSEMENT**

1 **G.B. MORAWETZ J.**:-- At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

2 The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

3 The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

4 The Monitor recommends that the motion be granted.

5 The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

6 Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

7 Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

8 The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

**9** Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

**10** The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

**11** It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

**12** Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

**13** The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp.* [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?
(b) Will the sale benefit the whole "economic community"?
(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
(d) Is there a better viable alternative?

**14** The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

**15** Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

**16** Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

**17** I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

**18** In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

**19** In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

**20** With respect to the possibility that the break fee may deter other bidders, this is a business point that has been

considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

**21** For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

**22** For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

**23** The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

**24** Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

**25** An order shall issue to give effect to the foregoing.

G.B. MORAWETZ J.

cp/e/qlrxg/qljxr/qlaxw/qlcas

# TAB 11

**CITATION:** Graceway Canada Company (Re), 2011 ONSC 6403
**COURT FILE NO.:** CV-11-9411CL
**DATE:** 20111027

**SUPERIOR COURT OF JUSTICE – ONTARIO**
**COMMERCIAL LIST**

**RE:** **IN THE MATTER OF THE RECEIVERSHIP OF GRACEWAY CANADA COMPANY, Applicant**

**AND IN THE MATTER OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED**

**BEFORE:** MORAWETZ J.

**COUNSEL:** Fred Myers, L. Joseph Latham and Caroline Descours, for the Applicant

J. Swartz, for RSM Richter Inc., Receiver

Mark Laugesen, for Galderma S.A., Stalking Horse Bidder

Jeffrey Levine, for the Bank of America

**HEARD & DETERMINED:** October 17, 2011

**REASONS RELEASED:** October 27, 2011

## ENDORSEMENT

[1] On October 17, 2011, the motion was granted with reasons to follow. These are the reasons.

[2] In a joint hearing held on October 17, 2011, the Bidding Procedures were approved by the U.S. Bankruptcy Court and by this court. In granting this relief, the Applicant and Receiver were authorized and directed to conduct the Sales Process and auction as contemplated in the Bidding Procedures. I also authorized and approved the Asset Purchase Agreement among Galderma S.A., as purchaser and the Applicant, Graceway Pharmaceuticals LLC, and its U.S. affiliates (collectively with Graceway Pharmaceutical LLC, the "U.S. Debtors"), as sellers, as the Stalking Horse Agreement for the purposes of conducting a Stalking Horse auction (the "Stalking Horse Process").

[3] In granting this relief, I took into consideration that prior to the Chapter 11 filing, the Applicant and the U.S. Debtors (collectively, "Graceway") pursued a range of options to address Graceway's concern about its ability to service its debt going forward. Further, Graceway had determined that the best way to maximize the value of its assets for the benefit of creditors was to seek a sale of substantially all of its assets pursuant to s. 363 of the *United States Bankruptcy Code*.

[4] I am satisfied that the Asset Purchase Agreement was negotiated at arm's length and that the purchase price payable represents a fair and reasonable price.

[5] An auction process will take place, followed by an application for court approval, both in this court and in the United States Bankruptcy Court.

[6] The Applicant is of the view that proceeding in this fashion will allow Graceway to continue operations with the least amount of disruption to its business operations, which will preserve the going concern value of the enterprise and maximize the potential recovery for creditors of both the Applicant and the U.S. Debtors. Graceway is of the view that it is in the best interests of its various estates, creditors and other stakeholders to move forward with the sales process as described in the motion record.

[7] I have been satisfied that it is appropriate to grant the requested relief. An order was signed in the form submitted approving the revised Bidding Procedures and the Asset Purchase Agreement.

[8] Finally, it is noted that the allocation of the purchase price between the Applicant and the U.S. Debtors is an outstanding issue. The Receiver, in its Report, advised that it is in discussions with the U.S. Debtors and its advisors in respect of this issue. It is expected that this issue will be resolved prior to the return of any motion to approve the sale of assets in question, which motion is currently scheduled for November 22, 2011.

MORAWETZ J.

**Date:** October 27, 2011

# TAB 12

Court File No.: 09-CL-7950

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | THURSDAY, THE 15th |
| | ) | |
| JUSTICE MORAWETZ | ) | DAY OF OCTOBER, 2009 |

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

**ORDER**
(GSM/GSM-R Bidding Procedures Order)

**THIS MOTION**, made by Nortel Networks Corporation, Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks Global Corporation and Nortel Networks International Corporation (collectively, the "Applicants") for the relief set out in the Applicants' notice of motion dated October 6, 2009 was heard this day at 393 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of George Riedel sworn October 6, 2009 (the "Riedel Affidavit"), the twenty-third report of Ernst & Young Inc. (the "Twenty-Third Report") in its capacity as monitor (the "Monitor"), and the supplemental twenty-third report of the Monitor, (the "Supplemental Twenty-Third Report") and on hearing submissions of counsel for the Applicants, the Monitor and those other parties present, no one appearing for any other person on

the service list, although served as appears from the Affidavit of Service of Katie Legree sworn October 6, 2009, filed.

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

2. **THIS COURT ORDERS** that the bidding procedures (the "Bidding Procedures") described in the Riedel Affidavit, the Twenty-Third Report and attached as Schedule "A" hereto are hereby approved and, subject to approval of the Bidding Procedures in substantially the same form by the United States Bankruptcy Court for the District of Delaware in the Chapter 11 Proceedings of the U.S. Debtors (each as defined in the Twenty-Third Report), the Applicants shall be authorized to conduct the bidding process contemplated therein.

3. **THIS COURT ORDERS** that in connection with the Bidding Procedures and pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Applicants shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the assets to be sold pursuant to the bidding process contemplated by the Bidding Procedures, but only to the extent desirable or required to negotiate and attempt to complete a sale (a "Sale") of the Applicants' GSM/GSM-R business (the "Business"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Applicants, or in the alternative destroy all such information. The purchaser of any assets associated with the Business shall be entitled to continue to use the personal information provided to it, and related to the Business, in a manner which is in all material respects identical to the prior use of such information by the Applicants, and shall return all other personal information to the Applicants, or ensure that all other personal information is destroyed.

4. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, the United Kingdom or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and

their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

5. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

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

OCT 16 2009

PER / PAR:

## SCHEDULE "A"

## BIDDING PROCEDURES

Set forth below are the bidding procedures (the "Bidding Procedures") to be employed with respect to the proposed sale of certain assets and assumption of certain liabilities (the "Sale") pertaining to the global GSM/GSM-R business of Nortel (as defined below).

On January 14, 2009 (the "Filing Date"), Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL") and certain of NNC's other Canadian affiliates (collectively, the "Canadian Debtors," and NNC and its debtor and non-debtor affiliates are sometimes referred to herein as "Nortel"), commenced creditor protection proceedings before the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court") under the Companies' Creditors Arrangement Act (Canada) (respectively, the "Canadian Proceedings" and "CCAA"), in connection with which Ernst & Young Inc. was appointed monitor (the "Monitor").

On the Filing Date and on July 14, 2009 (with respect to Nortel Networks (CALA) Inc.), Nortel Networks Inc. ("NNI") and certain of NNI's United States affiliates (collectively, the "US Debtors") filed petitions in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") under chapter 11 of title 11 of the United States Code (respectively, the "US Proceedings" and the "Bankruptcy Code").

On the Filing Date, Nortel Networks UK Limited ("NNUK"), Nortel Networks (Ireland) Limited ("NNIR"), Nortel Networks S.A. ("NNSA") and certain of NNUK's affiliates in the Europe, Middle East and Africa region (respectively, "EMEA Debtors" and "EMEA") commenced administration proceedings (the "UK Proceedings" and, together with the Canadian Proceedings and the US Proceedings, the "Proceedings") before the High Court of Justice in London, England (the "UK Court" and, together with the Canadian Court and the Bankruptcy Court, the "Courts"), and the UK Court appointed individuals from Ernst & Young LLP (the "UK Administrator"), and, in the case of NNIR only, Ernst & Young Chartered Accountants (the "NNIR Administrator"), as administrators in the UK Proceedings (the UK Administrator and the NNIR Administrator collectively, the "Administrators").

NNL, NNI and NNUK and certain of their affiliates (together, the "Sellers") have determined that: (A) the potential sale of the Assets (as defined below) contemplated by the Sale Motion (as defined below) should be subject to a competitive sale process as set forth herein and the supplement to these Bidding Procedures attached hereto as Schedule 1; (B) the eventual transfer of the U.S. Debtors' rights, title and interests in and to the Assets will be subject to approval by the Bankruptcy Court; (C) the eventual transfer of the rights, title and interests of the Canadian Debtors in and to the Assets will be subject to approval by the Canadian Court; and (D) the eventual transfer of the rights, title and interests of NNSA in and to the Assets will be subject to approval by the French Court (as defined in Schedule 1).

On September 30, 2009, the U.S. Debtors filed a Motion for Orders (I)(A) Authorizing and Approving the Bidding Procedures, (B) Approving the Notice Procedures, (C) Setting a Date

for the Sale Hearing, and (II) Authorizing and Approving the Sale of Certain Assets of Debtors' GSM/GSM-R Business (the "Sale Motion").

On [October 15], 2009 the Bankruptcy Court entered an Order approving, among other things, the Bidding Procedures set forth herein (the "Bidding Procedures Order").

On [October 6], 2009 the Canadian Debtors filed a motion with the Canadian Court seeking an order for approval of the Bidding Procedures set forth herein (the "Canadian Sales Process Order").

## Bidding Process

The Bidding Procedures set forth herein describe, among other things, the Assets available for sale, the manner in which prospective bidders may gain access to or continue to have access to due diligence materials concerning the Assets, the manner in which bidders and bids become Qualified Bidders (as defined below) and Qualified Bids (as defined below), respectively, the receipt and negotiation of bids received, the conduct of any subsequent Auction (as defined below), the ultimate selection of the Successful Bidder (as defined below), and the Bankruptcy Court's, the Canadian Court's and the French Court's and, if required, such other applicable courts' approval thereof (collectively, the "Bidding Process"). The Sellers intend to consult with, among others, the Official Committee of Unsecured Creditors in connection with the chapter 11 cases of Nortel Networks Inc., *et al.* (Case No. 09-10138) involving the U.S. Debtors (the "Committee"), the ad hoc group of bondholders holding claims against certain of the U.S. Debtors and certain of the Canadian Debtors (the "Bondholder Group"), Ernst & Young Inc., in its capacity as the Canadian Court-appointed monitor in connection with the proceedings under the CCAA, the Administrators in connection with the UK Proceedings, and their respective advisors throughout the Bidding Process. In the event that the Sellers and any party disagree as to the interpretation or application of these Bidding Procedures, the Bankruptcy Court and the Canadian Court will have jurisdiction to hear and resolve such dispute.[1]

## Assets To Be Sold

The Sellers are offering for sale certain of the Sellers' assets pertaining to the GSM/GSM-R business unit of Nortel (collectively, the "Transaction"), or, as set forth in the relevant sale agreements with respect to a Successful Bidder (as defined below), and related schedules and in an information memorandum made available by the Sellers to potential bidders that have executed a confidentiality agreement with the Sellers (the "Assets"). The Sellers will entertain bids to convey all or substantially all of the Assets to a single bidder or joint bids for all or substantially all of the Assets from a team of two or more bidders bidding jointly (each such bid, a "Joint Bid").

[1] For the avoidance of doubt, this Bidding Process shall not govern any disagreements among the Sellers.

Joint Bids

The Sellers recognize that certain Potential Bidders may desire to acquire only a portion of the Assets. The Sellers do **NOT** intend to entertain bids that seek to exclude a material portion of the Assets in any significant jurisdiction.[2] As mentioned above, the Sellers will entertain a Joint Bid for all or substantially all of the Assets from a team of two or more bidders bidding jointly. PLEASE NOTE, HOWEVER, THAT A POTENTIAL OR QUALIFIED BIDDER MAY CONTACT ANOTHER POTENTIAL OR QUALIFIED BIDDER IN CONNECTION WITH A JOINT BID ONLY UPON THE PRIOR WRITTEN CONSENT OF NNL, NNI AND NNUK, WHICH CONSENT SHALL BE GRANTED AFTER CONSULTATION WITH THE COMMITTEE, THE BONDHOLDER GROUP AND THE MONITOR. Any unauthorized contacts between one or more Potential Bidders or Qualified Bidders are hereby strictly prohibited and may result in disqualification from participation in the Bidding Process and any Auction that may occur.

Upon consummation of the Sale, the participants in a Joint Bid may decide to divide the Assets amongst themselves and operate each portion of the Assets on a stand-alone basis. In order to operate such stand-alone businesses, the ultimate buyers of the Assets may need to resolve certain interdependencies among the various Assets (the "Interdependencies"), including, without limitation, certain issues relating to the use of intellectual property or the provision of transition services by and between joint bidders. Please note that the Sellers do not intend to, and shall not, undertake any obligation to resolve any Interdependencies among the various Assets.

"As Is, Where Is"

The sale of the Assets will be on an "as is, where is" basis and without surviving representations or warranties of any kind, nature, or description by the Sellers, their agents, or estates. In addition, in the case of the EMEA Sellers (as defined below), the sale of whatever rights, title and interests that such EMEA Seller may have (if any) in and to the Assets will be on an "as-is" basis and will be without any representations or warranties. For the purposes of these Bidding Procedures, "EMEA Seller" means any Seller that is an EMEA Debtor or a wholly-owned subsidiary of an EMEA Debtor.

Free Of Any And All Claims And Interests

All of the rights, title and interests of the U.S. Debtors and the Canadian Debtors in and to the Assets, or any portion thereof, to be acquired will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options, and interests thereon and there against (collectively, the "Claims and Interests") as permitted by sections 105 (a), 363 and 365 of the Bankruptcy Code and the CCAA, such Claims and Interests to attach to the net proceeds of the sale of such Assets (without prejudice to any claims or causes of action regarding the priority, validity or enforceability thereof).

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[2] Without prejudice to the generality of this sentence, please note that the Sellers shall NOT entertain bids that exclude all or substantially all of the Assets that are located outside North America or vice versa.

Publication Notice

As soon as reasonably practicable after entry of the Bidding Procedures Order and the Canadian Bidding Procedures Order, but in any event no more than five (5) days after the entry of such orders, the Sellers shall publish notice of these Bidding Procedures, the time and place of the Auction (as defined below), if required, the time and place of the Sale Hearing (as defined below), and the objection deadline for the Sale Hearing in The Wall Street Journal (National Edition), The Globe & Mail (National Edition) and The Financial Times (International Edition) (such publication notice, the "Sale Notice").

Participation Requirements

Unless otherwise ordered by both the Bankruptcy Court and the Canadian Court and accepted by the Administrators, for cause shown or, as otherwise determined by the Sellers (in consultation with the Committee, the Bondholder Group and the Monitor), prior to the Bid Deadline (as defined below), in order to participate in the Bidding Process, each bidder (each such bidder, a "Potential Bidder") must deliver to the Notice Parties (as defined below) at the addresses provided below:

(a) an executed confidentiality agreement (to be delivered prior to the distribution of any confidential information by the Sellers to a Potential Bidder) in form and substance satisfactory to the Sellers, and which shall inure to the benefit of any purchaser of the Assets (in the event that the Potential Bidder has already entered into a confidentiality agreement with the Sellers, it must provide a statement agreeing that its obligations under such agreement shall inure to the benefit of any purchaser of the Assets and waiving any of its rights under such confidentiality agreement that are in conflict with the Bidding Procedures or that would otherwise prohibit disclosures regarding the Potential Bidder, or any Transaction it may enter into, to the Notice Parties (as defined below));

(b) current audited financial statements and latest unaudited financial statements of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring the Assets, current audited financial statements and latest unaudited financial statements of the equity holders or sponsors of the Potential Bidder who will guarantee the obligations of the Potential Bidder, or such other form of financial disclosure and credit-quality support or enhancement that will allow the Sellers and their respective financial advisors, in consultation with the Committee, the Bondholder Group and the Monitor, to make a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate the Transaction; and

(c) a preliminary (non-binding) written proposal regarding: (i) the purchase price range (including liabilities to be assumed by the Potential Bidder); (ii) any portion of the assets expected to be excluded; (iii) the structure (including, without limitation, in the case of each potential Joint Bid, the structure of such Joint Bid) and financing of the Transaction (including, but not limited to, the sources of financing for the purchase price and all requisite financial assurance); (iv) any anticipated corporate, stockholder, internal or regulatory approvals required to close the Transaction, the anticipated time frame and

any anticipated impediments for obtaining such approvals; (v) the proposed number of employees of the Sellers who will become employees of the Potential Bidder (save in jurisdictions where employees transfer by operation of law), and any proposed measures associated with the continued employment of all employees who will become employees of the Potential Bidder; and (vi) any conditions to closing that the Potential Bidder may wish to impose in addition to those set forth in the Purchase Agreements, where for the purposes of these Bidding Procedures, "Purchase Agreements" means the sale agreements and other ancillary agreements provided by the Sellers to each Potential Bidder for the proposed Sale. The Sellers shall provide such Purchase Agreements in consultation with the Committee, the Bondholder Group and the Monitor.

A Potential Bidder, or in the case of a Joint Bid, all of the Potential Bidders participating in such Joint Bid, which shall be collectively considered a single bidder, that delivers the documents described above, whose financial information and credit quality support or enhancement demonstrate to the Sellers' satisfaction the financial capability of the Potential Bidder to consummate the Transaction, and who has submitted a reasonably competitive and realistic non-binding proposal, as described above, and who has executed a confidentiality agreement, as described above, and that the Sellers determine in their reasonable business judgment, after consultation with their counsel and financial advisors, the Committee, the Bondholder Group and the Monitor, is likely (based on availability of financing, experience and other considerations) to be able to consummate the Transaction will be deemed a "Qualified Bidder". For the avoidance of any doubt, in the case of a proposed Joint Bid, the Potential Bidders participating in such Joint Bid shall together constitute a single Qualified Bidder.

As promptly as practicable after a Potential Bidder delivers all of the materials required above, the Sellers will determine, in consultation with the Committee, the Bondholder Group and the Monitor, and will notify the Potential Bidder, if such Potential Bidder either by itself or, in the case of a proposed Joint Bid, in conjunction with other bidders participating in such Joint Bid, is a Qualified Bidder. At the same time that the Sellers notify the Potential Bidder that it is a Qualified Bidder, the Sellers will allow the Qualified Bidder to begin or continue to conduct due diligence as provided in the following paragraph with respect to the Assets.

Due Diligence

The Sellers may in their reasonable business judgment, and subject to competitive and other business considerations, afford each Qualified Bidder and any person seeking to become a Qualified Bidder that has executed a confidentiality agreement (as described above) with the Sellers such due diligence access to materials and information relating to the Assets as the Sellers deem appropriate after consultation with the Committee, the Bondholder Group and the Monitor. Due diligence access may include management presentations as may be scheduled by the Sellers, access to electronic data rooms, on site inspections, and other matters which a Qualified Bidder or other person seeking to become a Qualified Bidder may reasonably request and as to which the Sellers, in their reasonable business judgment, may agree. The Sellers will designate an employee or other representative to coordinate all reasonable requests for additional information and due diligence access from such parties. The Sellers may, in their discretion, coordinate diligence efforts such that multiple parties have simultaneous access to due diligence materials and/or simultaneous attendance at management presentations or site inspections.

Neither the Sellers nor any of their affiliates (or any of their respective representatives) will be obligated to furnish any information relating to the Assets to any person other than to Qualified Bidders and any other person seeking to become a Qualified Bidder that has executed a confidentiality agreement with the Sellers. The Sellers make no representation or warranty as to the information to be provided through this due diligence process or otherwise, except to the extent set forth in the definitive sale agreements with any Successful Bidder executed and delivered by Sellers.

Bid Deadline

A Qualified Bidder that desires to make a bid must deliver written copies of its bid to the following parties (collectively, the "Notice Parties"): (i) Nortel Networks Limited and Nortel Networks Inc., c/o Nortel Networks Limited, Attn: Anna Ventresca, General Counsel, 195 The West Mall, Toronto, Ontario, Canada M9C 5K1, Facsimile: (905) 863-2075; (ii) U.S. Debtors' counsel: Cleary Gottlieb Steen & Hamilton LLP, Attn: James L. Bromley and Lisa M. Schweitzer, One Liberty Plaza, New York, New York 10006, Facsimile: (212) 225-3999; (iii) Canadian Debtors' counsel: Ogilvy Renault LLP, Attn: Derrick C. Tay and Jennifer Stam, Royal Bank Plaza, South Tower, Suite 3800, 200 Bay Street, Toronto, Ontario, Canada, Facsimile: (416) 216-3930; (iv) Sellers' financial advisors: Lazard Frères & Co., Attn: Frank A. (Terry) Savage, 30 Rockefeller Plaza, New York, NY 10020, Facsimile: (212) 332-1748; (v) counsel to the Committee: Akin Gump Strauss Hauer & Feld LLP, Attn: Fred S. Hodara, Stephen B. Kuhn, David H. Botter and Kenneth A. Davis, One Bryant Park, New York, New York 10036, Facsimile: (212) 872-1002; (vi) financial advisor to the Committee: Jefferies & Company, Inc., Attn: General Counsel, Investment Banking, 520 Madison Avenue, New York, New York, Facsimile: (212) 284-2280; (vii) counsel to the Bondholder Group: Milbank, Tweed, Hadley & McCloy, Attn: Roland Hlawaty, One Chase Manhattan Plaza, New York, New York, 10006, Facsimile: (212) 822-5735; (viii) the Monitor: Murray A. McDonald, Ernst & Young Inc., Ernst & Young Tower, 222 Bay Street, P. O. Box 251, Toronto, ON M5K 1J7 Canada, Facsimile: (416) 943-3300; (ix) the Administrators: Ernst & Young LLP, Attn: Stephen Harris, 1 More Place, London SE1 2AF, United Kingdom, Facsimile +44 20 7951 9002; and (x) counsel to the Administrators: Herbert Smith LLP, Attn: Stephen Gale, Exchange House, Primrose Street, London, EC2A 2HS, Facsimile: +44 20 7098 4878; so as to be received not later than November 5, 2009 at 12:00 pm (Eastern) by the Sellers (the "Bid Deadline"). The Sellers, after consultation with the Committee, the Bondholder Group and the Monitor, may extend the Bid Deadline once or successively, but they are not obligated to do so. If the Sellers extend the Bid Deadline, they will promptly notify all Qualified Bidders and the other Notice Parties of such extension.

Qualified Bid

A bid, including a Joint Bid, will be considered a Qualified Bid only if the bid is submitted by a Qualified Bidder, pursuant to the previous paragraph and complies with all of the following (a "Qualified Bid"):

(a) it states that the applicable Qualified Bidder offers to purchase all or substantially all of the Assets upon the terms and conditions substantially as set forth in the Purchase Agreements, including, without limitation, with respect to certainty and timing of closing, or pursuant to an alternative structure (including, without limitation, an offer conditioned upon confirmation of a plan of reorganization proposed by the U.S. Debtors either individually or in collaboration with such Qualified Bidder) or upon alternative terms and conditions that the Sellers determine, after consultation with the Committee, the Bondholders Committee and the Monitor, are no less favorable than the terms and conditions of the Purchase Agreements;

(b) it includes a letter stating that the Qualified Bidder's offer is irrevocable until the selection of the Successful Bidder and, if applicable, the Alternate Bidder (as defined below), provided that if such Qualified Bidder is selected as the Successful Bidder or the Alternate Bidder, its offer shall remain irrevocable until the earlier of (i) closing of the Sale to the Successful Bidder or the Alternate Bidder, and (ii) (x) with respect to the Successful Bidder only, 180 days from the entry of the Sale Order, and (y) with respect to the Alternate Bidder only, the Alternate Bid Expiration Date (as defined below);

(c) it includes duly authorized and executed purchase agreements, including the purchase price for the Assets expressed in U.S. Dollars (the "Purchase Price"), together with all exhibits and schedules thereto, including the French Offer (as such term is defined in Schedule 1 attached hereto) and, to the extent required by the terms and conditions of such bid, any ancillary agreements as described in the Purchase Agreements with all exhibits and schedules thereto (or term sheets that describe the material terms and provisions of such agreements), as well as copies of such materials marked to show those amendments and ancillary modifications to the Purchase Agreements ("Marked Agreements"), the French Offer (the "Marked French Offer") and such ancillary agreements (the "Marked Ancillary Agreements") and the proposed orders to approve the Sale by the Bankruptcy Court, the Canadian Court and any other applicable court(s) whose approval may be required, proposed by the Qualified Bidder;

(d) it includes written evidence of a firm, irrevocable commitment for financing, or other evidence of ability to consummate the proposed transaction, that will allow the Sellers, in consultation with the Committee, the Bondholder Group and the Monitor, to make a reasonable determination as to the Qualified Bidder's financial and other capabilities to consummate the transaction contemplated by the Marked Agreements, the Marked French Offer and the Marked Ancillary Agreements;

(e) it is not conditioned on (i) the outcome of unperformed due diligence by the Qualified Bidder (and includes an acknowledgement and representation that the

Qualified Bidder has had an opportunity to conduct any and all required due diligence regarding the Assets prior to making its offer); (ii) obtaining financing and (iii) in the case of a Joint Bid, the resolution of any Interdependencies among the various Assets or entry of a cooperation agreement or similar agreement among the various participants in the Joint Bid;

(f) it fully discloses the identity of each entity that will be bidding for the Assets or otherwise sponsoring or participating in connection with such bid, and the complete terms of any such participation;

(g) it includes an acknowledgment and representation that the Qualified Bidder will assume the Sellers' obligations under the executory contracts and unexpired leases proposed to be assigned pursuant to the Purchase Agreements (or identifies with particularity which of such contracts and leases of the US and Canada Debtors that the Qualified Bidder wishes not to assume, or alternatively which additional executory contracts or unexpired leases of the US and Canada Debtors that the Qualified Bidder wishes to assume), contains full details of the Qualified Bidder's proposal for the treatment of related cure costs; and it identifies with particularity any executory contract or unexpired lease the assumption and assignment of which is a condition to closing;

(h) it includes an acknowledgement and representation that the Qualified Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Assets in making its bid; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the Assets or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in the Marked Agreements, the Marked French Offer or the Marked Ancillary Agreements; and (iii) is not entitled to any expense reimbursement or break-up fee in connection with its bid;

(i) it includes evidence, in form and substance reasonably satisfactory to Sellers, of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the Marked Agreements, the Marked French Offer and Marked Ancillary Agreements;

(j) it is accompanied by a good faith deposit ("Good Faith Deposit") in the form of a wire transfer (to a bank account specified by the Sellers), certified check or such other form acceptable to the Sellers, payable to the order of the Sellers (or such other party as the Sellers may determine) in an amount equal to US$10 million to be dealt with as provided for under "Good Faith Deposit" herein;

(k) it (a) contains full details of the proposed number of employees of the Sellers, including, without limitation, NNSA (apportioned by jurisdiction(s)) who will become employees of the Qualified Bidder (save in jurisdictions where employees transfer by operation of law) and any proposed measures associated with the continued employment and associated with the employment of all employees who will become

employees of the Qualified Bidder, and (b) identifies any pension liabilities and assets related to any employees currently covered under any Nortel registered pension or retirement income plan who will become employees of the Qualified Bidder that the Qualified Bidder intends to assume or purchase;

(l) it includes evidence of the Qualified Bidder's ability to comply with Section 365 of the U.S. Bankruptcy Code (to the extent applicable), including providing adequate assurance of such Qualified Bidder's ability to perform in the future the contracts and leases proposed in its bid to be assumed by the Sellers and assigned or subleased to the Qualified Bidder, in a form that will permit the immediate dissemination of such evidence to the counterparties to such contracts and leases;

(m) it contains other information reasonably requested by the Sellers; and

(n) it is received by the Bid Deadline.

The Sellers will determine, in their reasonable business judgment, after consultation with the Committee, the Bondholder Group and the Monitor, whether to entertain bids for the Assets that do not conform to one or more of the requirements specified herein and deem such bids to be Qualified Bids.

The Sellers shall notify any Qualified Bidders in writing as to whether or not their bid constitutes a Qualified Bid promptly following the expiration of the Bid Deadline.

Evaluation of Competing Bids

A Qualified Bid will be valued based upon several factors including, without limitation, items such as the purchase price and the net value (including assumed liabilities and the other obligations to be performed or assumed by the bidder) provided by such bid, the claims likely to be created by such bid in relation to other bids, the counterparties to such Transaction, the proposed revisions to the relevant Transaction documents, the effect of the Transaction on the value of the ongoing businesses of the Sellers (including ongoing relationships with customers and suppliers), other factors affecting the speed, certainty and value of the Transaction (including any regulatory approvals required to close the Transaction), any assets excluded from the bid, the estimated number of in-scope employees of the Sellers (apportioned by jurisdiction(s)) to be offered post-closing employment by the Qualified Bidder (save in jurisdictions where employees transfer by operation of law) and any proposed measures associated with the continued employment of all employees who will become the employees of the Qualified Bidder, the transition services required from the Sellers post-closing and any related restructuring costs, and the likelihood and timing of consummating such transaction, each as determined by the Sellers, in consultation with their advisors, the Committee, the Bondholder Group and the Monitor. Following their review of the Qualified Bids and in consultation with their advisors, the Committee, the Bondholder Group and the Monitor, the Sellers reserve the right, in their sole discretion, to reject all Qualified Bids and/or withdraw from sale, in whole or in part, any Assets.

No Qualified Bids

If the Sellers do not receive any Qualified Bids, the Sellers reserve the right, in consultation with their advisors, the Committee, the Bondholder Group and the Monitor, to (i) extend the deadlines set forth in the Bidding Procedures without further notice, and (ii) withdraw from sale, in whole or in part, any Assets at any time and to make subsequent attempts to market the same.

Auction

If the Sellers receive two or more Qualified Bids, the Sellers will conduct an auction (the "Auction") of the Assets, which shall be transcribed or recorded on video to the extent required under Delaware local practice, at 9:30 a.m. on November 9, 2009, at the offices of Cleary Gottlieb Steen & Hamilton LLP located at One Liberty Plaza, New York, New York 10006 or such other location as shall be timely communicated to all entities entitled to attend the Auction, which Auction may be cancelled or adjourned without the prior written consent of any Qualified Bidder. Copies of all Qualified Bids shall be delivered to the Committee, the Bondholder Group, the Monitor and the Administrators at such time that such bid is deemed a Qualified Bid but no later than one (1) Business Day prior to the Auction. The Auction shall run in accordance with the following procedures:

(a) Only the Qualified Bidders that have timely submitted Qualified Bids, the Sellers, the Committee, the Bondholder Group, the Monitor and the Administrators (and the advisors to each of the foregoing), and any creditor of the North American Debtors shall attend the Auction in person (and the advisors to such Qualified Bidder), and only such Qualified Bidders will be entitled to make any subsequent bids at the Auction.

(b) Each Qualified Bidder shall be required to confirm that it has not engaged in any collusion with respect to the bidding or the Sale.

(c) At least one (1) Business Day prior to the Auction, each Qualified Bidder who has timely submitted a Qualified Bid must inform the Sellers whether it intends to attend the Auction, provided that in the event a Qualified Bidder elects not to attend the Auction, such Qualified Bidder's Qualified Bid shall nevertheless remain fully enforceable against such Qualified Bidder until (i) the date of the selection of the Successful Bidder at the conclusion of the Auction and (ii) if such bidder is selected as an Alternate Bidder (as defined below), the Alternate Bid Expiration Date. At least one (1) Business Day prior to the Auction, the Sellers will provide copies of the Qualified Bid which the Sellers believe, in their reasonable business judgment, after consultation with the Committee, the Bondholder Group and the Monitor, is the highest or otherwise best offer (the "Starting Bid") to all Qualified Bidders that have timely submitted Qualified Bids and have informed the Sellers of their intent to attend the Auction.

(d) All Qualified Bidders who have timely submitted Qualified Bids will be entitled to be present for all Subsequent Bids (as defined below) at the Auction with the understanding that the true identity of each Qualified Bidder at the Auction will be fully disclosed to all other Qualified Bidders at the Auction and that all material terms of each

Subsequent Bid will be fully disclosed to all other bidders throughout the entire Auction, provided that all Qualified Bidders wishing to attend the Auction must have at least one individual representative with authority to bind such Qualified Bidder attending the Auction in person.

(e) The Sellers, after consultation with their counsel and financial advisors, the Committee, the Bondholder Group and the Monitor, may employ and announce at the Auction additional procedural rules that are reasonable under the circumstances (e.g., the amount of time allotted to make Subsequent Bids) for conducting the Auction, provided that such rules are (i) not inconsistent with these Bidding Procedures, the Bankruptcy Code, or any order of the Bankruptcy Court, the Canadian Court or any other applicable court entered in connection herewith, and (ii) disclosed to each Qualified Bidder at the Auction.

(f) Bidding at the Auction will begin with the Starting Bid and continue, in one or more rounds of bidding, so long as during each round at least one subsequent bid is submitted by a Qualified Bidder that (i) improves upon such Qualified Bidder's immediately prior Qualified Bid (a "Subsequent Bid") and (ii) the Sellers determine, in consultation with their advisors, the Committee, the Bondholder Group and the Monitor that such Subsequent Bid is (A) for the first round, a higher or otherwise better offer than the Starting Bid, and (B) for subsequent rounds, a higher or otherwise better offer than the Leading Bid (as defined below). Each incremental bid at the Auction shall provide net value to the estate of at least US $3 million over the Starting Bid or the Leading Bid, as the case may be, provided that the Sellers, in consultation with the Committee, the Bondholder Group and the Monitor, shall retain the right to modify the increment requirements at the Auction, and provided, further that the Sellers in determining the net value of any incremental bid to the estate shall not be limited to evaluating the incremental dollar value of such bid and may consider other factors as identified in the "Selection of Successful Bid" section of these Bidding Procedures, including, without limitation, factors affecting speed and certainty of obtaining regulatory approvals required to close the Transaction. After the first round of bidding and between each subsequent round of bidding, the Sellers shall announce the bid (and the value of such bid(s)) that it believes to be the highest or otherwise better offer (the "Leading Bid"). A round of bidding will conclude after each participating Qualified Bidder has had the opportunity to submit a Subsequent Bid with full knowledge of the Leading Bid. Except as specifically set forth herein, for the purpose of evaluating the value of the consideration provided by Subsequent Bids, the Sellers will, at each round of bidding, give effect to any additional liabilities to be assumed by a Qualified Bidder and any additional costs which may be imposed on the Sellers.

Selection Of Successful Bid

Prior to the conclusion of the Auction, the Sellers, in consultation with their advisors, the Committee, the Bondholder Group and the Monitor will (a) review each Qualified Bid that is either the Leading Bid or submitted subsequent to and as an improvement to the submission of the Leading Bid on the basis of financial and contractual terms and the factors relevant to the sale process, including, among other things, the proposed revisions to the transaction documents,

the effect of the Sale on the value of the ongoing businesses of Sellers (including ongoing relationships with customers and suppliers), the counterparties to such transactions, the purchase price and the net value (including assumed liabilities and the other obligations to be performed or assumed by the bidder) provided by such bid, the claims likely to be created by such bid in relation to other bids, other factors affecting the speed, certainty and value of the Sale (including any regulatory approvals required to close the Transaction), any assets excluded from the bid, the estimated number of in-scope employees of the Sellers to be offered post-closing employment by the Qualified Bidder (save in jurisdictions where employees transfer by operation of law) and any proposed measures associated with the continued employment of all employees who will become employees of the Qualified Bidder, the transition services required from the Sellers post-closing and any related restructuring costs, and the likelihood and timing of consummating such transaction, each as determined by the Sellers, in consultation with their advisors, the Committee, the Bondholder Group and the Monitor; (b) identify the highest or otherwise best offer for the Assets received in accordance with the Bidding Procedures (such bid, the "Successful Bid" and the Qualified Bidder making such bid, collectively, the "Successful Bidder"); and (c) communicate to the Qualified Bidders the identity of the Successful Bidder, the Alternate Bidder (as defined below), if any, and the details of the Successful Bid and Alternate Bid (as defined below), if any. The determination of the Successful Bid and Alternate Bid by the Sellers, after consultation with the Committee, the Bondholder Group and the Monitor, at the conclusion of the Auction, shall be final subject to approval by the Bankruptcy Court and the Canadian Court.

The Sellers will sell the Assets to the Successful Bidder pursuant to the terms of the Successful Bid (or, under certain circumstances described herein, the Alternate Bidder) upon the approval of such Successful Bid by the Bankruptcy Court at the Sale Hearing, the approval by the Canadian Court and any required approvals of any other applicable court(s) with such Successful Bidder and approval and execution by the Administrators of the relevant Successful Bid transaction documents with such Successful Bidder (or, under certain circumstances described herein, the Alternate Bid transaction documents with the Alternate Bidder).

## Sale Hearing

The sale hearing to authorize certain of the Sellers to enter into agreements with respect to the Successful Bid (the "Sale Hearing") will be held, in respect of those Sellers that are U.S. Debtors, before the Honorable Judge Kevin Gross (or any substitute therefor) in the United States Bankruptcy Court for the District of Delaware, located in Wilmington, Delaware, on a date to be scheduled by the court and currently proposed as November 19, 2009 at 1 p.m. (Eastern), and, in respect of those Sellers that are Canadian Debtors, before the Honourable Mr. Justice Geoffrey B. Morawetz (or any substitute therefor) in the Ontario Superior Court of Justice, in Toronto, Ontario, on a date to be scheduled by the court and currently proposed as November 19, 2009 at 1 p.m. (Eastern), and in any other applicable court(s) whose approval is required, as soon as practicable following the date of the Sale Hearing (or, with respect to the Canadian Court, in a joint hearing with the Bankruptcy Court at the Sale Hearing). The Sale Hearing and any hearings of any other applicable court(s) to approve the entering into agreements with respect to the Successful Bid, may be adjourned or rescheduled by the Sellers without further notice by an announcement of the adjourned date at the Sale Hearing or, in the case of an adjournment of a relevant hearing of any other applicable court, at such hearing. If the

Sellers do not receive any Qualified Bids, the Sellers shall proceed as set forth in the "No Qualified Bids" section above. If the Sellers receive one or more Qualified Bid(s), then, at the Sale Hearing and at any other hearings of any other applicable court(s) to approve the entering into agreements with respect to the Successful Bid, the Sellers will seek approval of the Successful Bid, and, at the Sellers' election, the next highest or best Qualified Bid (the "Alternate Bid" and, such bidder, the "Alternate Bidder"). The Sellers' presentation to the Bankruptcy Court, the Canadian Court and any other applicable court(s) whose approval is legally required, of the Successful Bid, and, if applicable, the Alternate Bid will not constitute the Sellers' acceptance of either of such bids, which acceptance will only occur upon the latest approval of such bids to be delivered by the Bankruptcy Court at the Sale Hearing, the Canadian Court and any other applicable court(s) whose approval is legally required. Following approval of the Sale to the Successful Bidder, if the Successful Bidder fails to consummate the Sale for any reason, then the Alternate Bid will be deemed to be the Successful Bid and the Sellers will be authorized, but not directed, to effectuate a Sale to the Alternate Bidder subject to the terms of the Alternate Bid of such Alternate Bidder without further order of the Bankruptcy Court, the Canadian Court or any other court. The Alternate Bid shall remain open until 45 days from the conclusion of the Auction (the "Alternate Bid Expiration Date"). All Qualified Bids (other than the Successful Bid and the Alternate Bid) shall be deemed rejected by the Sellers on and as of the date of approval of the Successful Bid and the Alternate Bid by the Bankruptcy Court, the Canadian Court and any other applicable court(s) whose approval is required, as indicated above.

Good Faith Deposits

The Good Faith Deposit of any Alternate Bidder shall be retained by the Sellers until the Alternate Bid Expiration Date and returned to the Alternate Bidder within seven (7) days thereafter or, if the Alternate Bid becomes the Successful Bid, shall be applied to the purchase price to be paid by the Alternate Bidder in accordance with the terms of the Alternate Bid. The Good Faith Deposits of Qualified Bidders not selected as either the Successful Bidder or Alternate Bidder shall be returned to such bidders within five (5) Business Days of the date of the selection of the Successful Bidder and the Alternate Bidder. The Good Faith Deposit of the Successful Bidder will be applied in accordance with the terms of the Successful Bid.

Reservation Of Rights

The Sellers, after consultation with their advisors, the Committee, the Bondholder Group and the Monitor, and their respective advisors, (a) after each round of bidding at the Auction may determine which Qualified Bid, if any, is the highest or otherwise best offer and the value thereof; (b) may reject, at any time, any bid that is (i) inadequate or insufficient, (ii) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures, any orders of the Canadian Court or any other orders applicable to one or more Sellers, or the terms and conditions of the Sale, (iii) contrary to the best interests of the Sellers, their estates, and stakeholders as determined by the Sellers in consultation with the Committee, the Bondholder Group and the Monitor, or (iv) contrary to the statutory duties or legal obligations of the Administrators in relation to the exercise of their duties or functions as administrators of certain EMEA Sellers; (c) may impose additional terms and conditions and otherwise modify the Sale Procedures at any time; (d) withdraw from sale any Assets at any time and make subsequent attempts to market the same; and (e) reject all bids.

For the purposes of these Bidding Procedures and all matters relating to them, the Administrators are acting only as agents for and on behalf of the EMEA Sellers that are controlled by the Administrators pursuant to the UK Proceedings and without personal liability.

SCHEDULE 1
BIDDING PROCEDURES – FRENCH SUPPLEMENT

This document (the "French Supplement") supplements the Bidding Procedures to be employed with respect to the proposed sale of certain assets and assumption of certain liabilities pertaining to the global GSM/GSM-R business of Nortel.

Capitalized terms used but not defined herein have the meanings ascribed to them in the Bidding Procedures.

On May 28, 2009, at the request of the UK Administrator of NNSA and in accordance with Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the "EC Regulation"), the Commercial Court of Versailles, France, (the "French Court") ordered the commencement of secondary proceedings (the "Secondary Proceedings") in respect of NNSA. In accordance with the EC Regulation and applicable French laws, the Secondary Proceedings consist of liquidation proceedings during which NNSA continued to operate as a going concern for an initial three-month period and, in accordance with a judgment of the French Court of August 20, 2009, will continue to operate as a going concern for another three-month period, provided that this second three-month period has been further extended as a result of the suspension of the liquidation process under the Secondary Proceedings in accordance with a judgment of the French Court of October 1, 2009 rendered at the request of the U.K. Administrator. In accordance with the EC Regulation, the U.K. administration proceedings remain the main proceedings in respect of NNSA. However, a French administrator (the "French Administrator") has been appointed and is in charge of the day-to-day affairs and continuing business of NNSA and a French liquidator (the "French Liquidator") has also been appointed and is in charge of the sale process of the business of NNSA. The French Administrator and the French Liquidator will remain in place during the suspension of the Secondary Proceedings.

Publication Notice

The publication of the Sale Notice in The Wall Street Journal (National Edition), The Globe and Mail (National Edition) and The Financial Times (International Edition) contemplated by the "Publication Notice" section of the Bidding Procedures will be supplemented by the concurrent publication in each such newspapers of this French Supplement. In addition, the French Administrator and the French Liquidator will publish in Les Echos a French translation of the Sale Notice and of this French Supplement as soon as reasonably practicable after entry of orders by the Bankruptcy Court and the Canadian Court approving the Bidding Procedures, but in any event no more than fifteen (15) days after the entry of such orders.

Bid Deadline

In addition to the delivery of its bid to the Notice Parties, a Qualified Bidder that desires to make a bid will deliver written copies of its bid to (i) the French administrator: Me. Franck Michel, AJAssociés, 10 allée Pierrede Coubertin 78000 Versailles, France , Facsimile: +33 1 39 50 87 52; (ii) the French Liquidator: Me Cosme Rogeau, 26 avenue Hoche 78000 Versailles, France, Facsimile: +33 1 39 49 44 63; and (iii) counsel to the French Administrator and the French Liquidator: Foucaud, Tchekhoff, Pochet et Associés, Attn: Antoine Tchekhoff and Edouard Fabre, 1bis avenue Foch 75116 Paris, France, Facsimile: +33 1 45 00 08 19.

Notwithstanding the Bid Deadline applicable to the making of bids in accordance with the Bidding Procedures, the Successful Bidder will be expected to file with the French Court in accordance with applicable French laws shortly after the conclusion of the Auction and prior to the U.S. Sale Hearing an offer for the acquisition of NNSA's GSM/GSM-R assets and business (the "French Offer"). The Purchase Agreements among the Sellers and the Successful Bidder shall contain a commitment from the Successful Bidder(s) to that effect.

The French Court will determine in due course the deadline for the filing of the French Offer with the French Court. The French Administrator and the French Liquidator will announce such deadline by way of a publication in Les Echos in French and in The Financial Times (International Edition) in English. Such publications will supplement the announcement published by the French Administrator in French in Les Echos on September 4, 2009, and in English in the Financial Times on September 3, 2009.

Reservation Of Rights

The "Reservation of Rights" section of the Bidding Procedures is incorporated herein by reference.

For the purposes of this French Supplement and all matters relating to them, the French Administrator and the French Liquidator are acting solely as agents for and on behalf of NNSA and without personal liability.

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION**

Court File No: 09-CL-7950

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceeding commenced at Toronto

**ORDER**
**(GSM/GSM-R Bidding Procedures Order)**

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# TAB 13

# UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

# *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*

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**CONTENTS**

*Part One*

**UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY**

A/CN.9/433, paras. 46-49.
A/CN.9/435, paras. 123-124.

*Article 6. Public policy exception*

> Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

86. As the notion of public policy is grounded in national law and may differ from State to State, no uniform definition of that notion is attempted in article 6.

87. In some States the expression "public policy" may be given a broad meaning in that it might relate in principle to any mandatory rule of national law. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees; in those States, public policy would only be used to refuse the application of foreign law, or the recognition of a foreign judicial decision or arbitral award, when that would contravene those fundamental principles.

88. For the applicability of the public policy exception in the context of the Model Law it is important to note that a growing number of jurisdictions recognize a dichotomy between the notion of public policy as it applies to domestic affairs, as well as the notion of public policy as it is used in matters of international cooperation and the question of recognition of effects of foreign laws. It is especially in the latter situation that public policy is understood more restrictively than domestic public policy. This dichotomy reflects the realization that international cooperation would be unduly hampered if public policy would be understood in an extensive manner.

89. The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

*Discussion in UNCITRAL and in the Working Group*

A/52/17, paras. 170-173.
A/CN.9/419, para. 40.
A/CN.9/422, paras. 84-85.
A/CN.9/433, paras. 156-160.
A/CN.9/435, paras. 125-128.

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC. 1985, C.C-36, AS AMENDED AND IN THE MATTER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO**
**APPLICATION OF ALLIED SYSTEMS HOLDINGS, INC. UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

Court File No.: 12- CV-9757-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

**Proceeding commenced at Toronto, Ontario Canada**

# MOVING PARTY'S BOOK OF AUTHORITIES
**(Motion Returnable June 26, 2013)**

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