

**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**

**FACTUM OF THE APPLICANT
(Motion Returnable June 26, 2013)**

June 25, 2013

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PART I – NATURE OF THE MOTIONS

1. This factum is filed in support of two motions brought by Allied Systems Holdings, Inc. (“**Allied US**”, the “**Applicant**” or the “**Foreign Representative**”), in its capacity as foreign representative of Allied US, Allied Systems (Canada) Company (“**Allied Canada**”), Axis Canada Company (“**Axis Canada**”) and those other entities listed on Schedule “A” hereto (collectively, “**Allied**”, the “**Allied Group**” or the “**Chapter 11 Debtors**”) for Orders:
 - (a) recognizing an order (the “**Final Replacement DIP Financing Order**”) of the United States Bankruptcy Court for the District of Delaware (the “**US Court**”) which, amongst other things: (i) authorizes the Chapter 11 Debtors to (A) obtain post-petition secured replacement DIP financing and repay in full the existing DIP lending facility and (B) use cash collateral, (ii) grants super-priority liens and provides super-priority administrative expense status, (iii) grants adequate

protection to the pre-petition secured lenders and (iv) modifies the automatic stay in the Chapter 11 Cases;

- (b) discharging in full the Existing DIP Lenders' Charge in the manner set out in the DIP Replacement Affidavit (defined below);
- (c) granting the Replacement DIP Lenders' Charge and granting super-priority to the Replacement DIP Lenders' Charge in the manner set out in the Replacement DIP Affidavit;
- (d) amending the Supplemental Order to provide for the granting of the Replacement DIP Lenders' Charge and providing for priority of the Replacement DIP Lenders' Charge as provided in the draft order; and
- (e) recognizing an order ("**Bid Procedures Order**") of the US Court which, amongst other things: (i) approves certain bid procedures (the "**Bid Procedures**") for the assets and business of the Allied Group; (ii) approves the form and manner of notice of an auction for the assets and business of the Allied Group; (iii) schedules a hearing for approval of the sale(s) (the "**Sale(s)**") of assets in the event that an auction is conducted and sets objection and bidding deadlines with respect to such Sale(s); (iv) establishes procedures to determine cure amounts and deadlines for objections for certain contracts and leases to be assumed and assigned by the Chapter 11 Debtors; and (v) grants related relief.

2. The Final Replacement DIP Financing Order, amongst other things:

- (a) authorizes the Chapter 11 Debtors to (i) obtain post-petition secured replacement DIP financing and repay in full the existing DIP lending facility and (ii) use cash collateral;
- (b) grants super-priority liens and provides super-priority administrative expense status;
- (c) grants adequate protection to the pre-petition secured lenders; and
- (d) modifies the automatic stay in the Chapter 11 Cases.

3. The Bid Procedures Order, amongst other things:
 - (a) approves certain bid procedures (the “**Bid Procedures**”) for the assets and business of the Allied Group;
 - (b) approves the form and manner of notice of an auction for the assets and business of the Allied Group;
 - (c) schedules a hearing for approval of the sale(s) (the “**Sale(s)**”) of assets in the event that an auction is conducted and sets objection and bidding deadlines with respect to such Sale(s);
 - (d) establishes procedures to determine cure amounts and deadlines for objections for certain contracts and leases to be assumed and assigned by the Chapter 11 Debtors; and
 - (e) grants related relief.
4. All capitalized terms used herein and not otherwise defined below shall have the meanings given to them in the DIP Replacement Affidavit (defined below) or the Bid Procedures Affidavit (defined below).

PART II- THE FACTS

5. On June 10, 2012, the Chapter 11 Debtors filed involuntary and voluntary petitions with the US Court pursuant to Chapter 11 of title 11 of the United States Bankruptcy Code (the “**Chapter 11 Cases**”).

Affidavit of Scott Macaulay sworn May 28, 2013 pursuant to Bid Procedures Motion (“Bid Procedures Affidavit”) at para 7, Bid Procedures Motion Record, Tab 2.

6. The Chapter 11 Debtors commenced proceedings pursuant to Part IV of the CCAA pursuant to the Initial Recognition Order dated June 12, 2012 granted by this Court. In the orders granted by this Court thereafter (the “**Orders**”), *inter alia*: (a) the Chapter 11 Cases were recognized as a “foreign main proceeding” for the purposes of section 47 and 48 of the CCAA; (b) Allied US was appointed as the foreign representative of the Chapter 11 Debtors; (c) certain orders made in the US Court dated June 12, 2012 were

recognized; and (d) Duff & Phelps Canada Restructuring Inc. was appointed as the information officer (the “**Information Officer**”). The Orders also authorized the Chapter 11 Debtors to, amongst other things, obtain post-petition financing and use cash collateral on an interim, and later a final, basis.

Bid Procedures Affidavit, at para 8, Bid Procedures Motion Record, Tab 2.

PRIOR DIP FACILITY AND DIP LENDERS’ CHARGE

7. Following the filing of the Petitions, the Chapter 11 Debtors required post-petition financing in order to carry out their day-to-day operations and entered into a Senior Secured Super-Priority Debtor-In-Possession Credit and Guaranty Agreement (the “**Existing DIP Facility Agreement**”) with Yucaipa American Alliance Fund II, LLC, as agent for the lenders thereunder for super-priority secured loans in an aggregate principal amount not to exceed US \$20 million (which was later increased to US \$22 million) (the “**Existing DIP Facility**”).

Affidavit of Scott Macaulay sworn May 28, 2013 pursuant to Replacement DIP Motion (“DIP Replacement Affidavit”) at para 7, Replacement DIP Motion Record, Tab 2.

8. The term of the Existing DIP Facility is set to expire on June 30, 2013.

Supplemental Affidavit of Scott Macaulay sworn June 21, 2013, pursuant to the Motions for Recognition of Replacement DIP Facility and Bid Procedures (the “Supplemental Macaulay Affidavit”) at para 11.

THE US MOTIONS

9. On May 17, 2013, the Chapter 11 Debtors filed motions in support of a Replacement DIP Financing Order and a Bid Procedures Order (the “**US Motions**”) with a proposed stalking horse agreement, bid procedures and replacement DIP credit agreement. The Replacement DIP Facility was to be provided by Black Diamond Commercial Finance, L.L.C., BDCM Opportunity Fund III, L.P. and Spectrum Investment Partners, L.P. (“**BD/Spectrum**” or the “**DIP Lenders**”). Those motions were scheduled to be heard in the US Court on May 31, 2013.

Supplemental Macaulay Affidavit at para 7.

10. Due to objections filed in the US Court by, among others, Yucaipa and the Committee as well as concerns expressed by the US Court, the US Motions did not proceed on May 31, 2013. Instead, the Chapter 11 Debtors worked with other parties to see if a consensual resolution could be reached. The Chapter 11 Debtors ultimately reached agreement with BD/Spectrum for financing (the “**Replacement DIP Financing**”) on the terms of a revised replacement DIP agreement (the “**Modified Replacement DIP Agreement**”) as well as modified bid procedures (the “**Modified Bid Procedures**”), which terms were supported by the Committee.

Supplemental Macaulay Affidavit at paras. 9-10.

Affidavit of Tanya Rocca sworn June 21, 2013, pursuant to the Motions for Recognition of Replacement DIP Facility and Bid Procedures (“Rocca Affidavit”) at Exhibits B and C.

*The Modified Replacement DIP Facility*¹

11. Pursuant to the Modified Replacement DIP Agreement, the DIP Lenders will provide a replacement facility with commitments in the aggregate amount of \$33.5 million with a maturity date of December 31, 2013. The facility provided for under the Modified Replacement DIP Agreement is proposed to replace the Existing DIP Facility on the terms set out in the Modified Replacement DIP Agreement and provides the Chapter 11 Debtors with sufficient funds to repay the Existing DIP Facility as well as provide additional liquidity of \$11 million, which the Chapter 11 Debtors require in order to continue their restructuring and sale efforts. In connection with the negotiations that took place starting on May 31, 2013, the new DIP Lenders agreed to a number improvements on the proposed Modified Replacement DIP Agreement including as follows:²
- (a) the Petitioning Creditors, in their capacity as the lenders under the Modified Replacement DIP Agreement (the “**DIP Lenders**”, as applicable), have agreed to fund a “naked auction” employing the Modified Bid Procedures;

¹ Capitalized terms used in paragraph 11 shall have the meanings given to them in the Modified Replacement DIP Agreement.

² In the event that there is any conflict or inconsistency between the provisions contained under this paragraph and the provisions contained in the Modified Replacement DIP Agreement, then the provisions of the Modified Replacement DIP Agreement shall prevail.

- (b) the budget for the Committee's litigation fees and expenses in connection with the Yucaipa Adversary Proceeding will be increased from \$1,500,000 to \$1,850,000;
- (c) the Committee shall not be required to obtain the DIP Lenders' consent to settlement of any claim or cause of action in the Yucaipa Adversary Proceeding, subject to compliance with the Order of the US Court (i) Granting Motion of the Official Committee of Unsecured Creditors for Standing to Prosecute Certain Claims of the Chapter 11 Debtors' Estates, (ii) Granting Motion of Petitioning Creditors for Leave to Intervene, and (iii) Granting Related Relief;
- (d) interest spread on Base Rate Loans shall be reduced from 9.00% to 7.50%, and the spread on Eurodollar Rate Loans shall be reduced from 10.00% to 8.50%;
- (e) the Unused Line Fee will be reduced from 1.5% to .75%;
- (f) the Exit Fee will be reduced from 1.50% to 1.00%; and
- (g) the DIP Lenders will not take liens on Avoidance Actions, provided that Avoidance Actions (and the proceeds thereof) shall be pledged to the prepetition secured lenders as adequate protection against any diminution in value of their collateral.

Supplemental Macaulay Affidavit at paras 13-14.

*The Modified Bid Procedures*³

- 12. The proposed bid and auction process contemplate a "naked auction" based on the terms of the Modified Bid Procedures.

Supplemental Macaulay Affidavit at para 15.

- 13. A summary of certain of the key terms and dates set out in the Modified Bid Procedures is as follows:⁴

³ Capitalized terms used in these paragraphs 12-13 shall have the meanings given to them in the Modified Bid Procedures.

- (a) The Chapter 11 Debtors will file the form of asset purchase agreement with the US Court to be used by Qualified Bidders no later than July 1, 2013;
- (b) the definition of Consultation Parties includes each of the following: (i) the Committee, (ii) the Petitioning Creditors, (iii) Yucaipa, and (iv) the agent under any debtor in possession financing facility then in effect, provided, however, that any party submitting a Qualified Bid (or directly or indirectly participating in any Qualified Bid) would cease to be a Consultation Party;
- (c) all Qualified Bids must meet the criteria set out in the Modified Bid Procedures and include cash in an amount sufficient to satisfy in full the Chapter 11 Debtors' obligations under their debtor-in-possession financing facility and fully fund the Chapter 11 Debtors' post-closing wind-down budget, and provide for the assumption of Assumed Liabilities;
- (d) Prepetition First Lien Agents, at the direction of Requisite Lenders (as defined in the Prepetition First Lien Loan Agreement) will be a Qualified Bidder and entitled to submit a credit bid at or prior to the Auction (so long as such Qualified Bid otherwise complies with the requirements set forth in the Revised Bid Procedures). For the purposes of the Modified Bid Procedures, Requisite Lenders will be determined by either (i) the Bankruptcy Court at or prior to the Sale Hearing or (ii) with the agreement of the Petitioning Creditors and Yucaipa;
- (e) no individual Prepetition First Lien Lender shall be entitled to credit bid any Obligations held by it under the Prepetition First Lien Credit Agreement;
- (f) in determining the Successful Bidder, the Chapter 11 Debtors (in consultation with the Consultation Parties) shall take into account all relevant factors including, without limitation, the amount of consideration, the assumed liabilities, and the executory contracts to be assumed (including any collective bargaining agreements);

⁴ In the event that there is any conflict or inconsistency between the provisions contained under this paragraph and the provisions contained in the Modified Bid Procedures, then the provisions of the Modified Bid Procedures shall prevail.

- (g) to the extent a Qualified Bidder includes non-cash consideration as part of its Written Offer, such as the waiver of any right to receive a distribution on account of an allowed claim, then no later than seven (7) business days before the Bid Deadline, such Qualified Bidder must: (a) identify the form or forms of non-cash consideration that the Qualified Bidder included in any Written Offer, or that may be included in any subsequent Qualified Bid, (b) provide the Chapter 11 Debtors and the Consultation Parties with the Qualified Bidder's methodology for valuing the non-cash consideration and all supporting documentation to allow the Chapter 11 Debtors and the Consultation Parties to independently confirm that value of the form or forms of non-cash consideration so identified and such additional information requested by the Chapter 11 Debtors or any Consultation Party within two (2) Business Days after such request, and (c) provide detailed term sheets with respect to the material terms of any such non-cash consideration;
- (h) a Qualified Bidder must obtain consent of certain parties (as set forth in further detail in the Modified Bid Procedures) in order for a Written Offer that includes non-cash consideration to constitute a Qualified Bid;
- (i) the Bid Deadline shall be **12:00 p.m. (noon) (Prevailing Eastern Time) on August 8, 2013;**
- (j) the Auction shall be held on **August 14, 2013 at 10:00 a.m. (noon) (Prevailing Eastern Time);** and
- (k) the Sale Hearing will be held on **August 22, 2013 at 2 p.m. (Prevailing Eastern Time).**

Supplemental Macaulay Affidavit at para 16.

THE US HEARING

14. On June 13, 2013, the Chapter 11 Debtors filed with the US Court a Notice of Failing Modified DIP Agreement and Bid Procedures and Hearing Thereon ("**Notice of Filing**"). Subsequent to the Notice of Filing, Yucaipa filed an objection seeking to have the US Motions postponed to June 21, 2013. Judge Sontchi denied that request and confirmed

the hearing date for the US Motions would be June 19, 2013. Yucaipa filed a supplemental objection to the US Motions on June 18, 2013.

15. The US Motions were heard in the US Court on Wednesday, June 19, 2013. Yucaipa objected to the US Motions and proposed their own replacement DIP and bid procedures. Justice Sontchi agreed with the proposal put forth by the Chapter 11 Debtors, BD/Spectrum and the Committee and approved the Chapter 11 Debtors' Motions. On Friday, June 21, 2013, the US Court approved the Final Replacement DIP Financing Order and the Bid Procedures Order as submitted by the Chapter 11 Debtors.⁵

Supplemental Macaulay Affidavit at paras 17 and 18.

RECOGNITION IN CANADA

16. The Chapter 11 Debtors propose that the Final Replacement DIP Financing Order and the Bid Procedures Order be recognized in Canada. The Chapter 11 Debtors have been in bankruptcy proceedings for over a year. Allied continues to lose material customers, vendors and employees, and its financial and operational performance continues to suffer as a result of remaining in bankruptcy proceedings.
17. The term of the Existing DIP Credit Agreement will expire on June 30, 2013 and a new arrangement needs to be put in place immediately to address its expiration as well as the Chapter 11 Debtors' additional liquidity needs. The Modified Replacement DIP Agreement and Modified Bid Procedures are a result of a number of arm's length negotiations and are agreed to by the Chapter 11 Debtors and BD/Spectrum and have the support of the Committee. Recognition of the Final Replacement DIP Financing Order will provide the Chapter 11 Debtors with the working capital and time necessary to consummate the sale of all or substantially all of their assets.

Supplemental Macaulay Affidavit at paras 19-20.

PART III – THE ISSUES

18. The issues to be determined on this motion are:

⁵ The Orders were submitted noting outstanding objections from Yucaipa. The US Court signed the Orders submitted with a few changes from the Court.

- (a) Whether this Court possesses jurisdiction to recognize and give full force and effect to the US Orders?
- (b) Whether this Court should (i) recognize the Final Replacement DIP Financing Order and (ii) grant the Replacement DIP Lenders' Charge?
- (c) Whether this Court should recognize and give full force and effect to the Bid Procedures Order?

PART IV- THE LAW

(a) THE COURT HAS THE JURISDICTION TO GRANT THE RELIEF SOUGHT

19. Sections 49 and 50 of the CCAA provide this Court with the jurisdiction to recognize and give full force and effect to the US Orders in the context of an application for recognition of a foreign proceeding.

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.

...

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

As indicated above, this Court has recognised the Chapter 11 Cases as a "foreign main proceeding" pursuant to sections 47 and 48 of the CCAA.

Companies' Creditors Arrangement Act, RSC 1985, c C-36, ("CCAA"), ss. 49, 50.

Massachusetts Elephant & Castle Group, Inc, (Re), 2011 ONSC 4201 at para 38, (available on CanLII), (SCJ [Commercial List]) Morawetz J, Applicant's Brief of Authorities ("BOA"), Tab 1.

Initial Recognition Order of Justice Morawetz made on June 12, 2012 at para 3, BOA, Tab 2.

20. In Part IV cases, where an order recognizing a foreign proceeding is made, the CCAA permits the court to make any order that it considers appropriate if the court is satisfied that the order is necessary for the protection of the debtor company's property or the interests of a creditor or creditors. An order under Part IV may be made on any terms

and conditions that the court considers appropriate in the circumstances. Section 61 of the CCAA provides that the court may apply legal or equitable rules and may consider public policy when deciding whether foreign insolvency orders should be recognized.

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.

CCAA, ss 49, 50, 61.

21. The public policy exception is “intended to be invoked only under exceptional circumstances concerning matters of fundamental importance”. According to US caselaw, nothing more than a fair and impartial proceeding is required by §1506 or any other law.

UNCITRAL Model Law on Cross-Border Insolvency, at Article 6, BOA Tab 13.

In re Muscletech Research and Development Inc., et al., (No. 06 Civ 538 (JSR) at para 45; and *In re RSM Richter Inc., as Foreign Representative of Muscletech Research and Development Inc. and its Subsidiaries* (No. 06 Civ 539 (JSR), United States District Court, S.D. New York, BOA, Tab 3 [“*Muscletech*”]).

22. This Court has held, in agreement with the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, that the public policy exception is to be interpreted restrictively.

Hartford Computer Hardware, Inc (Re), 2012 ONSC 964 at paras 16-18, (available on CanLII), (SCJ [Commercial List]) Morawetz J, BOA, Tab 4.

The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, at paras 86-89, BOA Tab 13.

23. US cases since *Muscletech* evidence the limited application of the public policy exception. The 2012 *Ashapura Minechem Ltd.* case held that “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”.⁶

In Re Ashapura Minechem Ltd., 12 Civ. 257 (SAS) at paras 14-15, United States District Court, S.D. New York, BOA, Tab 5.

24. Based on the foregoing, it is clear that (i) this Court has the jurisdiction and authority to hear these motions and grant the relief sought; and (ii) there is no basis for the public policy exception.

(b) IT IS APPROPRIATE TO RECOGNIZE THE FINAL REPLACEMENT DIP FINANCING ORDER AND GRANT THE REPLACEMENT DIP LENDERS’ CHARGE

25. The US Court has heard a full contested motion on and has, having considered those objections, approved the Replacement DIP Facility as well as the Replacement DIP Postpetition Liens charging the Chapter 11 Debtors’ assets, including collateral located in Canada. The Applicant is seeking recognition of the Final Replacement DIP Financing Order as well as an order granting the Replacement DIP Lenders’ Charge charging the collateral located in Canada of the Chapter 11 Debtors (the “**Canadian Collateral**”).

Supplemental Macaulay Affidavit at para 18.

26. Section 11.2 of the CCAA provides the court with express jurisdiction to grant a debtor-in-possession financing charge:

11.2 (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.

Priority — secured creditors

⁶The two cases being: *In re Gold & Honey, Ltd.*, 410 B.R. at 368 (the Bankruptcy Court decision being appealed noted the case was 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”) and *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).

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority – other orders

(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.

27. Section 11.2(4) sets out the factors to be considered by the court in determining whether to grant a DIP Charge:

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) 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.

28. The court is to have particular regard to the following factors in determining whether the criteria in section 11.2(1) has been met:

(a) whether notice has been given to secured creditors likely to be affected by the security charge or charge;

- (b) whether the amount to be granted under the DIP Facility is appropriate and required having regard to the debtor's cash-flow statement; and
- (c) whether the DIP Charge secures an obligation that existed before the order was made (which it should not).

***Canwest Global Communications Corp (Re)*, [2009] OJ No 4286 (QL) at paras 32-34 (SCJ [Commercial List]) Pepall J, BOA, Tab 6.**

- 29. In determining whether to grant a DIP Charge to the DIP lender, this Court has emphasized that such a charge, in light of all other circumstances, furthers the objectives of the CCAA and is commercially reasonable as it allows an insolvent company to continue operations. Not granting a DIP Charge and allowing a company to fall into bankruptcy proceedings would not only defeat the underlying purpose of the CCAA, but would also prejudice stakeholders.

***Timminco Limited (Re)*, 2012 ONSC 506 at paras 46-49 (available on CanLII) (SCJ [Commercial List]) Morawetz J, BOA, Tab 7.**

- 30. The Applicant submits that similar considerations should be given where a DIP Charge is being sought within a proceeding commenced under Part IV of the CCAA or, in this particular case, a Replacement DIP Lenders' Charge.
- 31. This Court recognized and approved the Existing DIP Facility and granted the Existing DIP Lenders' Charge pursuant to the Existing Canadian DIP Orders and as such, has already recognized its jurisdiction to recognize the Replacement DIP Financing and grant the Replacement DIP Lenders' Charge.
- 32. Imminent access to the Replacement DIP Financing is essential to the continued operation of the Allied Group. The additional liquidity provided by the Replacement DIP Financing is needed in order to allow the Chapter 11 Debtors to carry out its intended sales process. The Canadian Companies receive a direct benefit from the continued operation of the U.S. Companies, which can continue only with the Replacement DIP Financing. It is a condition of the Replacement DIP Financing that this Court grant an order recognizing the Final Replacement DIP Financing Order in Canada and granting the Replacement DIP Lenders' Charge. The Replacement DIP Lenders' Charge is reasonable in the circumstances.

33. Applicable notice of the proposed Replacement DIP Financing has been provided.

DIP Replacement Affidavit at paras 17-19 and Rocca Affidavit at Exhibit A.

(c) IT IS APPROPRIATE TO RECOGNIZE THE BID PROCEDURES ORDER

34. The Applicant is seeking recognition from this Court of the Bid Procedures Order granted by the US Court, which approves, among other things, Bid Procedures and Cure Procedures.

Canadian Courts have Recognized US Orders for Auction Bidding Processes in other Part IV Proceedings

35. Canadian Courts have recognized the use of auction bidding processes, including by way of a “naked auction”, as a reasonable and useful sales process. Further, in cases where the US orders were consistent with the provisions in the CCAA and where no public policy issues were raised, Canadian Courts have recognized US orders made in Chapter 11 proceedings approving auction processes.

Hartford Computer Hardware, Inc (Re), 2012 ONSC 964 at para 19, (available on CanLII), (SCJ [Commercial List]) Morawetz J, BOA, Tab 4.

White Birch Paper Holding Company, 2010 QCCS 4915 at paras 3, 5-7, 11, (available on CanLII), (QSC [Commercial Division]) Mongeon J, BOA, Tab 8.

Nortel Networks Corp (Re), [2009] OJ No 3169 (QL) at para 2, (SCJ [Commercial List]), Morawetz J, BOA, Tab 9.

Bidding Procedures Order of Justice Morawetz made on October 15, 2009, Nortel Network Corporation et al. Court File Number 09-CL-7950, BOA, Tab 12.

The Proposed Sale Process is not contrary to the CCAA

36. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors’ assets in the absence of a plan and sets out certain factors to be considered on such a sale. However, the CCAA does not directly assess the factors a court should consider when deciding to approve a sale process. The four factors that the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process were set out in *Re Nortel Networks Corp.* as follows:

- (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?

Section 36 of the CCAA should also be considered indirectly when applying the Nortel Criteria.

Nortel Networks Corp (Re), [2009] OJ No 3169 (QL) at para 49, (SCJ [Commercial List]), Morawetz J, BOA, Tab 9.

Brainhunter Inc (Re), [2009] OJ No 5578 (QL) at paras 15-16, (SCJ [Commercial List]), Morawetz J, BOA, Tab 10.

The Proposed Contract Assignment Process is not contrary to the CCAA

37. The CCAA allows the court to make orders assigning rights and obligations. Factors to be considered in deciding whether to make the order requested include, but are not limited to:
- (a) whether the monitor approved the proposed assignment;
 - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
 - (c) whether it would be appropriate to assign the rights and obligations to that person.

CCAA, s 11.3

APPLICABILITY TO THE CURRENT CASE

The Proposed Sale Process is Warranted at this Time

38. It is imperative that the Chapter 11 Debtors move forward with the Bid Procedures at this time in order to optimize the prospects of securing the best price for the assets. The timeframe proposed for the submission of qualifying bids and the conduct of the auction is reasonable. The Bid Procedures were developed consistent with the Chapter 11 Debtors’ need to expedite the sale process, but with the objective of promoting active bidding that will result in the highest or best offer for the Purchased Assets.

Additionally, it is a condition of the Replacement DIP Financing that this Court grant an order recognizing the Bid Procedures Order in Canada.

The Sales Process is the Best and Most Viable Option

39. A quick sales process is required. The Modified Bid Procedures are likely to result in a fair, transparent, and commercially efficient process in the circumstances. In the circumstances, the Sale Process is the most viable process to maximize value for the benefit of stakeholders.

The Proposed Contract Assignment Process is Appropriate

40. A mechanism to address whether the party assuming the contracts would be able to perform the obligations under the Assumed and Assigned Contracts is provided for in the sales process. The proposed process for assignment of contracts will apply equally to the US and Canadian contracts. Canadian contract counterparties are not disadvantaged, nor is the proposed process contrary to the CCAA or in violation of public policy.

Bid Procedures Affidavit at paras 41, 50, Bid Procedures Motion Record, Tab 2.

CONCLUSION

41. The approval of the sale of assets will be the subject of a future motion to this Court, which approach is consistent with the practice of this Court.

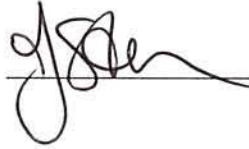
Re Graceway Canada Co, 2011 ONSC 6403 at para 5 (available on CanLII) (SCJ [Commercial List]), Morawetz J, BOA, Tab 11.

42. In these circumstances, it is appropriate that this Court recognize and give full force and effect to the US Orders. There are no provisions in the US Orders that would be inconsistent with the provisions of the CCAA or that would raise public policy exceptions referenced in section 61 of the CCAA.

PART V – RELIEF REQUESTED

43. The Applicant requests that this Honourable Court grant the Order Recognizing the US Bid Procedures Order and the Final Replacement DIP Financing Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June, 2013.



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TO: THE ATTACHED SERVICE LISTS

**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
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**ONTARIO
SUPERIOR COURT OF JUSTICE
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**ONTARIO
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SCHEDULE A – APPLICANTS

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 – LIST OF AUTHORITIES

1. *Massachusetts Elephant & Castle Group, Inc (Re)*, 2011 ONSC 4201.
2. Initial Recognition Order of Justice Morawetz made on June 12, 2012.
3. *In re Muscletech Research and Development Inc., et al.*, (No. 06 Civ 538 (JSR); and *In re RSM Richter Inc., as Foreign Representative of Muscletech Research and Development Inc. and its Subsidiaries* (No. 06 Civ 539 (JSR), United States District Court, S.D. New York.
4. *Hartford Computer Hardware Inc (Re)*, 2012 ONSC 964.
5. *In Re Ashapura Minechem Ltd.*, 12 Civ. 257 (SAS), United States District Court, S.D. New York.
6. *Canwest Global Communications Corp (Re)*, [2009] OJ No 4286.
7. *Timminco Limited (Re)*, 2012 ONSC 506.
8. *White Birch Paper Holding Company*, 2010 QCCS 4915.
9. *Nortel Networks Corp (Re)*, [2009] OJ No 3169.
10. *Brainhunter Inc (Re)*, [2009] OJ No 5578.
11. *Re Graceway Canada Co*, 2011 ONSC 6403.
12. Bidding Procedures Order of Justice Morawetz made on October 15, 2009 in the case of Nortel Networks.
13. Article 6 of the UNCITRAL Model Law on Cross-Border Insolvency and The Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency.

SCHEDULE C – STATUTES

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

Interim financing

11.2 (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.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(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.

Factors to be considered

- (4) In deciding whether to make an order, the court is to consider, among other things,
- (a) 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.

Assignment of agreements

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

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

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

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

...

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

(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.

Related persons

(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).

Assets may be disposed of free and clear

(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.

Restriction — employers

(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.

...

Order recognizing foreign proceeding

47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

Nature of foreign proceeding to be specified

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Order relating to recognition of a foreign main proceeding

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.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

When subsection (1) does not apply

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

Application of this and other Acts

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Other orders

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.

Restriction

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

Application of this and other Acts

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of the debtor company.

Terms and conditions of orders

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

...

Court not prevented from applying certain rules

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.

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

**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**

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

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

Proceeding commenced at Toronto, Ontario Canada

**FACTUM OF THE APPLICANT
(Motion Returnable June 26, 2013)**

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