DUFF & PHELPS

# Fifth Report to Court of Duff & Phelps Canada Restructuring Inc. as Information Officer of Allied Systems Holdings, Inc., Allied Systems (Canada) Company, Axis Canada Company and those other companies listed on Schedule “A” hereto

April 11, 2013

DUFF & PHELPS

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**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**

**FIFTH REPORT OF DUFF & PHELPS CANADA RESTRUCTURING INC.**
**AS INFORMATION OFFICER OF**
**ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES**
**LISTED ON SCHEDULE "A" HERETO**

**APRIL 11, 2013**

## 1.0 Introduction

1. On May 17, 2012, involuntary petitions were filed by BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P. ("Black Diamond/Spectrum") against Allied Systems Holdings, Inc. ("Allied Systems US") and its subsidiary, Allied Systems, Ltd. (L.P.) ("ASL") pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11") ("Involuntary Petitions") in the United States Bankruptcy Court for the District of Delaware ("U.S. Court").

2. On June 10, 2012, voluntary petitions were filed with the U.S. Court for relief under Chapter 11 by the US and Canadian subsidiaries of Allied Systems US ("Subsidiaries")[1] (Allied Systems US, ASL and the Subsidiaries

[1] The U.S. subsidiaries are: Allied Automotive Group, Inc.; Allied Freight Broker LLC; Axis Areta, LLC; Axis Group, Inc.; Commercial Carriers, Inc.; CT Services, Inc.; Cordin Transport LLC; F.J. Boutell Driveaway LLC; GACS Incorporated; Logistic Systems, LLC; Logistic Technology, LLC; QAT, Inc.; RMX LLC; Transport Support LLC; and Terminal Services LLC. The Canadian subsidiaries are Allied Systems (Canada) Company and Axis Canada Company.

are collectively referred to as the "Chapter 11 Debtors" or "Allied Group"), including Allied Systems (Canada) Company ("Allied Canada") and Axis Canada Company ("Axis Canada") (jointly, the "Canadian Debtors"). In connection therewith, Allied Systems US and ASL consented to the Involuntary Petitions. The cases commenced or consented to by the Chapter 11 Debtors in the U.S. Court are herein defined as the "Chapter 11 Proceedings".

3. The Chapter 11 Debtors were granted ancillary relief under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") pursuant to an Order of the Ontario Superior Court of Justice ("Court", and together with the U.S. Court, the "Courts") dated June 12, 2012 (the "Initial Order") and a Court Order dated June 13, 2012 (the "Supplemental Order", and together with the Initial Order, the "Orders").

4. Pursuant to the Orders, inter alia: a) the Chapter 11 Proceedings were recognized as a "foreign main proceeding" pursuant to Part IV of the CCAA; b) Allied Systems US was appointed as Allied Group's foreign representative ("Foreign Representative"); c) certain orders made by the U.S. Court dated June 12, 2012 were recognized; and d) Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed as the Information Officer (the "Information Officer").

5. On July 16, 2012, this Court made an Order: a) recognizing certain final orders of the U.S. Court that had previously been granted on an interim basis; b) approving certain ancillary relief in respect of Allied Group's cash management system; and c) amending the Supplemental Order to provide for increased priority for the Administration Charge and the DIP Lender's Charge (as both terms are defined in the Supplemental Order).

6. This report ("Report") is filed in D&P's capacity as Information Officer.

## 1.1 Purposes of this Report

1. The purposes of this Report are to:

   a) Provide background information about Allied Group;

   b) Provide an update to the Court on the status of these proceedings and the Chapter 11 Proceedings, pursuant to the terms of the Supplemental Order;

   c) Provide information with respect to the CAW Settlement Agreement (defined below) approved by Order of the U.S. Court dated April 11, 2013 ("U.S. Approval Order") and the proposed Directors' Charge (defined below);

d) Recommend that this Honorable Court make orders:

a. Recognizing the U.S. Approval Order, establishing the Directors' Charge and amending the Supplemental Order to provide for priority for the Directors' Charge;

b. Approving the fees and disbursements of the Information Officer and its counsel, Norton Rose Canada LLP ("Norton Rose"), from commencement of these proceedings to March 31, 2013 and March 25, 2013, respectively; and

c. Approving the conduct and activities of the Information Officer as described in the Information Officer's First Report to Court dated July 11, 2012; Second Report to Court dated July 26, 2012 ("Second Report"); Third Report to Court dated October 11, 2012; Fourth Report to Court dated January 11, 2013 ("Fourth Report"); and this Report.

### 1.2 Currency

1. All currency references in this Report are to United States dollars, unless otherwise noted.

### 1.3 Restrictions

1. In preparing this Report, the Information Officer has relied upon unaudited financial information prepared by Allied Group's representatives, Allied Group's books and records and discussions with its representatives. The Information Officer has not performed an audit or other verification of such information. The Information Officer expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Report, or relied upon by the Information Officer.

## 2.0 Background

1. Allied Group is primarily engaged in the "car-haul" business, being the transport by specially designed tractor trailers of vehicles, such as automobiles, sport-utility vehicles and light trucks, from manufacturing plants, ports, auctions, and railway distribution points to automobile dealerships in the United States and Canada. In Canada, this business is conducted by Allied Canada.

2. Allied Group's operations are centralized from its head office located in Atlanta, Georgia. As of the date of the Orders, Allied Group employed approximately 1,835 individuals, including approximately 600 active employees in Canada[2]. At that time, approximately 390 active Canadian employees were members either of the International Brotherhood of Teamsters ("Teamsters") or the Canadian Auto Workers' unions.

3. Further background concerning Allied Group was provided in the affidavit of Scott Macaulay, Senior Vice President and Chief Financial Officer of Allied Systems US, sworn June 11, 2012 ("Macaulay Affidavit") and the Information Officer's previous reports ("IO Reports"). The Macaulay Affidavit, the IO Reports and other materials filed with the Court in the Canadian proceedings are available on D&P's website at www.duffandphelps.com/restructuringcases. Information regarding the Chapter 11 Proceedings is posted on the "Restructuring News" portion of Allied Group's website at www.alliedautomotive.com.

## 3.0 Operations

1. The Information Officer has been advised by Mr. Macaulay and other senior members of Allied Group's management team that Allied Group's operations, including those of the Canadian Debtors, have continued in the ordinary course and without significant disruption since the commencement of the Chapter 11 Proceedings.

2. John Jansen, President of Allied Canada, advised the Information Officer that employees, creditors and customers of the Canadian Debtors have been supportive of Allied Group's attempt to restructure.

3. Allied Group continues to operate with excess capacity. Specifically, Allied Group had approximately 939 out of its 2,000 readily available tractor-trailers in use as of March 29, 2013, representing the same usage reported by the Information Officer in its Fourth Report.

4. For the two month period ending February 28, 2013, Allied Group generated revenue of $47 million compared to $40 million in the same period in 2012, representing an 18% increase. The revenue increase is mainly the result of pricing increases implemented by Allied Group.

[2] The number of active Canadian employees varies by season.

5. For the two month period ending February 28, 2013, Allied Group generated revenue of $47 million compared to $40 million in the same period in 2012, representing an 18% increase. The revenue increase is mainly the result of pricing increases implemented by Allied Group.

6. The revenue increase has resulted in Allied Group's EBITDA before professional fees increasing to approximately negative $1 million for the year-to-date period ending February 28, 2013 from approximately negative $5 million for the same period in 2012.

## 4.0 Financing

1. At the commencement of the Chapter 11 Proceedings, Allied Group entered into a debtor-in-possession loan facility in the amount of $20 million ("DIP Facility") with Yucaipa American Alliance Fund II, LLC, as agent, and Yucaipa Leveraged Finance, LLC and CB Investments, LLC, as lenders ("DIP Lender"). The DIP Facility was approved by Order of the U.S. Court dated June 12, 2012 and recognized by Order of this Court dated June 13, 2012.

2. In January, 2013, the DIP Lender increased the amount available under the DIP Facility to $22 million pursuant to an amendment to the DIP Facility ("DIP Amendment"). The DIP Amendment was approved by an Order of the U.S. Court on February 1, 2013.

3. Based on Allied Group's books and records, as at March 31, 2013, Allied Group had borrowed $18 million under the DIP Facility. This amount is consistent with Allied Group's projections at the outset of the Chapter 11 Proceedings[3]. As at March 31, 2013, Allied Group had liquidity of approximately $10.6 million, comprised of $4 million available under the DIP Facility and $6.6 million of unrestricted cash on hand.

4. No direct advances have been made to the Canadian Debtors under the DIP Facility.

5. The DIP Facility expires and becomes payable on June 11, 2013.

[3] The projection is based on Allied Group's DIP Facility budget provided to the DIP Lenders at the outset of the proceedings.

6. Allied Group does not expect to complete the Chapter 11 Proceedings before the expiry date of the DIP Facility. Accordingly, Allied Group and Rothschild Inc. ("Rothschild"), its financial advisor, have approached the DIP Lender and other parties to extend or replace the DIP Facility.

7. The Information Officer understands that discussions are ongoing with respect to a new DIP facility and that Allied Group expects to seek an Order of the U.S. Court approving a new DIP facility in May, 2013. If such an order is made, Allied Group would then seek recognition of it in Canada.

# 5.0 Chapter 11 Proceedings

## 5.1 Sale Process

1. As detailed in the Fourth Report, on October 16, 2012, the U.S. Court made an order authorizing Allied Group to employ and retain Rothschild. One purpose of Rothschild's engagement is to explore the possibilities with respect to a sale of Allied Group's business and assets, including the business and assets of the Canadian Debtors.

2. Rothschild has advised the Information Officer that it is:

   - Meeting with prospective purchasers and their respective advisors regarding the sale process;
   - Working with Allied Group's management and counsel to respond to diligence requests from potential purchasers;
   - Reviewing proposals received by Allied Group for the sale of its business and assets;
   - Considering the strategic direction of the sale process as a result of ongoing litigation amongst Allied Group's senior lenders (discussed below); and
   - Meeting with representatives of Allied Group's secured lenders and the Official Committee of Unsecured Creditors of Allied Group ("Committee") regarding the status of the sale process.

## 5.2 First and Second Lien Lenders

1. Pursuant to a First Lien Credit Facility and Second Lien Credit Facility (both as defined in the Macaulay Affidavit and together, the "Facilities"), as amended, Black Diamond/Spectrum, Yucaipa American Alliance Fund I, LP and Yucaipa American Alliance (Parallel) Fund I, LP (together, "Yucaipa", including companies affiliated with Yucaipa) and other parties are lenders to Allied Group (collectively, the "First and Second Lien Lenders").

2. Yucaipa is also Allied Group's majority shareholder, owning a 67% interest in Allied Group.

### 5.2.1 Requisite Lender

1. The Information Officer has previously reported on litigation between Black Diamond/Spectrum and Yucaipa. Specifically, the Information Officer advised in its Fourth Report that:

   - On January 18, 2012, Black Diamond/Spectrum filed suit against the Yucaipa Defendants in the Supreme Court of the State of New York ("NY Court") to seek a judicial declaration that the Fourth Amendment to the First Lien Facility dated August 21, 2009[4] is null and void and that, consequently, the Yucaipa Defendants are not the Requisite Lender ("Requisite Lender") as defined in the First Lien Facility ("Requisite Lender Suit").

   - The Requisite Lender has certain voting and other rights with respect to the First Lien Facility, which could include the right to credit bid in a sale process for Allied Group's assets. Accordingly, its determination is relevant to these proceedings.

   - On November 19, 2012, the NY Court heard the Requisite Lender Suit and granted summary judgment in favour of Black Diamond/Spectrum.

2. Pursuant to a Memorandum of Decision dated March 8, 2013 ("Memorandum"), the NY Court ordered, among other things, that "the Purported Fourth Amendment is not, and never was, effective under the plain terms of the Credit Agreement, Yucaipa is not the Requisite Lender and Plaintiffs [Black Diamond/Spectrum] are entitled to summary judgment as a result". A copy of the Memorandum is provided in Appendix "A".

[4] The effect of the Fourth Amendment was to designate the Yucaipa Defendants as the Requisite Lender.

3. The Information Officer also reported that both Allied Group and Yucaipa applied in October, 2012 to the U.S. Court to hear claims on the validity of certain amendments to the First Lien Facility and certain other issues not argued before the NY Court and that Black Diamond/Spectrum filed a cross-motion for the U.S. Court to abstain from hearing matters related to the Requisite Lender. The Information Officer understands that the U.S. Court deferred hearing these motions until it received and had an opportunity to review a written ruling from the NY Court.

### 5.2.2 Equitable Subordination

1. On January 25, 2013, Black Diamond/Spectrum filed a complaint ("Black Diamond Complaint") with the U.S. Court for an Order, among other things, subordinating the claims held by Yucaipa pursuant to the Facilities to the claims of the other First and Second Lien Lenders. A copy of the Black Diamond Complaint is provided in Appendix "B".

2. On February 1, 2013, the Committee filed a complaint ("Committee Complaint") with the U.S. Court for an Order, among other things, subordinating the claims of Yucaipa to all other creditor claims asserted against Allied Group and requiring Yucaipa to make a capital contribution of approximately $57.5 million to Allied Group ("Capital Contribution"). A copy of the Committee Complaint is provided in Appendix "C" (the Black Diamond Complaint and Committee Complaint are jointly referred to as the "Complaints"[5]).

3. The nature of the Complaints is similar: Yucaipa advanced its interests ahead of and to the detriment of other creditors. The Committee Complaint alleges that Yucaipa "took control over all facets of the Debtors' capital structure in order to protect its equity investment over the legitimate rights and expectations of the Debtors' secured and unsecured creditors" [6]. The Committee Complaint also alleges that: "Yucaipa gave itself the ability to prevent creditors from exercising rights against [Allied Group] that could have benefitted [Allied Group] and their creditors but would have adversely affected Yucaipa's equity interests" [7].

4. Yucaipa denies the allegations in, and has objected to, the Complaints.

[5] The Complaints filed in the U.S. Court's public record have been redacted to exclude sensitive information regarding Allied Group's business.

[6] Committee Complaint, paragraph 1.

[7] Committee Complaint, paragraph 12.

5. With respect to the Capital Contribution, the Committee's position is that:

   - In 2007, upon Allied Group exiting its first Chapter 11 reorganization, Allied Group borrowed $265 million under the First Lien Credit Facility and $50 million under the Second Lien Credit Facility from a syndicate of lenders. Under the original terms of the First Lien Credit Facility, Yucaipa, as Allied Group's majority shareholder, was subject to various restrictions, including a restriction from acquiring any part of the First Lien Credit Facility;

   - In 2009, Yucaipa entered into an agreement with ComVest Partners, the Requisite Lender at that time under the First Lien Credit Facility, to amend the First Lien Credit Facility to allow Yucaipa to acquire the majority of Allied Group's first lien debt and become the Requisite Lender ("Fourth Amendment");

   - Since the NY Court ruled that the Fourth Amendment is invalid, the Third Amendment of the First Lien Credit Facility ("Third Amendment") is operative. According to the Third Amendment, Yucaipa is required to make a capital contribution to Allied Group of 50% of the aggregate principal amount of debt under the First Lien Credit Facility it acquires. Accordingly, since Yucaipa acquired approximately $115 million of debt under the First Lien Credit Facility, Yucaipa was required to make a capital contribution of approximately $57.5 million to Allied Group, but did not do so.

6. The Committee Complaint also seeks $57 million in damages from certain of Allied Systems US's directors ("Allied Directors") for beaches of their fiduciary duty. The Committee Complaint alleges that the Allied Directors were nominees of Yucaipa, did not protect the interests of other Allied Group stakeholders and allowed Yucaipa to take control of Allied Group.

7. On March 21, 2013, the U.S. Court issued an Order ("March 21st Order") authorizing the Committee to prosecute the claims and causes of action as set out in the Complaints on behalf of Allied Group's estate. The U.S. Court also granted Black Diamond/Spectrum leave to intervene as plaintiffs in the Committee's Complaint. A copy of the March 21st Order is provided in Appendix "D".

8. The foregoing information is intended as a brief summary of the Complaints and the equitable subordination issue and is not intended to provide a comprehensive review or an evaluation of any such claims.

# 6.0 Directors' Charge

## 6.1 Overview

1. As a Canadian transportation carrier, Allied Canada is subject to the *Canada Labor Code* ("CLC"). Section 251.18 of the CLC imposes joint and several liability on directors of a company for wages, severance and termination pay, among other things. As a logistics service company, Axis Canada is not subject to the CLC.

2. Pursuant to the CLC, individuals who have completed twelve consecutive months of continuous employment are eligible for severance pay except where their termination is by way of dismissal for just cause. The CLC further provides that individuals who have completed three consecutive months are entitled to receive two weeks' notice prior to termination or two weeks wages, in lieu of the notice, except where termination is by way of dismissal for just cause. The CLC stipulates that each director of a company is liable for unpaid wages and other amounts, including severance and termination pay, to a maximum amount of six months' wages for each employee to the extent that such entitlement arose during the particular director's incumbency and recovery of the amount from the company is unlikely or impossible. In the current case, a deemed termination can occur if an employee remains laid off for a period of more than twelve months.

3. From May 1, 2011 to June 10, 2012, the date on which the Chapter 11 Proceedings commenced, Allied Canada laid off approximately 280 unionized employees. Most of these employees are members of the National Automobile, Aerospace, Transportation and General Works Union of Canada ("CAW") ("Laid-Off CAW Employees").

4. At the commencement of these proceedings, the potential severance obligation to the Laid-Off CAW Employees was approximately CDN$1.9 million, inclusive of applicable payroll taxes of CDN $165,000.

5. Allied Canada has made monthly severance payments ranging from CDN $47,000 to $65,000 to the Laid-Off CAW Employees as authorized in the "Final Order Authorizing Payment of Wages, Payroll Taxes, Certain Employee Benefits and Related Expenses Due Prior to the Commencement of the Chapter 11 Cases, and Other Compensation to Employees, Owner-Operators and Independent Contractors" entered by the U.S. Court on July 10, 2012 ("Final Wages Order") and recognized by Order of the Court on July 16, 2012. A copy of the Final Wages Order is provided in Appendix "E".

6. As at April 1, 2013, the severance obligation owing to the Laid-Off CAW Employees (assuming these employees were not recalled) was approximately CDN $1.4 million ("CAW Severance")[8], inclusive of payroll taxes.

7. During the Chapter 11 Proceedings, the two directors of Allied Canada resigned due to, among other things, concerns about personal liability for severance or termination obligations ("Director Liabilities"). Allied Canada has been unable to locate an individual willing to serve as a director since June, 2012. The Information Officer understands that Allied Canada has pursued new directors, but none will accept the position without the protection provided for by an indemnity and a charge for Director Liabilities ("Directors' Charge").

8. Axis Canada's two directors and three officers have remained in such capacities since the Chapter 11 Proceedings commenced. Their potential liabilities are more limited than those of Allied Canada due to the limited number of Axis Canada employees (twelve) and the nature of the business (not subject to the CLC).

## 6.2 July 31 Motion

1. Pursuant to a Notice of Motion returnable July 31, 2012, the Foreign Representative sought a Court-ordered directors' and officers' charge, in the maximum amount of CDN $9.9 million, on the collateral of the Canadian Debtors. The charge was to have secured an indemnity by the Canadian Debtors' to its directors and officers (current and former, actual and deemed) for liabilities associated with severance and termination pay arising before and after the commencement of the Chapter 11 Proceedings and other statutory obligations, such as wages, withholdings and sales taxes, arising after the commencement of the Chapter 11 Proceedings ("July 31 Motion").

2. The July 31 Motion was adjourned to allow time for negotiation between Allied Canada and its stakeholders in response to their objections. Further background concerning the July 31 Motion can be found in the Second Report. The Second Report is attached as Appendix "F".

[8] The amount of the CAW Severance includes adjustments arising from Allied Canada's recall of certain employees, which reduced the obligation to the Laid-Off CAW Employees. It also includes adjustments resulting from incentives offered by Allied Canada to the Laid-Off CAW Employees to defer receipt of their severance payments, which increased the obligation to the Laid-Off CAW Employees.

## 6.3 CAW Settlement Agreement

1. On March 15, 2013, Allied Canada and CAW (on behalf of itself and its members) executed a settlement agreement ("CAW Settlement Agreement") which provides for the following:

   - Allied Canada will continue to pay the CAW Severance, up to a maximum of CDN $1.4 million. Payment may be made on an ongoing basis as an administrative expense of the bankruptcy proceeding of Allied Canada in the Chapter 11 Proceedings;

   - Allied Canada shall indemnify its directors ("Directors") with respect to any obligation or liability of a Director to pay the CAW Severance. The indemnification is to be secured by the Directors' Charge of up to CDN $1.4 million, which will be reduced by Allied Canada's subsequent payments;

   - If Allied Canada fails to pay the CAW Severance, the CAW (either directly or through the Directors) would look first to claims against existing and applicable directors' and officers' insurance policies ("Directors' Policies"). If the proceeds thereof are unavailable or insufficient to pay the remaining amount of the CAW Severance, the Directors' Charge covers the liability of the Directors under the proposed indemnity;

   - Any recovery with respect to a CAW Claim[9] asserted against any director (whether past, present, future, actual or deemed) of Allied Canada or any affiliate of Allied Canada (the "Releasees"), which cannot be recovered from Allied Canada, shall be limited to any proceeds that the CAW may recover from the Directors' Policies, and any other CAW Claim against the Releasees shall be released and discharged. CAW agrees to limit its claims against the Directors or the directors of any affiliate of Allied Canada to the proceeds from the Directors Policies; and

   - The CAW Settlement Agreement is subject to the approval of the Courts.

[9] Defined as any demand or claim, asserted or otherwise made by the CAW or any of its respective members (who are current employees of Allied Canada) against Allied Canada for payment of any amounts in respect of termination or severance whether owing pursuant to the CLC, a collective agreement, other written agreement or notice or otherwise.

2. On March 25, 2013, Allied Group filed a motion with the U.S. Court seeking the U.S. Approval Order, being an Order approving the CAW Settlement Agreement and authorizing the Foreign Representative to move the Court to establish a Directors' Charge on the property of Allied Canada.

3. On April 11, 2013, the U.S. Court entered the U.S. Approval Order. A copy of the U.S. Approval Order is provided in Appendix "G".

## 6.4 Teamsters

1. Approximately 200 of Allied Canada's employees are members of Teamsters local unions.

2. Allied Canada received correspondence from each relevant Teamsters local union ("Teamsters Letters") indicating that they will not pursue or make a claim against any Director should there be a default by Allied Canada pursuant to their obligation to pay any amounts for which a director has a personal liability under the collective agreement or the CLC, except to the extent that these amounts can be satisfied from the proceeds of the Directors' Policies. The Teamsters local unions advised that they agreed to this restriction as, in their view, it increases the likelihood that Allied Canada will be able to retain a director and continue as a going concern, thereby providing employment for Teamsters members. The Teamsters Letters are provided in Appendix "H".

## 6.5 The Charge

1. Allied Group is proposing a Directors' Charge as follows:

   a. Up to CDN $1.4 million to secure severance payments owing to the Laid-Off CAW Employees; and

   b. Up to CDN $570,000 to secure severance or termination obligations pursuant to the CLC for Allied Canada's employees who are not members of CAW or Teamsters, were employed by Allied Canada on June 10, 2012 and may subsequently be terminated ("Non-Union Employees")[10]. The Non-Union Employees are not subject to the CAW Settlement Agreement or the Teamsters Letters.

2. The Information Officer understands that Allied Group's main stakeholders, being Yucaipa (as DIP Lender), Black Diamond/Spectrum and the Committee, are not opposed to the relief being sought.

[10] Allied Canada employs approximately sixty Non-Union Employees.

## 6.6 Priority

1. Pursuant to the July 16 Order, the Administration Charge and the DIP Lender's Charge (the "Charges") rank in priority to the existing security interests created pursuant to the Facilities and other trusts, liens, charges and encumbrances, claims of secured creditors or otherwise (collectively, "Encumbrances") [11].

2. The Foreign Representative is seeking to have the Court issue an Order amending the Supplemental Order, as amended the July 16 Order such that the Court-ordered charges would be as follows:

   a) Administration Charge (to the maximum amount of CDN $600,000);

   b) Directors' Charge with respect to severance obligations to the Laid-Off CAW Employees (to a maximum amount of CDN $1.4 million);

   c) DIP Lender's Charge; and

   d) Directors' Charge for severance and termination obligations pursuant to the CLC to Non-Union Employees if they are terminated during the Chapter 11 Proceedings (to a maximum amount of CDN $570,000).

## 6.7 Information Officer's View

1. The Information Officer supported the relief that had been sought by the Foreign Representative pursuant to the July 31 Motion. The relief contained therein was broader than what is currently being sought;

2. The proposed multi-pronged solution of: a) the CAW Settlement Agreement including the Directors' Charge of $1.4 million; b) the Teamster Letters and c) the $570,000 Directors' Charge relating to Non-Unionized Employees represents a fair compromise and, as a result, Allied Canada will be able to appoint a new director;

[11] The Charges do not rank ahead of: a) Encumbrances, if any, that are valid, perfected by registration or possession, non-avoidable and senior to the Encumbrances securing the First Lien Credit Facility as of the date of the Final Financing Order (as defined in the July 16 Order); b) The Carve-Out (as defined in the Final Financing Order and generally includes certain professional fees associated with the Chapter 11 Proceedings).

3. The Information Officer supports the CAW Settlement Agreement and the Directors' Charge for many of the same reasons as outlined in the Second Report, being:

- The Information Officer has reviewed Allied Canada's calculations of the amounts underlying the Directors' Charge. The quantification of the Directors' Charge appears to be reasonable;

- The portion of the Directors' Charge that covers the CAW Severance is, in effect, secondary protection. The CAW Severance is being paid per the Final Wages Order. Further, Allied Canada has acknowledged that access to the Directors' Charge would only be sought once (or if) the Directors' Policies are exhausted or will not provide coverage;

- In order to effectively and efficiently restructure Allied Canada, director oversight is highly beneficial. Allied Canada needs Directors to consider and approve transactions that will allow it to emerge from Chapter 11 Proceedings. Allied Canada has not had a Director since June, 2012. A member of Allied Group's senior management team has agreed to serve as a Director if the proposed Order is made;

- Allied Group has considered alternatives for Allied Canada, such as the appointment of a restructuring officer or a receiver or securing additional insurance coverage, in the event the Directors' Charge is not granted and no individual is willing to serve as a director of Allied Canada. These alternatives are costly and may not be as effective as simply having a director in place – operational disruption is possible and the costs could be significant, both in dollar terms and to the outcome of the restructuring process;

- As the Information Officer has previously reported in the context of the Administration Charge and the DIP Lender's Charge, based on the advances made under the Facilities compared to the Information Officer's understanding of the approximate value of Allied Group's business and assets, the Information Officer is of the view that in these circumstances there will be no prejudice to the Canadian unsecured creditors of Allied Group if the Court grants the proposed Order.

- The portion of the Directors' Charge that relates to Non-Union Employees, CDN $570,000, is intended to address CLC severance for non-unionized employees who could, in future, be terminated as it was impractical to enter into individual settlements or obtain individual releases from each employee – this portion of the Directors' Charge is also only available if the liability is not covered by Allied Canada and proceeds under the Directors' Policies are not available or are insufficient.

4. Based on the foregoing, the Information Officer believes that the Directors' Charge and its proposed priority are appropriate in the circumstances.

## 7.0 Professional Fees

1. The Information Officer's fees from June 4, 2012 to March 31, 2013 total approximately CDN $270,707, inclusive of disbursements and taxes.

2. The fees of Norton Rose, the Information Officer's counsel, from June 4, 2012 to March 25, 2013 total approximately CDN $105,540, inclusive of disbursements and taxes.

3. Fee affidavits from representatives of D&P and Norton Rose are provided in Appendices "I" and "J". The Information Officer's invoices summarize its activities.

4. A summary of the invoices in Canadian dollars is as follows:

**Duff & Phelps Canada Restructuring Inc.**

| Period | Fees ($) | Disbursements($) | HST($) | Total($) |
|---|---|---|---|---|
| June 4 to June 16, 2012 | 48,025.00 | 0.00 | 6,243.25 | 54,268.25 |
| June 17 to June 30, 2012 | 21,575.00 | 5,339.08 | 3,498.83 | 30,412.91 |
| July 1 to July 21, 2012 | 38,831.25 | 5,223.48 | 5,727.11 | 49,781.84 |
| July 21 to August 10, 2012 | 20,295.00 | 11.55 | 2,639.85 | 22,946.40 |
| August 11 to August 31, 2012 | 11,312.50 | 0.00 | 1,470.63 | 12,783.13 |
| September 1 to September 30, 2012 | 11,712.50 | 0.00 | 1,522.63 | 13,235.13 |
| October 1 to October 31, 2012 | 23,996.25 | 0.00 | 3,119.51 | 27,115.76 |
| November 1 to November 30, 2012 | 8,260.00 | 0.00 | 1,073.80 | 9,333.80 |
| December 1, 2012 to January 31, 2013 | 20,018.75 | 8.79 | 2,603.58 | 22,631.12 |
| February 1, 2013 to March 31, 2013 | 24,955.00 | 0.00 | 3,244.15 | 28,199.15 |
| Total | 228,981.25 | 10,582.90 | 31,143.34 | 270,707.49 |

5. The Information Officer's average hourly rate for the referenced billing period was CDN $470. The Information Officer used a limited number of representatives on this matter.

**Norton Rose Canada LLP**

| Period | Fees ($) | Disbursements($) | HST($) | Total($) |
|---|---|---|---|---|
| June 5 to June 14, 2012 | 41,256.00 | 0.00 | 5,363.28 | 46,619.28 |
| June 15 to June 30, 2012 | 3,931.00 | 0.00 | 511.03 | 4,442.03 |
| July 1 to July 13, 2012 | 12,422.00 | 0.00 | 1,614.86 | 14,036.86 |
| July 14 to July 31, 2012 | 21,096.00 | 242.80 | 2,774.04 | 24,112.84 |
| August 1 to August 15, 2012 | 2,761.50 | 8.93 | 360.16 | 3,130.59 |
| August 16 to September 17, 2012 | 1,918.00 | 0.00 | 249.34 | 2,167.34 |
| September 18 to October 31, 2012 | 3,788.00 | 0.00 | 492.44 | 4,280.44 |
| November 1 to December 31, 2012 | 273.00 | 20.43 | 38.15 | 331.58 |
| January 1, 2013 to March 25, 2013 | 5,213.50 | 466.92 | 738.45 | 6,418.87 |
| Total | 92,659.00 | 739.08 | 12,141.75 | 105,539.83 |

6. Norton Rose's average hourly rate for the referenced billing period was CDN $724.

7. The Information Officer is of the view that the hourly rates charged by Norton Rose are consistent with the rates charged by other major law firms in Toronto providing insolvency and restructuring advice. The Information Officer notes that Norton Rose has used only a limited number of lawyers on the matter.

8. The Information Officer has reviewed the accounts of Norton Rose and believes them to be reasonable.

## 8.0 Conclusion

1. Based on the foregoing, it is the Information Officer's view that the relief being sought by the Foreign Representative is reasonable. In addition, the Information Officer respectfully recommends that this Honorable Court make orders granting the relief detailed in Section 1.1 of the Report.

* * *

All of which is respectfully submitted,


**DUFF & PHELPS CANADA RESTRUCTURING INC.**
**IN ITS CAPACITY AS INFORMATION OFFICER OF**
**ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO AND NOT IN ITS PERSONAL CAPACITY**

# Schedule "A"

## 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

# Appendix "A"

FILED: NEW YORK COUNTY CLERK 03/29/2013 INDEX NO. 650150/2012
NYSCEF DOC. NO. 84 RECEIVED NYSCEF: 03/29/2013

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: **Charles E. Ramos** PART **53**
*Justice*

Index Number : 650150/2012
BDCM OPPORTUNITY FUND II, LP
vs.
YUCAIPA AMERICAN ALLIANCE
SEQUENCE NUMBER : 003
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/8/13

_____, J.S.C.
CHARLES E. RAMOS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

BDCM OPPORTUNITY FUND II, LP, BLACK DIAMOND CLO 2005-1 LTD, and SPECTRUM INVESTMENT PARTNERS, L.P.,

Plaintiffs,

Index No.: 650150/2012
Motion Seq.No. 3

- against -

YUCAIPA AMERICAN ALLIANCE FUND I, LP, and YUCAIPA AMERICAN ALLIANCE (PARALLEL) FUND I, LP,

Defendants.

----------x

**Hon. Charles E. Ramos, J.S.C.**

Plaintiffs move for a declaration regarding their rights under a Credit Agreement with respect to a series of amendments that plaintiffs claim have the effect of amending the definition of the term Requisite Lenders.

This decision amplifies this Court's transcript dated November 19, 2012.

The Credit Agreement itself is unambiguous and accordingly, summary judgment is appropriate.

**Background.**

Allied Systems Holdings, Inc. ("Allied" or "Borrower"), provides distribution and transportation services to the automotive industry, concentrating on the delivery of new vehicles to dealers.

In May of 2007, Allied and several related entities emerged

from bankruptcy under a plan of reorganization that, among other things, resulted in the defendant Yucaipa becoming the majority and controlling shareholder of Allied. In order to finance its emergence from bankruptcy, Allied obtained financing through a $315 million credit facility consisting of a $265 million senior secured first priority credit facility ("First Lien Facility"), and a $50 million junior credit facility ("Second Lien Facility").

The First Lien Facility is governed by a Credit Agreement, and was comprised of (I) term loans in the aggregate principal amount of $180 million (the "Term Loans"); (ii) a $35 million revolving credit facility from CIT (the "Revolving Loan"); and (iii) a $50 million synthetic letter of credit facility ("LC Facility"). The plaintiffs are Lenders under the Credit Agreement.

Under the Credit Agreement, those who are Requisite Lenders have the authority to make certain key decisions affecting the rights of all Lenders. As defined in the Credit Agreement, the Requisite Lenders consist of: one or more Lenders having or holding Term Loan Exposure, LC Exposure and/or Revolving Exposure and representing more than 50% of the sum of (I) the aggregate Term Loan Exposure of all Lenders, (ii) the aggregate LC Exposure of all Lenders and (iii) the aggregate Revolving Exposure of all Lenders.

Term Loan Exposure, a defined term that is incorporated into the definition of Requisite Lenders, is used to determine both who is eligible to be a Requisite Lender and to calculate the ratable shares necessary to become a Requisite Lender.

The Credit Agreement vests the Requisite Lender with the authority to direct the exercise of Lender remedies such as declaring Events of Default or commencing foreclosure on the collateral pledged to secure Allied's debt obligations. The Requisite Lender also has the authority to cause the Lenders to refrain from exercising such remedies in all but limited circumstances.

The plaintiffs contend that the Credit Agreement prohibits - absent the written consent of all affected Lenders - any modification or amendment of the Credit Agreement "if the effect thereof would . . . amend the definition of Requisite Lenders." They also contend that the Credit Agreement as initially drafted and executed foreclosed the possibility that Yucaipa could become a Requisite Lender. They assert that the only parties eligible to be a Requisite Lender are "Lenders" under the Credit Agreement and Eligible Assignees who subsequently become Lenders pursuant to an Assignment Agreement. Yucaipa, Allied's majority shareholder and Sponsor under the Credit Agreement, was neither a Lender nor was eligible to become a Lender through an Assignment Agreement because Lenders were the only ones permitted to assign

their Obligations to Eligible Assignees and the definition of Eligible Assignee provides that no sponsor [Yucaipa] could be an Eligible Assignee.

In April 2008, Yucaipa sought to acquire a portion of Allied's outstanding Credit Agreement Obligations. Due to the restrictions prohibiting Yucaipa from becoming an Eligible Assignee, Yucaipa could become eligible to acquire these Obligations only through an amendment to the Credit Agreement. (Credit Agreement §§ 1.1, 10.6(c).)

Yucaipa and Allied requested and received consent from a majority of the Lenders to amend the Credit Agreement - the Third Amendment - to permit Yucaipa to become a "Restricted Sponsor Affiliate" and purchase Term Loans under limited circumstances and conditions and with certain restrictions. (Third Amendment §§ 2.1, 2.7.)

The restrictions precluded Yucaipa from becoming the Requisite Lender or exerting control over the other Lenders. The Third Amendment prohibited Yucaipa from accumulating over (I) 25% of the aggregate principal amount of the Term Loan Exposure held by all Lenders or (ii) $50 million of the principal amount of Term Loans. (Third Amendment §§ 2.7(c), 2.7(e).)

In addition, the Third Amendment prohibited Yucaipa from exercising any and all voting rights it would otherwise have as a Lender, including the right to consent to any amendment of the

Credit Agreement or the right to vote its debt in any Allied bankruptcy. (Third Amendment §§ 2.1(e), 2.7(a), 2.7(b), 2.7(e).)

By the terms of the Third Amendment, upon acquiring any interest in the Term Loans, Yucaipa "knowingly and irrevocably waive[d] any and all right to exercise any voting rights it would otherwise have as a Lender for all purposes under [the Credit Agreement]." (Third Amendment § 2.7(e)(iv).)

Further, the Third Amendment prohibited Yucaipa from including its Term Loans in any calculation of Term Loan Exposure when such calculation was required under the Credit Agreement. (Third Amendment § 2.1(e).) The amended definition of Term Loan Exposure in the Third Amendment provided that, "with respect to any provisions of this Agreement relating to voting rights of Lenders (including the right of Lenders to consent to or take any other action with respect to any amendment . . . of any provision of this Agreement . . .), the aggregate outstanding principal amount of the Term Loans of all Restricted Sponsor Affiliates shall be disregarded for purposes of this definition of 'Term Loan Exposure.'" (*Id.*)

Finally, the Third Amendment required Yucaipa to make a capital contribution to Allied of no less than 50% of the aggregate principal amount of any Term Loans that Yucaipa obtained within ten days after the date of such acquisition. (Third Amendment § 2.7(e).)

The Third Amendment also required Allied to deliver to the Administrative Agent monthly reports of the amount of Term Loans and Second Lien Term Loans acquired and held by Yucaipa, and the price paid for such loans. (Third Amendment § 2.3(a).)

Allied failed to deliver monthly reports of Yucaipa's holdings, which constituted an Event of Default under the Credit Agreement. (Forbearance Agreement.) Since August 2008, Allied has been in default under the Credit Agreement for, among other reasons, failing to make principal and interest payments, failing to comply with the financial covenants in the Credit Agreement and failing to deliver required financial information.

Allied and Yucaipa have acknowledged these defaults and recognized that the defaults entitled the Lenders to exercise rights and remedies under the Credit Agreement, including the right to accelerate Allied's debt.

On August 21, 2009, after Allied had been in default under its Credit Agreement Obligations for more than a year, Allied entered into the Purported Fourth Amendment with ComVest.

The effect of the Purported Fourth Amendment was to remove all of the restrictions imposed on Yucaipa's ownership of Obligations under the initial Credit Agreement and the Third Amendment, thereby purporting to make Yucaipa eligible to be Requisite Lender for the first time. (Purported Fourth Amendment §§ 2.1(b), 2.4.)

The Purported Fourth Amendment professes to amend the definition of "Term Loan Exposure" (a term expressly used in the definition of Requisite Lenders in the Credit Agreement) by deleting the language which excludes the amount of Term Loans held by Yucaipa from any calculation of the aggregate amount of Term Loans outstanding (Purported Fourth Amendment § 2.1(b); Ex. 5, Third Amendment § 2.1(c); Credit Agreement § 1.1.)

The Purported Fourth Amendment eliminates the provision of the Credit Agreement that prohibited Yucaipa from acquiring more than the lesser of 25% of the aggregate Term Loan Exposure, or $50 million of the principal amount of Term Loans (Purported Fourth Amendment § 2.4(c); Third Amendment § 2.1(c); Credit Agreement § 10.6(c).)

The Purported Fourth Amendment also eliminates the restrictions placed on Yucaipa's right to vote as if it was a Lender, including the right to consent to any modification of the Credit Agreement and to vote its debt in bankruptcy (Purported Fourth Amendment § 2.4(a); Third Amendment § 2.7(a); Credit Agreement § 10.5) and it eliminates the requirement that Yucaipa was required to make a capital contribution to Allied of 50% of the aggregate principal amount of Term Loans it acquired. (Purported Fourth Amendment § 2.4(e); Third Amendment § 2.7(e).)

The Purported Fourth Amendment eliminates the restriction in the definition of Eligible Assignee in the Credit Agreement as

originally drafted that prohibited the Sponsor from becoming an Eligible Assignee. (Purported Fourth Amendment § 2.1(b); Third Amendment § 2.1(c); Credit Agreement § 1.1.)

On August 21, 2009, contemporaneously with the execution of the Purported Fourth Amendment, Yucaipa and ComVest executed a purported Assignment and Assumption Agreement, whereby Yucaipa agreed to acquire the obligations owned by ComVest for a combination of cash and future consideration.

As a result of the Purported Fourth Amendment and Assignment and Assumption Agreement with ComVest, Yucaipa contends that it is the Requisite Lender, with all the attendant powers to dictate the enforcement of, or forbearance from enforcement of, Lenders' rights and remedies.

Plaintiffs BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 LTD, and Spectrum Investment Partners, L.P. (collectively, "Plaintiffs") move, pursuant to CPLR 3212 and 3001, for summary judgment declaring that the Purported Fourth Amendment to the Credit Agreement is not, and never was, effective, and that, as a result, Defendants are not, and may not act as, Requisite Lenders under the Credit Agreement.

**Discussion**

There is no credible dispute that under the terms of the Credit Agreement as initially drafted and executed, Yucaipa American Alliance Fund I, LP and Yucaipa American Alliance

(Parallel) Fund, L.P. (collectively, "Yucaipa"), as the "Sponsors" and controlling shareholders of Allied Systems Holdings, Inc. ("Allied" or "Borrower"), were absolutely prohibited from being a Lender to Allied, or an Eligible Assignee of a Lender, and thus could not acquire any Term Loans or other Obligations under the Credit Agreement.

There is also no dispute that under the Third Amendment to the Credit Agreement (which was approved by a majority of the Lenders at the request of Yucaipa and Allied), Yucaipa was permitted to acquire a certain limited amount of Term Loans under the Credit Agreement. However, the *quid pro quo* for permitting Yucaipa to acquire the Term Loans was that a cap was imposed on the amount of Term Loans that Yucaipa could acquire, and that any such Term Loans acquired by Yucaipa would be subject to substantial restrictions that among other things, would preclude Yucaipa from voting on any matter that could affect in any way the rights and remedies of the Lenders, or the Lenders' ability to obtain payment on their debt.

Plaintiffs contend that Yucaipa's scheme was in fact not successful because the purported Fourth Amendment violates the Credit Agreement and the Third Amendment, and thus never became effective.

Yucaipa is trying to claim ownership of a sufficient amount of the Term Loans so as to declare itself a Requisite Lender, a

designation that would allow Yucaipa to make decisions that would be binding on all Lenders, including the ability to direct the Agent for the Lenders to exercise (or forbear from exercising) rights and remedies against Allied and the other Loan Parties upon the occurrence and during the continuance of an Event of Default (which has been the case here since 2008).

Plaintiffs, who are Lenders under the Credit Agreement, seek a declaration that the purported Fourth Amendment to the Credit Agreement - which ostensibly strips out all of the restrictions incorporated into the Credit Agreement by the Third Amendment on the ability of Defendants as the "Sponsor" and majority shareholders to acquire more than a majority of the Term Loans and become the "Requisite Lender" - is ineffective, because Allied failed to obtain (and did not even seek) the unanimous Lender consent required by the Credit Agreement to remove these restrictions.

The plaintiffs are correct that the Credit Agreement unambiguously requires unanimous consent - and because it admittedly was not obtained - no material issue of fact exists, and Plaintiffs' Motion should be granted.

What the defendants did was to cause Allied to enter into an agreement with ComVest Investment Partners III, L.P. ("ComVest") - who then held a majority of the outstanding Obligations under the Credit Agreement - pursuant to which Yucaipa agreed to

purchase the Obligations held by ComVest for a combination of cash and future consideration to ComVest (calculated as a percentage of Yucaipa's ultimate recovery on the Obligations purchased). That transaction, however, could not be consummated so long as the restrictions on Yucaipa's acquisition, ownership and voting of Obligations, as set forth in the Third Amendment, remained effective. So, as a condition to the consummation of the transaction, Yucaipa required that an amendment to the Credit Agreement be entered into by Allied and ComVest eliminating the restrictions.

Thus, on August 21, 2009, Yucaipa, as controlling shareholder of Allied, caused Allied to enter into that certain Amendment No. 4 to Credit Agreement with ComVest (the "Purported Fourth Amendment"), which purported to eliminate any restrictions on Yucaipa's ownership of Allied debt (including those that existed in the Credit Agreement as initially drafted and executed), including the provision disregarding Yucaipa-held debt in calculating "Term Loan Exposure," which would otherwise have prevented Yucaipa from becoming the Requisite Lender. After the Purported Fourth Amendment was signed, Yucaipa consummated its transaction with ComVest and acquired a majority of the Obligations - thereby seizing control of the Lenders' rights and remedies under the Credit Facility.

This was, of course, flatly prohibited under the Credit

Agreement absent the consent of all of the Lenders, and thus the Purported Fourth Amendment is invalid and of no force or effect.

Section 10.5 of the Credit Agreement, which governs amendments to the Credit Agreement, unambiguously states in clause (b) that "[w]ithout the written consent of each Lender . . . affected thereby, no amendment, modification, termination or consent shall be effective if the effect thereof would: . . . (ix) amend the definition of 'Requisite Lenders' . . . " "[T]he intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law . . . [and] no trial is necessary to determine the legal effect of the contract." *Gen. Phoenix Corp. v Cabot*, 300 N.Y. 87, 92 (1949).

In fact, the Purported Fourth Amendment "affected" every Lender and had the "effect" of amending the definition of Requisite Lenders. A material element of the definition of Requisite Lenders is Term Loan Exposure, which is utilized both to define which Lenders may become the Requisite Lender (or be part of a group comprising Requisite Lenders) and to calculate whose obligations may be counted in calculating the amount that a Lender or group of Lenders must hold in order to be the Requisite Lender(s).

There is no doubt that the Purported Fourth Amendment's changes to the definition of Term Loan Exposure had "the effect

of" changing the definition of Requisite Lenders by allowing the Yucaipa-owned Obligations to be included in the calculation of Term Loan Exposure when, under the Third Amendment, they had previously been expressly excluded.

By the express terms of the Credit Agreement, the Purported Fourth Amendment could only become effective upon the unanimous consent of the Lenders. It is undisputed that Allied did not obtain - or even seek - consent from any Lender other than ComVest, whom Yucaipa paid and indemnified.

For their part the defendants contend that there are many factual issues. There are none. This is a case of contract interpretation. The defendants argue that summary judgment should not be granted because fact discovery is necessary for its *res judicata* defense, which is based upon the settlement of a Georgia Action, a case in which Plaintiffs were not parties. The Settlement Agreement — which was negotiated and executed by Defendants — demonstrates that any claims by Plaintiffs were not dismissed in that Georgia Action.

This Court does not consider the existence of the Settlement Agreement to be a viable defense. It was entered into by CIT to settle claims and defenses it (CIT) had on its own in the Georgia Action. CIT expressly limited the release it gave under the Settlement Agreement to itself by providing that the limited release was made solely by CIT on its own behalf and not in a

representative capacity on behalf of any other person and thus it could not constitute a release by any other person. In addition, the parties to the Settlement Agreement, including Defendants here, made it clear that nothing in the Settlement Agreement released any claims belonging to anyone other than the parties to the Settlement Agreement by stating that "for the avoidance of doubt and notwithstanding anything herein to the contrary, nothing in this Agreement shall release any claims, actions, causes of action . . . whatsoever belonging to any person or entity other than the Parties to this Agreement (and each of their respective personal representatives, successors and assigns.)" The signature blocks in the Settlement Agreement show, that CIT signed, through its attorneys, only in its individual capacity.

The defendants' contention that Georgia law requires the Plaintiffs to appear in the Georgia Action to attack the judgment is unworthy of comment.

This Court considers the balance of the defendants' defenses to be unavailing.

Accordingly, it is Ordered ans Adjudged that the Purported Fourth Amendment is not, and never was, effective under the plain terms of the Credit Agreement, Yucaipa is not the Requisite Lender and Plaintiffs are entitled to summary judgment as a result.

Dated: March 8, 2013

J.S.C.

CHARLES E. RAMOS

# Appendix "B"

**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF DELAWARE**

| | |
|---|---|
| In re:<br><br>Allied Systems Holdings, Inc. *et al*,[1]<br><br>Debtors. | Chapter 11<br><br>Case No.: 12-11564 (CSS)<br>(Jointly Administered) |
| BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd., and Spectrum Investment Partners, L.P.,<br><br>Plaintiff(s),<br><br>- against -<br><br>Yucaipa American Alliance Fund, I, LP, Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund, II, LP, Yucaipa American Alliance (Parallel) Fund II, L.P., Ronald Burkle, Derex Walker, Ira Tochner, Jeff Pelletier, Jos Opdeweegh, Joseph Tomczak, and Mark Gendregske,<br><br>Defendants. | Adversary Proceeding No. |

**COMPLAINT FOR (I) EQUITABLE SUBORDINATION OF CLAIMS AGAINST THE YUCAIPA DEFENDANTS, (II) SPECIFIC PERFORMANCE AGAINST THE YUCAIPA DEFENDANTS, (III) BREACH OF CONTRACT AGAINST THE YUCAIPA DEFENDANTS, (IV) BREACH OF FIDUCIARY DUTY AGAINST THE YUCAIPA DIRECTORS, AND (V) AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST BURKLE AND THE YUCAIPA DEFENDANTS**

Plaintiffs BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd., and

[1] The "Debtors" in these cases, along with the federal tax identification number (or Canadian business number where applicable) for each of the Debtors, are: Allied Systems Holdings, Inc. (58-0360550); Allied Automotive Group, Inc. (58-2201081); Allied Freight Broker LLC (59-2876864); Allied Systems (Canada) Company (90-0169283); Allied Systems, Ltd. (L.P.) (58-1710028); Axis Areta. LLC (45-5215545); Axis Canada Company (875688228); Axis Group, Inc. (58-2204628); Commercial Carriers, Inc. (38-0436930); CT Services. Inc. (38-2918187); Cordin Transport LLC (38-1985795); F.J. Boutell Driveaway LLC (38-0365100); GACS Incorporated (58-1944786); Logistic Systems. LLC (45-4241751); Logistic Technology, LLC (45-4242057): QAT, Inc. (59-2876863): RMX LLC (31-0961359); Transport Support LLC (38-2349563); and Terminal Services LLC (91-0847582).

Spectrum Investment Partners, L.P. (the "Plaintiffs"), bring this action:

(i) under 11 U.S.C. § 510(c) to subordinate, for purposes of distribution, the claims held by Yucaipa American Alliance Fund, I, LP, Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund, II, LP, and/or Yucaipa American Alliance (Parallel) Fund II, L.P. (collectively, "Yucaipa" or "Yucaipa Defendants") pursuant to the First Lien Credit Agreement[2] and the Second Lien Credit Agreement,[3] to the claims of all other First Lien Lenders and Second Lien Lenders,[4]

(ii) for specific performance against the Yucaipa Defendants based upon the Yucaipa Defendants failure to comply with the terms of the First Lien Credit Agreement, including (without limitation) Section 10.6(c) and Sections 10.6(j)(iii) and (iv) (as amended through the Third Amendment),

(iii) for breach of contract against the Yucaipa Defendants based on the Yucaipa Defendants failure to comply with the terms of the First Lien Credit Agreement, including (without limitation) Section 10.6(j)(iii) thereof (as amended through the Third Amendment),[5]

(iv) for damages against Derex Walker, Ira Tochner, Jeff Pelletier, Jos Opedeweegh, Joseph Tomczak and Mark Gendregske (the "Yucaipa Directors") for breach of fiduciary duties as directors of Allied Systems Holdings, Inc. and certain of the other Debtors, and

(v) for damages against Ronald Burkle ("Burkle") and the Yucaipa Defendants for aiding and abetting breach of the Yucaipa Directors' fiduciary duties.

---

[2] "First Lien Credit Agreement" means that certain Amended and Restated First Lien Secured Super-Priority Debtor in Possession and Exit Credit Agreement and Guaranty Agreement, dated May 15, 2007, between Allied Systems Holdings Inc. and Allied Systems Ltd. (L.P.), as Borrowers", the Lenders from time to time party thereto, and The CIT Group Business Credit, Inc. ("CIT"), as Administrative Agent and Collateral Agent (as amended, modified or supplemented from time to time through and including that certain Amendment No. 3 to Credit Agreement and Consent, dated as of April 17, 2008). All capitalized terms used herein and not otherwise defined shall have the meanings set forth in the First Lien Credit Agreement.

[3] "Second Lien Credit Agreement" means that certain Second Lien Secured Super-Priority Debtor in Possession and Exit Credit and Guaranty Agreement dated as of May 15, 2007 among Allied Systems Holdings Inc. and Allied Systems Ltd. (L.P.), as Borrowers, Certain Subsidiaries of the Borrowers as Guarantors, Various Lenders and Goldman Sachs Credit Partners L.P. as Lead Arranger and Syndication Agent, Administrative Agent and Collateral Agent ((as amended, modified or supplemented from time to time).

[4] "First Lien Lenders" means the Lenders from time to time party to the First Lien Credit Agreement. "Second Lien Lenders" means the Lenders from time to time party to the Second Lien Credit Agreement.

[5] "Third Amendment" means Amendment No. 3 to the First Lien Credit Agreement, dated April 17, 2008, between Allied Systems Holdings Inc. and Allied Systems Ltd. (L.P.), as Borrowers and CIT.

## NATURE OF THE COMPLAINT

1. This case arises out of a highly choreographed scheme by Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, implemented over the course of several years, to advance the investment interests of Yucaipa to the detriment of the Plaintiffs and the other First Lien Lenders. In furtherance of this scheme, Yucaipa -- as the controlling shareholder of the Debtors and acting through its hand-picked Board of Directors[6] – engaged in a course of conduct designed to frustrate the exercise of the legitimate rights and remedies of Plaintiffs and the other First Lien Lenders after numerous Events of Default had admittedly occurred and were continuing, and at a time when the Debtors were insolvent. Yucaipa, the Yucaipa Directors and Burkle have (i) engaged in a pattern of inequitable conduct against the Plaintiffs and the other First Lien Lenders, (ii) conferred (and/or took actions in an effort to confer) an unfair advantage on Yucaipa; and (iii) caused damages to the Plaintiffs and the other First Lien Lenders.

2. The lynchpin of Yucaipa's scheme was Yucaipa's illegitimate and improper assertion that it is/was the controlling or "Requisite Lender" under the First Lien Credit Agreement. Had that been the case, Yucaipa would have had dictatorial powers as a result of its ability to control both the Debtors (through its majority equity ownership and the Yucaipa Directors) *and* the exercise (or forbearance from exercise) of the rights and remedies of the Debtors' First Lien Lenders. However, as discussed more fully below, the Supreme Court of the State of New York (the "New York Court") recently ruled, unequivocally, that Yucaipa is not and never was the "Requisite Lender" under the First Lien Credit Agreement. The improper and self-interested actions taken by Yucaipa, the Yucaipa Directors and, upon information and belief,

[6] Upon information and belief, Derex Walker (the Chairman of the Allied Board) and Ira Tochner (also a director) are employees or principals of Yucaipa and/or its affiliates, and are responsible for managing Yucaipa's debt and equity investments in the Debtors.

Burkle, to manipulate and control the Debtors during the more than three year period preceding the New York Court's ruling, caused substantial harm to the Plaintiffs and the other First Lien Lenders, warranting subordination of Yucaipa's claims to the claims of all other First Lien Lenders and Second Lien Lenders, and the award of damages against the Yucaipa Directors and Burkle.

3. The goal of the scheme by Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, was to control every aspect of the Debtors' capital structure, and neutralize the legal rights of Plaintiffs and other First Lien Lenders, so that Yucaipa and the Yucaipa Directors could control Allied for the benefit of Yucaipa and to the detriment of Plaintiffs and each other First Lien Lender. Upon information and belief, at the direction of Burkle, in August 2009, Yucaipa, which by then already controlled the Debtors through (i) ownership of a majority of the Debtors' equity interests, (ii) its appointment of the majority of the Debtor's Board of Directors (the "Board"), and (iii) its control of Allied's management, consummated in a highly choreographed series of events to hijack control of the First Lien Credit Agreement and declare itself the "Requisite Lender" thereunder.

4. The First Lien Credit Agreement vests the Requisite Lenders with broad authority to make key decisions affecting the rights of all First Lien Lenders. In addition, the Requisite Lenders are vested with the authority to direct the Administrative Agent to exercise certain rights and remedies on behalf of all First Lien Lenders, such as declaring Events of Default, demanding immediate payment by Borrowers of any and all amounts due, or commencing foreclosure on the collateral pledged to secure the Obligations. Significantly, in addition to the right to direct the Administrative Agent to exercise remedies on behalf of all First

Lien Lenders, Requisite Lenders also have the power to direct the Administrative Agent to refrain from exercising such remedies.

5. Given the manifest conflict of interest that would arise if Yucaipa – as controlling and majority shareholder of Allied – were able to control the exercise of the First Lien Lenders' rights and remedies under the First Lien Credit Agreement, and thereby protect and benefit itself as equity owner, the First Lien Credit Agreement was initially drafted to absolutely prohibit Yucaipa from becoming a First Lien Lender (thus foreclosing any possibility that Yucaipa could become Requisite Lender). Under the Third Amendment, however, Yucaipa was permitted to acquire a certain limited amount of Term Loans, but only subject to substantial restrictions that, among other things, required Yucaipa to contribute to capital fifty (50%) of the Term Loans it acquired, and precluded Yucaipa from becoming the Requisite Lender or voting on any matter that could affect in any way the rights and remedies of the First Lien Lenders.

6. Given the occurrence and continuance of Events of Default (including payment Defaults), and with the First Lien Lenders beginning to exert pressure on the Debtors (including the possible acceleration of the Obligations, which would have precipitated the commencement of chapter 11 cases), Yucaipa determined that it had to become the Requisite Lender to stop any possible exercise of remedies by the First Lien Lenders. Knowing that it could not achieve that objective with the restrictions contained in the Third Amendment in place, Yucaipa attempted in February 2009 to become the Requisite Lender by tendering for the Obligations under the First Lien Credit Agreement. As a condition to the tender, any tendering First Lien Lender would have to execute an amendment to the First Lien Credit Agreement eliminating all of the restrictions imposed by the Third Amendment on Yucaipa's ownership of Obligations. Yucaipa admits that the form of the amendment for which it sought approval was in

all material respects identical to the Purported Fourth Amendment (described below), which approval Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, engineered several months later. Yucaipa's tender failed miserably.

7. Upon information and belief, by December 2008 ComVest Investment Partners III, L.P. ("ComVest") had either acquired, or had committed to acquire, a majority of the Obligations under the First Lien Credit Agreement. By February 2009, ComVest had become the Requisite Lender. Upon information and belief, ComVest was pressing Yucaipa and the Yucaipa Directors to address the Events of Default under the First Lien Credit Agreement through a restructuring of the Debtors that would eliminate (or substantially dilute) Yucaipa's equity interest. Yucaipa, the Yucaipa Directors and, upon information and belief Burkle, would have none of it. Instead, despite the occurrence and continuance of Events of Default, Yucaipa and the Yucaipa Directors refused to pursue any restructuring, and held ComVest at bay while at the same time Yucaipa was negotiating to purchase the Obligations held by ComVest for the purpose of becoming Requisite Lender. After months of futile efforts to pursue an appropriate restructuring of the Debtors for the benefit of all First Lien Lenders, ComVest finally acceded and agreed to sell their Obligations to Yucaipa.

8. On August 21, 2009, in furtherance of its scheme to usurp control of every level of the Debtors' capital structure, Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, caused Allied to enter into a "Purported Fourth Amendment" to the First Lien Credit Agreement. The only First Lien Lender who signed the Purported Fourth Amendment was ComVest; no other First Lien Lender was even solicited. The sole purpose and effect of the Purported Fourth Amendment was to remove all of the restrictions imposed on Yucaipa's acquisition, ownership and voting of Obligations under the First Lien Credit Agreement and the

Third Amendment, thereby making Yucaipa eligible to be the Requisite Lender. On the same day as Yucaipa, the Yucaipa Directors and Burkle caused Allied to enter into the Purported Fourth Amendment, Yucaipa purchased all of the Obligations under the First Lien Credit Agreement owned by ComVest.[7] Yucaipa's ability to completely dominate and control the Allied capital structure (through a combination of the Yucaipa Directors' control of the Board and its alleged status as Requisite Lender) and to insulate itself from the legitimate exercise of rights and remedies by Plaintiffs and the other First Lien Lenders was now (presumably) complete.[8]

9. The Purported Fourth Amendment and Yucaipa's purchase of ComVest's Obligations afforded Yucaipa and Burkle their stated purpose -- the ability to simultaneously control the (a) Debtors, through Yucaipa's majority equity position and control of the Board, and (b) the First Lien Lenders, through Yucaipa's alleged Requisite Lender position. Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, exercised this dominion and control for more than three (3) years, and used millions of dollars of corporate assets to fund litigation defending Yucaipa's alleged Requisite Lender status. And while Yucaipa reigned as the alleged Requisite Lender (in conjunction with its control of the Board), the Events of Default continued to the point where the Debtors missed principal and interest payments exceeding tens of millions of dollars. The Debtors' business operations also withered under a mountain of crushing debt which impaired the Debtors' ability to attract new business and invest sorely needed capital. Yucaipa, however, exercised its alleged position as Requisite Lender and its control over the

[7] Upon information and belief, in exchange for the acquisition of the Obligations owned by ComVest, Yucaipa agreed to (a) pay for ComVest an amount in cash, and (b) provide ComVest with a portion of any profit Yucaipa received on such Obligations.

[8] Yucaipa has admitted that it would not have purchased any First Lien Debt from ComVest if it had known that Yucaipa "could be subject to the decisions of other Lenders." *See* Yucaipa Answer and Counterclaims, at par. 18. Thus, the objective of Yucaipa's scheme, by its own admission, was to become the Requisite Lender and to control the entirety of the Debtors' capital structure.

Board to preclude any exercise of rights or remedies by the Agent or the First Lien Lenders, or any restructuring that would have allowed the other First Lien Lenders to recover on the Obligations they held under the First Lien Credit Agreement. Yucaipa hid the Debtors' poor financial condition by intentionally causing the Debtor to withhold financial information it was obligated to provide under the First Lien Credit Agreement from other First Lien Lenders.

10. On November 19, 2012, in an action commenced in the New York Court by Plaintiffs against Yucaipa challenging the Purported Fourth Amendment and Yucaipa's alleged status as Requisite Lender, the New York court granted Plaintiff's motion for summary judgment, ruling that Yucaipa is not and never has been the Requisite Lender. *BDCM Opportunity Fund II, LP et al. v. Yucaipa American Alliance Fund I L.P. et al, Index No.* 650150/2012 (the "New York Action"). That ruling laid bare the falsity of the pretext upon which Yucaipa had been holding hostage Plaintiffs and the other First Lien Lenders for more than three (3) years.

11. Prior to that ruling, Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, exercising dictatorial powers as the controlling shareholder and alleged Requisite Lender, caused the Debtors to, among other things, (i) default on numerous provisions of the First Lien Credit Agreement and other agreements, including failure to pay interest and principal to the First Lien Lenders; and (ii) engage in corporate waste and misappropriate assets in favor of Yucaipa, while at the same time precluding Plaintiffs and the other First Lien Lenders from exercising legitimate rights and remedies as First Lien Lenders, all for the benefit of Yucaipa and to the detriment of Plaintiffs and all other First Lien Lenders. Upon information and belief, and as further detailed below, Yucaipa, and the Yucaipa Directors, who, upon information and belief, acted at the direction of Burkle, also usurped from the Debtors a pre-

petition corporate opportunity with a potential strategic buyer in an effort to allow Yucaipa to recover more on account of the Obligations it allegedly owned under the First Lien Credit Agreement than Plaintiffs or any other First Lien Lender. These and other actions to be detailed at trial harmed Plaintiffs and the other First Lien Lenders warranting subordination of Yucaipa's claims.

12. This Complaint also seeks redress for the egregious breaches of fiduciary duty by the Yucaipa Directors. Upon information and belief, Allied was insolvent as early as July 2008. As a result, the Yucaipa Directors owed fiduciary duties to the Debtors' creditors. The Yucaipa Directors breached these fiduciary duties by their abject failure to develop, manage, or oversee a restructuring or sale process despite numerous admitted Events of Default under the First Lien Credit Agreement and continuous, substantial operating losses. In addition, the Yucaipa Directors acted solely in furtherance of Yucaipa's interests, consistently placing those interests ahead of the interests of the Plaintiffs and the other First Lien Lenders. The failures of the Yucaipa Directors were avoidable and directly resulted in harm to Plaintiffs through, among other things, the precipitous decline in the value of Debtors' assets and enterprise value (which constitute the collateral for the Obligations).[9]

13. Yucaipa and, upon information and belief, Burkle, knowingly participated in and induced all of the breaches of fiduciary duty by the Yucaipa Directors to the Debtors and such breaches were on account of, or for the direct benefit of Burkle, and Yucaipa.

14. Finally, the Plaintiffs seek redress for Yucaipa's breach of the First Lien Credit Agreement and the Third Amendment by failing to make the mandatory capital contribution to the Debtors' estate of "no less than 50% of the aggregate principal amount" of the

[9] The Debtors' certificates of incorporation contain certain exculpatory provisions that are apparently intended to eliminate personal liability of its directors and officers for breaches of their fiduciary duties. However, such exculpatory provisions are not applicable under Delaware law.

Term Loans purchased by Yucaipa, as required by the Third Amendment to the First Lien Credit Agreement. Yucaipa alleges that it acquired from ComVest Term Loans aggregating $114,712,088.66. Thus, under the Third Amendment Yucaipa is obligated to contribute to capital $57,356,044.30 of such Term Loans. Further, under the Third Amendment, Yucaipa is not permitted to acquire more than $50 million of the principal amount of any Term Loans or any LC Commitments. Thus, Yucaipa must divest itself of all LC Commitments and any Term Loans held in excess of $25 million (i.e. the maximum amount of Term Loans Yucaipa was permitted to hold after giving effect to the mandatory capital contribution).

**PARTIES**

15. Plaintiff BDCM Opportunity Fund II, LP is a Delaware limited partnership, with its principal place of business at One Sound Shore Drive, Suite 200, Greenwich, CT 06830.

16. Plaintiff Black Diamond CLO 2005-1 Ltd. is a Cayman Islands limited liability company, with its principal place of business at One Sound Shore Drive, Suite 200, Greenwich CT 06830.

17. Plaintiff Spectrum Investment Partners, L.P. is a Delaware limited partnership, with its principal place of business at 1250 Broadway, New York, NY 10001.

18. Defendant Yucaipa American Alliance Fund, I, LP is a Delaware limited partnership with its principal place of business at 9130 West Sunset Boulevard, Los Angeles, California, 90069. Upon information and belief, Yucaipa American Alliance Fund, I, LP is a 37.24% (approximate) shareholder of Allied Systems Holdings, Inc.

19. Defendant Yucaipa American Alliance (Parallel) Fund II, LP is a Delaware limited partnership with its principal place of business at 9130 West Sunset Boulevard,

Los Angeles, California, 90069. Upon information and belief, Yucaipa American Alliance (Parallel) Fund I, LP is a 26.10% (approximate) shareholder of Allied Systems Holdings, Inc.

20. Defendant Yucaipa American Alliance Fund, II, LP is a Delaware limited partnership with its principal place of business at 9130 West Sunset Boulevard, Los Angeles, California, 90069.

21. Defendant Yucaipa American Alliance (Parallel) Fund II, LP is a Delaware limited partnership with its principal place of business at 9130 West Sunset Boulevard, Los Angeles, California, 90069.

22. Defendant Ronald Burkle, an individual, upon information and belief, is the founder and Managing Partner of The Yucaipa Companies LLC, a private investment firm and, upon information and belief, at all relevant times, controlled the actions of Yucaipa and the Yucaipa Directors.

23. Defendant Derex Walker is an individual who served as a director of and Chairman of the Board of Allied during the relevant time period herein. Upon information and belief, Defendant Walker, at all relevant times herein, was affiliated with Yucaipa or The Yucaipa Companies LLC and, acted in his capacity as an Allied Director, at the direction of and for the benefit of Burkle and Yucaipa.

24. Defendant Ira Tochner is an individual who served as a director of Allied during the relevant time period herein. Upon information and belief, Defendant Tochner, at all relevant times herein, was affiliated with Yucaipa or The Yucaipa Companies LLC and, acted in his capacity as an Allied Director, at the direction of and for the benefit of Burkle and Yucaipa.

25. Defendant Jeff Pelletier is an individual who served as a director of Allied during the relevant time period herein. Upon information and belief, Defendant Pelletier, at all

relevant times herein, was affiliated with Yucaipa or The Yucaipa Companies LLC and, acted in his capacity as an Allied Director, at the direction of and for the benefit of Burkle and Yucaipa.

26. Defendant Jos Opdeweegh is an individual who served as a director of Allied during the relevant time period herein. Upon information and belief, Defendant Opdeweegh, at all relevant times herein, was affiliated with Yucaipa or The Yucaipa Companies LLC and, acted in his capacity as an Allied Director, at the direction of and for the benefit of Burkle and Yucaipa.

27. Defendant Joseph Tomczak is an individual who served as an officer and upon information and belief, a director of Allied during the relevant time period herein. Upon information and belief, Defendant Tomczak, at all relevant times herein, was affiliated with Yucaipa or The Yucaipa Companies LLC and, acted in his capacity as an Allied Director, at the direction of and for the benefit of Burkle and Yucaipa.

28. Defendant Mark Gendregske is an individual who served as Chief Executive Officer and upon information and belief, a director of Allied during the relevant time period herein. Upon information and belief, Defendant Gendregske was appointed as a director by Yucaipa and Burkle, and at all relevant times acted in his capacity as an Allied Director, at the direction of and for the benefit of Burkle and Yucaipa.

## JURISDICTION/VENUE

29. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) because this proceeding arises under or in a case under the Bankruptcy Code ("Code"), Title 11 of the United States Code.

30. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

31. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

## FACTS

32. The Debtors are providers of distribution and transportation services to the automotive industry, specializing in the delivery of new vehicles from auto manufacturing plants to auto dealerships. The Debtors and several related entities filed for Chapter 11 bankruptcy protection once before, in July 2005 (the "Prior Bankruptcy Cases").

**Yucaipa's Control of the Debtors' Business**

33. In May 2007, the Debtors' plan of reorganization in the Prior Bankruptcy Cases became effective resulting in Yucaipa becoming the majority and controlling shareholder of the Allied Systems Holdings, Inc. Upon information and belief, as a result of the plan in the Prior Bankruptcy Cases, Yucaipa owned or controlled more than 70% of the common equity of the Debtors. Since Allied's emergence from the Prior Bankruptcy Cases, Yucaipa has used (and continues to use) this controlling interest to operate the Debtors for its own benefit.

34. In addition to, and as a result of, their majority ownership interest in the Debtors, Yucaipa controls the Debtors' Board. Pursuant to the Debtors' 2007 plan of reorganization, Yucaipa appointed four out of the five members of the Debtors' Board, all of whom were either employees of, or affiliated with, or under the dominion and control of Yucaipa.[10]

35. Yucaipa's control over the Board has enabled it to at all relevant times control the Debtors, including appointing members of senior management of the Debtors and controlling their actions.

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[10] The initial appointees to the Board were Brian Cullen, and Defendants Gendregske, Opdeweegh, Tochner and Walker. Defendants Opdeweegh, Tochner and Walker were selected to serve by Yucaipa. Upon information and belief, Defendant Tomczak served, at the direction of Yucaipa, as directors at certain times during 2008 and 2009. Also, upon information and belief, Defendant Gendregske is under Yucaipa's control due to Yucaipa's guarantee of compensation arrangements worth millions of dollars.

**The Credit Agreements**

36. To finance their May 2007 emergence from the Prior Bankruptcy Cases, Allied and its affiliates obtained financing through two credit facilities consisting of (a) a $265 million senior secured first priority credit facility evidenced by the First Lien Credit Agreement and (b) a $50 million second lien credit facility evidenced by the Second Lien Credit Agreement. The First Lien Credit Agreement provided for (i) term loans in the aggregate principal amount of $180 million (the "Term Loans"); (ii) a $35 million revolving credit facility from CIT (the "Revolving Loan"); and (iii) a $50 million synthetic letter of credit facility ("LC Facility").

37. The Yucaipa Defendants are defined in the First Lien Credit Agreement as the "Sponsor" due to their sponsorship of the Debtors' 2007 plan of reorganization and subsequent control of the Debtors after its emergence from the Prior Bankruptcy Cases.

38. Central to the First Lien Credit Agreement is the concept of the Requisite Lender(s). As defined in the First Lien Credit Agreement, the Requisite Lenders are

> one or more Lenders having or holding Term Loan Exposure, LC Exposure and/or Revolving Exposure and representing more than 50% of the sum of (i) the aggregate Term Loan Exposure of all Lenders, (ii) the aggregate LC Exposure of all Lenders and (iii) the aggregate Revolving Exposure of all Lenders.

39. As set forth above, the Requisite Lenders, as majority debt holders, are vested with broad authority to make key decisions affecting the rights of all First Lien Lenders, including the authority to direct the Administrative Agent to exercise or refrain from exercising certain rights and remedies on behalf of all Lenders, such as declaring Events of Default, demanding immediate payment by Allied of any and all amounts due, or commencing foreclosure on the collateral pledged to secure the Obligations.

40. Given the manifest conflict of interest that would arise if Yucaipa – as controlling and majority shareholder of the Debtors – were able to control the exercise of the First Lien Lenders' rights and remedies under the First Lien Credit Agreement, and thereby protect and benefit itself as equity owner, the First Lien Credit Agreement was drafted to foreclose any possibility that Yucaipa could become a Requisite Lender. Under the First Lien Credit Agreement, the only parties eligible to be a Requisite Lender are "Lenders," which consist solely of the original First Lien Lender signatories to the First Lien Credit Agreement, and Eligible Assignees who subsequently become First Lien Lenders.

41. Yucaipa was not a First Lien Lender signatory under the First Lien Credit Agreement. Nor could Yucaipa become a First Lien Lender through an Assignment Agreement because, pursuant to Section 10.6(c) of the First Lien Credit Agreement, First Lien Lenders were only permitted to sell, transfer or assign their rights under the First Lien Credit Agreement (*i.e.*, enter into an Assignment Agreement) to Eligible Assignees.) The definition of Eligible Assignee expressly provides that "no … Sponsor shall be an Eligible Assignee."[11]

**Allied's Business Falters Shortly After Emergence From the Prior Bankruptcy Cases**

42. Less than a year after their emergence from the Prior Bankruptcy Cases, the Debtors were back in financial trouble. In the April 1, 2008 minutes of the Special Committee of the Board, Tom King, Allied's chief financial officer, reported that "the Company's lenders were nervous." He further reported that the Company was obligated to report its first quarter financial results to the First Lien Lenders by the end of April and would likely have a "going concern problem" if a transaction then under discussion with Yucaipa were not timely

[11] Similar restrictions on Yucaipa existed under the initial Second Lien Credit Agreement.

concluded. Mr. King further reported that the issuance of a going concern opinion from the Company's auditors would constitute a default under the First Lien Credit Agreement.

43. The transaction then under discussion between Yucaipa and the Debtors contemplated Yucaipa's acquisition of Obligations under the First Lien Credit Agreement and the contribution of those Obligations (in the amount of approximately $20-25 million) to capital of Allied in exchange for additional equity interests. As Mr. King advised the Special Committee at the April 8, 2008 meeting, absent the transaction, the Company's only other option would be to try to meet their covenants, which would be "pathetically tight" in June. At that meeting Mr. King again expressed his concerns regarding the auditor's issuance of a qualified going concern opinion.

**Yucaipa Obtains the Right to Become a Lender Under the Credit Agreement with Significant Restrictions on its Rights as a Lender**

44. In or around April 2008, the First Lien Lenders were advised that Yucaipa was interested in acquiring a portion of the Obligations under the First Lien Credit Agreement (and thus becoming a First Lien Lender under the First Lien Credit Agreement) presumably for the purpose of effectuating the transaction then under discussion with the Debtors. However, due to the restrictions prohibiting Yucaipa from being an Eligible Assignee, Yucaipa could only purchase the Obligations if an amendment to the First Lien Credit Agreement were executed permitting such acquisition. As a result, Yucaipa and the Debtors requested and received consent from the First Lien Lenders to amend the First Lien Credit Agreement (pursuant to the Third Amendment dated April 17, 2008) to permit Yucaipa to become a "Lender" under

extremely limited circumstances and with severe conditions and restrictions placed on its rights in connection with the Obligations it could acquire.[12]

45. Specifically, under the Third Amendment, Yucaipa was expressly designated a Restricted Sponsor Affiliate and was:

- Required to contribute to Allied as capital no less than 50% of the aggregate principal amount of any Term Loans that Yucaipa obtained within ten days after the date of such acquisition – **thus further minimizing the impact Yucaipa could assert through its ownership of the Term Loans.**

- Prohibited from accumulating over (i) 25% of the aggregate principal amount of the Term Loan Exposure held by all First Lien Lenders or (ii) $50 million of the principal amount of Term Loans,– **thus preventing the acquisition of the majority ownership stake required to become a Requisite Lender**;[13]

- Prohibited from exercising any and all voting rights it would otherwise have as a First Lien Lender, including the right to consent to an amendment of the First Lien Credit Agreement or the right to vote its debt in any Allied bankruptcy – **thereby precluding Yucaipa from exercising any voting rights granted to the Lenders ;**

- Prohibited from including its Term Loans in any calculation of Term Loan Exposure when such calculation was required under the First Lien Credit Agreement – **thus again precluding Yucaipa from amassing a sufficient stake to become a Requisite Lender**; **and**

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[12] Simultaneously, Yucaipa and the Debtors sought and received an amendment to the Second Lien Credit Agreement to permit Yucaipa to become a "Lender" under the Second Lien Credit Agreement and to contribute a portion of any Obligations purchased to capital. Thus, on or about April 17, 2008 (the same date as the Third Amendment) the Debtors, the Second Lien Agent and Requisite Lenders under the Second Lien Credit Agreement executed that certain Amendment No. 3 to the Credit Agreement and Consent. As Yucaipa now admits, Yucaipa never had any intention of purchasing Obligations under the First Lien Credit Agreement under the terms of the Third Amendment. Rather, Yucaipa and the Yucaipa Directors deceived the First Lien Lenders into believing Yucaipa intended to acquire Obligations under the First Lien Credit Agreement so that Yucaipa could get what it really wanted, which was the amendment to the Second Lien Credit Agreement. The consents of the First Lien Lenders contained in the Third Amendment were required in order for the transactions contemplated by the amendment to the Second Lien Credit Agreement to be permitted. Having requested and negotiated the execution of the Third Amendment, there is nothing "inequitable" about requiring Yucaipa to comply with its terms.

[13] Yucaipa was also prohibited from acquiring *any* Revolving Loans or LC Deposit Loans.

46. To ensure Yucaipa's compliance with these fundamental restrictions, the Third Amendment further required Allied to deliver to the Administrative Agent monthly reports of the amount of Term Loans acquired and held by Yucaipa, and the price paid for such loans.

**Allied's Financial Condition Deteriorates, While Events of Default Occur and Continue**

47. Despite the execution and delivery of the Third Amendment, Yucaipa never acquired any of the Obligations under the First Lien Credit Agreement at that time.

48. Meanwhile, as predicted by Mr. King, Allied's financial condition continued to deteriorate. Specifically, in August 2008, Allied notified the First Lien Lenders and the Administrative Agent that it had failed to comply with the financial covenants set forth in Sections 6.7(a) and 6.7(b) of the First Lien Credit Agreement, resulting in Events of Default under Section 8.1 of the First Lien Credit Agreement as of the fiscal quarter ended June 30, 2008.

49. Since Allied's first default in August 2008, Allied has, all at Yucaipa's, the Yucaipa Directors' and, upon information and belief, Burkle's, direction and control, continued, on a regular basis, to default on its obligations under the First Lien Credit Agreement, resulting in a multitude of Events of Default under, and material breaches of, the First Lien Credit Agreement, including and without being exhaustive: (i) failure to comply with the financial covenants in the First Lien Credit Agreement for the past several years; (ii) failure to comply with its letter of credit obligations, by not reimbursing a collateral account when beneficiaries have drawn on those letters of credit and thereby squandering security of the First Lien Lenders; (iii) since December 2008, maintaining excess cash balances in accounts outside of control agreements, thereby securing for itself, without authorization or consent, access to cash that was supposed to be security for the First Lien

Lenders; and (iv) failure to deliver requisite financial statements and other information on a timely basis.

50. Allied, at Yucaipa's, the Yucaipa Directors' and, upon information and belief, Burkle's, direction and control, also ceased payment of required principal and interest payments under the First Lien Credit Agreement, even though Allied had the requisite cash to make the payments. By not making principal and interest payments — in combination with the self-help in which Allied has engaged by not reimbursing the collateral account that secures the L/C Facility, attempting to terminate control agreements without providing specified terms for new agreements and by retaining excess cash outside of controlled accounts pledged to the Lenders in contravention of the Credit Documents —Yucaipa, through the Yucaipa Directors, effectively usurped the First Lien Lenders' rights.

**Yucaipa Usurps Requisite Lender Status**

51. In September 2008, the First Lien Lenders and the Debtors entered into a Forbearance Agreement, dated September 24, 2008, to provide for a period of negotiations on how to address the various Events of Default. Concurrent with the execution of the Forbearance Agreement, upon information and belief, Yucaipa executed a side letter in favor of the First Lien Lenders in which Yucaipa agreed to refrain from purchasing any Obligations under the First Lien Credit Agreement (the "Side Letter").

52. By December 2008, no agreement on a restructuring had been reached and the Forbearance Agreement and Side Letter agreements had expired. At the December 10, 2008 meeting the Board (not the Special Committee) discussed at length Yucaipa's efforts to acquire a majority of the Obligations under the First Lien Credit Agreement. Defendant Walker, a Yucaipa Director and Chairman of the Allied Board, reported that Yucaipa was approached by a

"group of lenders" comprising 50.4% of the First Lien Term Loans who were interested in selling their loans to Yucaipa.

53. Defendant Walker told the Board that Yucaipa was continuing to negotiate with the selling lenders and that the other First Lien Lenders would not be offered the opportunity to participate in the transaction. Walker told the Board that with the proposed transaction "there would be an amendment" to the First Lien Credit Facility which "would remove the existing restrictions on Yucaipa ownership of Allied to *[sic]* first lien debt."

54. When Defendant Walker was asked Mr. Cullen to confirm that the First Lien Lenders did not want Yucaipa to purchase First Lien Debt, Defendant Walker evaded the question, responding only that "the lender restriction on Yucaipa purchasing first lien debt was contained only in the expired side letters." This was incorrect, as the restrictions were contained in the Third Amendment dated April 17, 2008. Defendant Walker also informed the Board that Yucaipa and the Debtors together "would likely issue a tender offer" to purchase First Lien Obligations of all First Lien Lenders, even though the Debtors had no funds with which to pay for any Obligations acquired.

55. At that same meeting, the Board was also informed by certain of the Yucaipa Directors (Messrs. Walker, Tomczak and Gendregske) that it was their opinion that the actions of the Administrative Agent and other First Lien Lenders had the "clear intent" of driving Allied into liquidation. Based upon the information from the Yucaipa Directors, it appeared to the Board as "though CIT and the lenders were approaching consensus on exercising their rights."

56. The Board was also informed by Mr. Walker that any debt acquired by Yucaipa would be held and not converted to equity. After a brief meeting of the Special

Committee, the Special Committee expressed the opinion that the transaction proposed by Yucaipa (i.e. the acquisition of a majority of the First Lien Obligations) "appeared allowable" and also "appeared to provide the only viable option to liquidation." Notably, the Board minutes contain no discussion of other strategic alternatives (including a possible debt for equity swap with the existing First Lien Lenders to restructure the Obligations), nor is there any indication that the Board received advice on restructuring alternatives from any investment banker or financial advisor. Rather, the only transaction the Board considered was the one presented by Yucaipa, based upon the opinions offered by the Yucaipa Directors.

57. In February 2009, Yucaipa launched a tender offer to purchase from the First Lien Lenders at a substantial discount to par, Allied's Obligations under the First Lien Credit Agreement.[14] As a condition to any tender, the tendering First Lien Lender would have to execute an amendment to the First Lien Credit Agreement. The tender offer failed, and Yucaipa was left to implement its alternative strategy to become the Requisite Lender.

58. After the failed tender offer, in an effort that Yucaipa admits was designed to frustrate the First Lien Lenders' rights under the First Lien Credit Agreement – in particular to prevent the First Lien Lenders from declaring the Obligations to be immediately due and payable and exercising their remedies – Yucaipa engineered a two-step hijacking of Allied's First Lien Credit Agreement.

59. First, after ComVest's effort to facilitate a restructuring had been rebuffed for months by Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, Yucaipa and ComVest – who then held a majority of the Obligations under the First Lien Credit Agreement – entered into an Assignment and Assumption Agreement whereby Yucaipa agreed

[14] The proposed amendment was the same, in all material respect, as the document then later became the Purported Fourth Amendment.

to acquire the Obligations owned by ComVest for a combination of cash and future consideration (calculated as a percentage of Yucaipa's ultimate recovery on the Obligations purchased). That transaction, however, could not be consummated so long as the restrictions on Yucaipa's acquisition, ownership and voting of Obligations, as set forth in the Third Amendment, remained effective. So as a condition to consummation of the transaction with ComVest, Yucaipa required that an amendment to the First Lien Credit Agreement be entered into by Allied and ComVest eliminating these restrictions so that Yucaipa could become the Requisite Lender

60. Thus, on August 21, 2009, Yucaipa caused Allied to enter into the Purported Fourth Amendment with ComVest. No First Lien Lender other than ComVest, whose interests were being bought out by Yucaipa for cash and future consideration rewarding ComVest for its role in the hijacking, consented to the Purported Fourth Amendment or was even solicited, even though stripping out the conditions and restrictions that prevented Yucaipa from becoming Requisite Lender clearly required the consent of all affected First Lien Lenders under the First Lien Credit Agreement.

61. The sole purpose and effect of the Purported Fourth Amendment was to remove all of the restrictions imposed on Yucaipa's acquisition, ownership and voting of Obligations under the First Lien Credit Agreement (as amended through the Third Amendment), thereby for the first time making Yucaipa eligible to be a Requisite Lender. Yucaipa has admitted that it would not have purchased First Lien Debt unless the Fourth Amendment was enacted because the restrictions and conditions limiting Yucaipa's potential ownership rights would have prevented it from carrying out its scheme to control the entire capital structure.[15]

62. Upon the execution and purported effectiveness of the Purported Fourth Amendment, Yucaipa and ComVest consummated the transactions contemplated by the

[15] [Yucaipa Answer and Counterclaims ¶50].

Assignment and Assumption Agreement. As a result of that acquisition, and because of the purported removal of the restrictions on Yucaipa in the Purported Fourth Amendment, Yucaipa asserted that *it* was the Requisite Lender, with all of the attendant powers to enforce or refuse to enforce the First Lien Lenders' rights and remedies.

63. Beginning in August 2009 and continuing thereafter, Events of Default occurred under each of the Credit Agreements as the financial condition of the Debtors and their business operations continued to deteriorate. In particular, the Debtors

(a) Failed to make the payments of interest due to the First Lien Lenders on August 3, 2009 and on each Interest Payment Date thereafter through the date hereof;

(b) Failed to make the payment of principal due to the First Lien Lenders on October 1, 2009 and on the first day of each calendar quarter thereafter;

(c) Failed to make the payments of interest due to the Second Lien Lenders on August 17, 2009 and on each Interest Payment Date thereafter through the date hereof;

(d) Failed to timely comply with their obligation to deliver certain annual financial statements, a Compliance Certificate and certain other materials for the Fiscal Years ended December 31, 2008 and December 31, 2009;

(e) Failed to timely comply with their obligation to deliver a consolidated plan and financial forecast for the Fiscal Years ended December 31, 2009 and December 31, 2010;

(f) Hoarded cash by maintaining excess cash balances in bank accounts not subject to any account control agreement;

(g) Failed to timely comply with their obligation to pay promptly the attorneys' fees incurred by the First Lien Agent and First Lien Lenders in enforcing Obligations of and in collecting any payments due from a Credit Party under the First Lien Credit Agreement; and

(h) Failed to comply with their obligations to reimburse LC Disbursements.

64. Not surprisingly, once it began to assert the rights of the Requisite Lender, Yucaipa refused to allow the Administrative Agent to enforce any rights or take any actions on behalf of the First Lien Lenders despite the occurrence and continuance of Events of Default, including Events of Default resulting from the failure to make required payments of principal and interest. Yucaipa prevented the Administrative Agent from taking any actions on behalf of the First Lien Lenders to accelerate the Obligations or exercise remedies, notwithstanding that Allied admitted its continuing Events of Default for more than three years, including the failure to pay millions of dollars of principal and interest on the Obligations to the detriment of all of Allied's non-insider First Lien Lenders. With its dual control over both the Board and the First Lien Lenders, Yucaipa and the Yucaipa Directors were free to take whatever actions they deemed appropriate without fear of reprisal or repercussion, and without regard to the damage caused to Plaintiffs and the other First Lien Lenders.

65. The Administrative Agent refused to acknowledge the validity of the Purported Fourth Amendment or Yucaipa's alleged status as Requisite Lender. In response, on November 13, 2009, Yucaipa caused Allied (using the Debtors' assets to pay all the costs of the litigation) to commence an action on behalf of itself and Yucaipa against The CIT Group/Business Credit, Inc. ("CIT"), in the Superior Court of Fulton County, Georgia, *inter alia*, (a) alleging breach of the First Lien Credit Agreement, (b) seeking a declaration that the Purported Fourth Amendment was effective and binding on the parties to the First Lien Credit Agreement, and (c) seeking a declaration that Yucaipa was the Requisite Lender under the First Lien Credit Agreement (the "Georgia Action").

66. Thereafter, on December 21, 2009, CIT filed a verified answer and counterclaims against Yucaipa and Allied seeking a declaration that the Purported Fourth

Amendment was ineffective and not binding, that Yucaipa was not the Requisite Lender, and other relief.

67. After more than two years of ruinously expensive litigation, on December 5, 2011, the parties to the Georgia Action entered into a settlement agreement pursuant to which CIT, in its individual capacity, capitulated and agreed not to "object to, challenge or contest, either directly or indirectly, the validity of the Fourth Amendment," and acknowledged "that Yucaipa is the Requisite Lender for all purposes including the exercise of remedies." Yucaipa also agreed to indemnify CIT "with respect to all claims, lawsuits, losses, damages or fees" arising out of, among other things, "CIT's express recognition herein of the validity and enforceability of the Fourth Amendment and the Yucaipa-ComVest Assignment Agreement."

68. After learning of the aforementioned Settlement of the Georgia Action and CIT's capitulation, Plaintiffs commenced the New York Action against Yucaipa on January 17, 2012 seeking a declaration that the Purported Fourth Amendment is invalid, ineffective and not binding, and that Yucaipa is not the Requisite Lender under the First Lien Credit Agreement.

69. In February and March 2012, the Plaintiffs urged the Board to engage in immediate discussions with Plaintiffs and/or other interested non-Yucaipa third parties regarding "an appropriate restructuring and/or recapitalization of the Borrowers and Subsidiary Guarantors to preserve and protect the Company's assets, and to maximize the value available to all interested parties." The Plaintiffs calls for negotiation were met with a terse refusal to engage in restructuring negotiations.

70. On May 17, 2012, the Petitioning Creditors filed involuntary petitions against Debtors. On June 10, 2012, Allied consented to orders for relief.

71. Since the commencement of these chapter 11 cases, Yucaipa has continued to hold itself out as the Requisite Lender, and caused the Debtors to acknowledge their support for that position.

72. On November 19, 2012, the court in the New York Action granted the Plaintiffs motion for summary judgment, declaring that Yucaipa is not and never was the "Requisite Lender."

**Yucaipa Controls the Debtors for Yucaipa's Benefit**

73. Upon information and belief, in 2008, 2009 and 2010, the Debtors were presented with certain restructuring and/or sale alternatives ("Pre-Petition Transactions").

74. These alternative proposals however, threatened Yucaipa's scheme to benefit itself and, upon information and belief, Burkle, to the detriment of the Debtor and the non-insider creditors.

75. Yucaipa and the Yucaipa Directors, at the direction of Burkle, systematically maneuvered to impede any proposal that would result in sharing the benefits of the Pre-Petition Transactions with the Debtors or the Debtors' non-insider First lien Lender.

76. Despite the Debtors' continuing Events of Default under the First Lien Credit Agreement, and deteriorating financial condition and business operations, Yucaipa, the Yucaipa Directors and, upon information and belief, Burkle, caused the Debtors not to pursue strategic alternatives for reorganization that would undercut Yucaipa's self-interest.

77. In addition to the foregoing, Yucaipa and the Yucaipa Directors, intentionally caused the Debtors:

(a) To pay millions of dollar of legal fees incurred by Yucaipa in the Georgia Action to Yucaipa's lawyers while in default under the First Lien Credit Agreement;

(b) To fail to disclose such payments to or for the benefit of Yucaipa during the applicable period prior to the commencement of the cases;

(c) To improperly assert positions in these chapter 11 cases supporting Yucaipa as Requisite Lender;

(d) To promote a sale process in these bankruptcy cases solely for the benefit of Yucaipa which relied upon Yucaipa's illegitimate status as Requisite Lender ("Yucaipa Credit Bid"); and

(e) To fail to pursue post-petition restructuring opportunities other than the Yucaipa Credit Bid;

78. The Debtors and their creditors have been injured by the aforesaid intentional actions by Yucaipa, the Yucaipa Directors and Burkle.

**COUNT I**

**AGAINST YUCAIPA**
**FOR EQUITABLE SUBORDINATION PURSUANT TO 11 U.S.C. § 510(c)**

79. The Plaintiffs repeat and reallege each allegation contained in paragraphs __ through ____above as if set forth fully herein.

80. At all times relevant hereto, Yucaipa was an insider of the Debtor.

81. As more fully described above, Yucaipa has engaged in unfair and inequitable conduct towards the Plaintiffs in that Yucaipa has manipulated the Debtors as an insider and in its capacity as alleged Requisite Lender and has engaged in overreaching with respect to the Debtors and their creditors by, among other things:

(a) Yucaipa caused the Debtors to favor Yucaipa at the expense of other non-insider creditors.

(b) Yucaipa caused the Debtors to abdicate their duty to maximize value, in favor of protecting Yucaipa's ownership position.

(c) Yucaipa pressured Debtors' management repeatedly to defer to Yucaipa for the sole benefit of Yucaipa.

82. Yucaipa's inequitable conduct has resulted in injury to the Plaintiffs by conferring unfair advantages upon Yucaipa in at least the following ways:

(a) Yucaipa caused the Debtors to adopt a business strategy to benefit Yucaipa at the expense of Plaintiffs.

(b) Yucaipa prevented the Debtors from developing restructuring proposals that maximize value Plaintiffs.

(c) Yucaipa forced the Debtors to place the interests of Yucaipa above the Debtors' own interests and those of the Plaintiffs, including but not limited to orchestrating amendments to the Credit Agreement solely for the benefit of Yucaipa.

83. As a result of Yucaipa's conduct, Plaintiffs have been materially harmed.

84. Granting the relief sought herein against Yucaipa is consistent with the Bankruptcy Code and is appropriate based on the indisputable facts of this case.

85. Pursuant to 11 U.S.C. §510(c), all distributions to Yucaipa on account of its status as First Lien Lender and Second Lien Lender should be subordinated to the claims of all other creditors.

## COUNT II

## AGAINST YUCAIPA FOR SPECIFIC PERFORMANCE UNDER THE THIRD AMENDMENT TO THE FIRST LIEN CREDIT AGREEMENT

86. The Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 85 above as if set forth fully herein.

87. The Plaintiffs, Debtors and Yucaipa, as a Restricted Sponsor Affiliates, were parties to the Credit Agreement, a binding contractual agreement for valuable consideration.

88. Yucaipa has breached the First Lien Credit Agreement by failing to make the capital contribution required under Section 10.6(j)(iii) of the First Lien Credit Agreement. Specifically,

"(j) Restricted Sponsor Affiliates. ...Each Lender that is a Restricted Sponsor Affiliate, upon succeeding to an interest in the Term Loans:

...

(iii) agrees further that no later than ten days after the date of such assignment or transfer of such Term Loans (or, if a Default or Event of Default occurs during such ten day period, then three Business Days after such Restricted Sponsor Affiliate has knowledge of the occurrence of such Default or Event of Default but in no event later than the last day of such ten day period), such Restricted Sponsor Affiliate shall make a capital contribution to Borrowers of no less than 50% of the aggregate principal amount of such Term Loans in accordance with Section 10.6(k);

89. Yucaipa has breached the First Lien Credit Agreement by exceeding the maximum permissible limits under the First Lien Credit Agreement on the acquisition of Term Loan Exposure under Section 10.6(c) after given effect to the mandatory capital contribution in Section 10.6(j)(iii). Specifically,

"provided further, that (x) no Lender may sell, assign, transfer or otherwise convey any of its rights and obligations under this Agreement (including the Commitments, the LC Deposits or the Loans) to a Restricted Sponsor Affiliate and no Restricted Sponsor Affiliate shall acquire any such rights or obligations, in each case if (A) immediately prior to and after giving effect to such assignment or transfer the aggregate amount of the Term Loan Exposure held or beneficially owned by all Restricted Sponsor Affiliates would exceed 25% of the aggregate principal amount of the Term Loan Exposure held or beneficially owned by all Lenders (including Restricted Sponsor Affiliates) or (B) after giving effect to such assignment or transfer, the aggregate amount of Term Loans acquired by all Restricted Sponsor Affiliates since the Closing Date would exceed $50 million (notwithstanding whether all or any portion of such acquired Term Loans have been contributed to Borrowers or otherwise disposed of by the Restricted Sponsor Affiliates) and (y) assignments by or to a Restricted Sponsor Affiliate shall be further subject to Section 10.6(j)."

90. The Plaintiffs are not in violation of any provision of the First Lien Credit Agreement. The Plaintiffs have performed or are prepared to perform all of their obligations under that contract.

91. The First Lien Credit Agreement entitles the Plaintiffs as "Lenders" to specific performance pursuant to Section 10.6(j)(iv) . Specifically,

"Each Restricted Sponsor Affiliate recognizes and acknowledges that a breach by it of any covenants or agreements contained in this Section 10.6(j) will cause the other Lenders and Agents to sustain damages for which it would not have an adequate

remedy at law for money damages, and therefore each Restricted Sponsor Affiliate agrees that in the event of any such breach, each of the other Lenders and Agents shall be entitled to specific performance of such covenants and agreements and injunctive and other equitable relief in addition to any other remedy to which it may be entitled, at law or in equity."

92. The Plaintiffs are entitled to a decree of specific performance by Yucaipa of its obligations under the First Lien Credit Agreement.

**COUNT III**

**AGAINST YUCAIPA FOR BREACH OF CONTRACT FOR MONEY DAMAGES UNDER NEW YORK LAW**

93. The Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 92 above as if set forth fully herein.

94. The Plaintiffs, Debtors and Yucaipa, as a Restricted Sponsor Affiliates, were parties to the Credit Agreement, a binding contractual agreement for valuable consideration.

95. Yucaipa has breached the First Lien Credit Agreement by failing to make the capital contribution required under Section 10.6(j)(iii) of the First Lien Credit Agreement. Specifically,

> "(j) Restricted Sponsor Affiliates. ...Each Lender that is a Restricted Sponsor Affiliate, upon succeeding to an interest in the Term Loans:
>
> ...
>
> (iii) agrees further that no later than ten days after the date of such assignment or transfer of such Term Loans (or, if a Default or Event of Default occurs during such ten day period, then three Business Days after such Restricted Sponsor Affiliate has knowledge of the occurrence of such Default or Event of Default but in no event later than the last day of such ten day period), such Restricted Sponsor Affiliate shall make a capital contribution to Borrowers of no less than 50% of the aggregate principal amount of such Term Loans in accordance with Section 10.6(k);

96. Yucaipa has breached the First Lien Credit Agreement by exceeding the maximum permissible limits under the First Lien Credit Agreement on the acquisition of Term Loan Exposure under Section 10.6(c). Specifically,

> "provided further, that (x) no Lender may sell, assign, transfer or otherwise convey any of its rights and obligations under this Agreement (including the Commitments, the LC Deposits or the Loans) to a Restricted Sponsor Affiliate and no Restricted Sponsor Affiliate shall acquire any such rights or obligations, in each case if (A) immediately prior to and after giving effect to such assignment or transfer the aggregate amount of the Term Loan Exposure held or beneficially owned by all Restricted Sponsor Affiliates would exceed 25% of the aggregate principal amount of the Term Loan Exposure held or beneficially owned by all Lenders (including Restricted Sponsor Affiliates) or (B) after giving effect to such assignment or transfer, the aggregate amount of Term Loans acquired by all Restricted Sponsor Affiliates since the Closing Date would exceed $50 million (notwithstanding whether all or any portion of such acquired Term Loans have been contributed to Borrowers or otherwise disposed of by the Restricted Sponsor Affiliates) and (y) assignments by or to a Restricted Sponsor Affiliate shall be further subject to Section 10.6(j)."

97. The Plaintiffs are not in violation of any provision of the First Lien Credit Agreement. The Plaintiffs have performed or are prepared to perform all of their obligations under that contract.

98. By reason of the foregoing, the Plaintiffs sustained monetary damages in in an amount to be proven at trial.

## COUNT IV

## AGAINST THE YUCAIPA DIRECTORS FOR BREACH OF FIDUCIARY DUTIES UNDER DELAWARE LAW

99. The Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 98 above as if set forth fully herein.

100. The Yucaipa Directors owed fiduciary duties of care and loyalty to the Debtor and its creditors because the Debtor has been insolvent since 2008.

101. The fiduciary duties owed by the Yucaipa Directors to the creditors of the Debtors included, but were not limited to, the duty (i) to act in good faith; (ii) not to engage in any intentional misconduct or knowing violations of law, (iii) of undivided and unselfish loyalty to the Debtor and not to consider or represent interests other than those in the best interests of the Debtor, (iv) to preserve the assets of the Debtors for the benefit of its creditors, (v) to place the interests of the Debtors' non-insider creditors ahead of the interests of their equity holders and affiliates of their equity holders, including Yucaipa; and (vi) to place the interests of their non-insider creditors ahead of their own interests and the interests of the individual officers of the Debtors.

102. The Yucaipa Directors' acts and omissions were not in good faith, and were each undertaken to further Yucaipa's financial interests.

103. The Yucaipa Directors' interests were adverse to the interests of the Debtor and the Debtors' non-insider creditors, and their acts and omissions breached their duty of loyalty, and materially benefited the Yucaipa Directors, Yucaipa and Burkle.

104. The Yucaipa Directors intentionally and willfully breached their duty to evaluate and effectuate a potential restructuring, sale or other strategic alternatives available to the Debtors.

105. Through these acts and omissions, the Yucaipa Directors intentionally and willfully failed to act in good faith and with care and loyalty to the Debtors and all of the Debtors' non-insider creditors, and engaged in a dereliction of their fiduciary duties.

106. As a result of these acts and omissions, the Yucaipa Directors caused direct injury and damages to the Debtors for which the Yucaipa Directors are liable.

107. The Debtor and its estate are entitled to damages from the Yucaipa Directors for their breaches of their fiduciary duties.

## COUNT V

## AGAINST BURKLE AND YUCAIPA FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTIES UNDER DELAWARE LAW

108. The Plaintiffs repeat and reallege each allegation contained in paragraphs 1 through 107 above as if set forth fully herein.

109. The Yucaipa Directors owed fiduciary duties of care and loyalty to the Debtors and their creditors because the Debtors have been insolvent since 2008.

110. Upon information and belief, Defendant Burkle, as founder and Managing Partner of The Yucaipa Companies LLC, directed and controlled the actions of Yucaipa and the Yucaipa Directors.

111. The Yucaipa Directors breached their fiduciary duties of care and loyalty.

112. Defendants Burkle and Yucaipa knowingly participated in and induced the breaches of the fiduciary duties of loyalty and care owed by the Yucaipa Directors to the Debtors, and such breaches were on account of, or for the direct benefit of Defendants Burkle and Yucaipa.

113. Upon information and belief, Defendant Burkle used his dominion and control of Yucaipa to knowingly induce the Yucaipa Directors, among other things, (i) to usurp

an opportunity with a potential strategic buyer in an effort to allow Yucaipa to recover more on its Obligations it allegedly owned under the First Lien Credit Agreement, (ii) to direct the Yucaipa Directors to not pursue restructuring opportunities despite Events of Default under the First Lien Credit Agreement, and (iii) to cause the Yucaipa Directors to force Allied to enter into the Purported Fourth Amendment.

114. Defendants Burkle and Yucaipa knew of the Yucaipa Directors' breaches, and not only failed to take any action to stop them, but instead took advantage of the Yucaipa Directors' breaches of the fiduciary duties of care and loyalty for the benefit of Defendants Burkle and Yucaipa. As a result, Burkle and Yucaipa induced the Yucaipa Directors to use millions of dollars of the Debtors' assets to defend Yucaipa's control of the Debtors. Such actions by Defendants Burkle and Yucaipa proximately caused damages to the Debtor and its creditors, including Plaintiffs, for which Defendants Burkle and Yucaipa are liable.

## RELIEF SOUGHT

**WHEREFORE,** by reason of the foregoing, the Plaintiffs request that the Court grant the following relief:

A. enter judgment against Yucaipa finding that it engaged in inequitable conduct pursuant to 11 U.S.C. §510(c);

B. subordinate all Yucaipa claims to the claims of all other creditors; and

C. decree specific performance of Yucaipa's obligations under the First Lien Credit Agreement under Court II of this Complaint;

D. award money damages against Yucaipa and in favor of the Plaintiffs under Count III of this Complaint in an amount to be determined at trial; and

E. enter judgment against the Yucaipa Directors, jointly and severally, and in favor of the Plaintiffs under Count IV of this Complaint for damages,

attorneys' fees and costs and such other amounts as to be determined at trial; and

F. enter judgment against Burkle and Yucaipa and in favor of the Plaintiffs under Count V of this Complaint for damages, attorneys' fees and costs and such other amounts as to be determined at trial; and

G. grant the Plaintiffs such other and further relief as this Court deems equitable and just.

Dated: January 25, 2013
Wilmington, Delaware

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*Attorneys for Plaintiffs BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd, and Spectrum Investment Partners, L.P.*

# Appendix "C"

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

| | |
|---|---|
| In re: | Chapter 11 |
| ALLIED SYSTEMS HOLDINGS, INC., *et al.*,[1] | Case No. 12-11564 (CSS) |
| Debtor. | (Jointly Administered) |
| THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ALLIED SYSTEMS HOLDINGS, INC. and its affiliated debtors, | |
| Plaintiff, | Adv. Proc. No. 13-_____ (CSS) |
| v. | |
| YUCAIPA AMERICAN ALLIANCE FUND I, L.P., YUCAIPA AMERICAN ALLIANCE (PARALLEL) FUND I, L.P., YUCAIPA AMERICAN ALLIANCE FUND II, L.P., YUCAIPA AMERICAN ALLIANCE (PARALLEL) FUND II, L.P., MARK J. GENDREGSKE, JOS OPDEWEEGH, JAMES FRANK, DEREX WALKER, JEFF PELLETIER, IRA TOCHNER, and JOSEPH TOMCZAK. | |
| Defendants. | |

**THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' COMPLAINT FOR (I) EQUITABLE SUBORDINATION, (II) RECHARACTERIZATION, (III) BREACH OF CONTRACT, (IV) SPECIFIC PERFORMANCE, (V) BREACHES OF FIDUCIARY DUTIES, (VI) AIDING AND ABETTING BREACHES OF FIDUCIARY DUTIES, (VII) AVOIDANCE AND RECOVERY OF AVOIDABLE TRANSFERS, AND (VIII) DISALLOWANCE OF CERTAIN CLAIMS**

[1] The Debtors in these cases, along with the federal tax identification number (or Canadian business number where applicable) for each of the Debtors, are: Allied Systems Holdings, Inc. (58-0360550); Allied Automotive Group, Inc. (58-2201081); Allied Freight Broker LLC (59-2876864); Allied Systems (Canada) Company (90-0169283); Allied Systems, Ltd. (L.P.) (58-1710028); Axis Areta, LLC (45-5215545); Axis Canada Company (87568828); Axis Group, Inc. (58-2204628); Commercial Carriers, Inc. (38-0436930); CT Services, Inc. (38-2918187); Cordin Transport LLC (38-1985795); F.J. Boutell Driveaway LLC (38-0365100); GACS Incorporated (58-1944786); Logistic Systems, LLC (45-4241751); Logistic Technology, LLC (45-4242057); QAT, Inc. (59-2876863); RMX LLC (31-0961359); Transport Support LLC (38-2349563); and Terminal Services LLC (91-0847582). The location of the Debtors' corporate headquarters and the Debtors' address for service of process is 2302 Parklake Drive, Bldg. 15, Ste. 600, Atlanta, Georgia 30345.

The Official Committee of Unsecured Creditors (the "Committee" or the "Plaintiff"), appointed in the above-captioned chapter 11 cases of Allied Systems Holdings, Inc. ("Allied"), Allied Systems, Ltd. (L.P.) ("Systems") and their U.S. and Canadian subsidiaries (collectively, the "Debtors" or the "Company"), by and through its undersigned counsel, hereby files, on behalf of the unsecured creditors of the Debtors and on behalf of the estates of the Debtors, this Complaint for (I) Equitable Subordination, (II) Recharacterization, (III) Breach of Contract, (IV) Specific Performance, (V) Breaches of Fiduciary Duties, (VI) Aiding and Abetting Breaches of Fiduciary Duties, (VII) Avoidance and Recovery of Avoidable Transfers, and (VIII) Disallowance of Certain Claims (the "Complaint") against Yucaipa American Alliance Fund I, L.P., Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund II, L.P., Yucaipa American Alliance (Parallel) Fund II, L.P. (collectively, "Yucaipa"), Mark J. Gendregske ("Gendregske"), Jos Opdeweegh ("Opdeweegh"), James Frank ("Frank"), Derex Walker ("Walker"), Jeff Pelletier ("Pelletier"), Ira Tochner ("Tochner"), and Joseph Tomczak ("Tomczak," together with Gendregske, Opdeweegh, Frank, Walker, Pelletier and Tochner, the "Allied Directors" and the Allied Directors together with Yucaipa, the "Defendants"). The Committee expressly reserves the right to amend or supplement the parties to, and claims for relief in, the Complaint, and to assert and file additional cross-claims and/or third-party complaints herein and in any related adversary proceeding, including, without limitation, *Allied Systems Holdings, Inc. v. American Money Management Corp. et al.*, Adv. Pro. No. 12-50947 (CSS) (Bankr. D. Del.) (the "Delaware Action") and *BDCM Opportunity Fund II, LP et al. v. Yucaipa American Alliance Fund, I, LP et al.*, Adv. Pro. No. 13-50499 (CSS) (Bankr. D. Del.), which cannot be articulated as a result of the fact that the Committee has not yet been able to confirm or deny many of the allegations in the related adversary proceedings, and/or due to the

failure of the complainants to particularize their claims in the related adversary proceedings, and/or due to the fact that the Committee does not have copies of documents relating to certain of the allegations in the related adversary proceedings. In support of the requested relief, the Committee alleges, upon information and belief, as follows:

## PRELIMINARY STATEMENT

1. This is a case about the efforts of the owner of the majority of equity in the Debtors to take control over all facets of the Debtors' capital structure in order to protect its equity investment over the legitimate rights and expectations of the Debtors' secured and unsecured creditors. Through various methods, after taking control of the Debtors following their first bankruptcy proceeding, Yucaipa attempted to strip away the protections afforded to all creditors of Allied, all in an effort to protect its equity investment from the legitimate exercise by actual creditors of their rights.

2. Following the first Allied bankruptcy, Yucaipa took control of approximately 67% of the outstanding equity of Allied and was given the ability to name outright three of the five directors on Allied's board of directors. What is more, Yucaipa effectively has the power to name all five directors on Allied's Board of Directors (the "Board"), as it was empowered, through its express control of an outright majority of the Board, to select Allied's Chief Executive Officer and the fourth Board member, as well as the fifth Board member, who, despite being selected by the Creditors' Committee in the first Allied bankruptcy, had to be "reasonably acceptable" to Yucaipa. Thus, given its controlling influence and express appointment and veto powers, even the two nominal "independent" directors were under the control of Yucaipa, as the appointment of both so-called "independent" directors was subject to Yucaipa's veto and whim. Accordingly, after Allied's emergence from the first bankruptcy, Yucaipa effectively controlled

not only a super-majority of the outstanding equity, and expressly controlled a super-majority of the Board, but it also effectively controlled 100% of the Board.

3. Not long after Allied had emerged from its first bankruptcy in May 2007, its business prospects began to falter. The global economic downturn began to come into view in late 2007 and early 2008, and was particularly felt in the automotive market, the primary market that Allied serviced as a long-haul car servicer.

4. Accordingly, as early as 2008, Allied was nearing insolvency, if not already insolvent. Indeed, at that time Allied was increasingly failing to meet various debt covenants and failing to make required debt payments. What was needed to keep the business afloat and to navigate the challenging economic times was an equity investment that could be used to service the outstanding debt or a voluntary restructuring to keep Allied's business running until the challenging economic conditions improved. Indeed, Allied's existing creditors pleaded with its owner, Yucaipa, to provide such an infusion of equity for the benefit of all of its stakeholders, including its creditors, its employees and its equity owners.

5. Yucaipa, however, refused to put equity into Allied, but instead crafted a scheme whereby it would protect its existing equity investment, take control over the outstanding secured debt of the Company and launch a plan to eliminate the existing debt in a manner that would benefit Yucaipa and Yucaipa alone. Additionally, Yucaipa thwarted any possibility of the Company entering into a voluntary restructuring or strategic combination that might have the effect of lessening the value of Yucaipa's existing equity. While Yucaipa may not have been required to infuse the Company with additional cash for a new equity investment, what it could not do was to take steps to prevent the possibility of a voluntary restructuring or the exercise of rights by creditors in order to protect Yucaipa's existing equity investment. However, that is

exactly what Yucaipa did, as it utilized its control over Allied to elevate Yucaipa to a status whereby it controlled not only the majority of the equity and effectively 100% of the Board, but also the outstanding secured debt of the company.

6. First, Yucaipa began to push Allied's creditors to lift the restrictions upon Yucaipa's ability to own outstanding debt (the "First Lien Debt") under the Amended and Restated First Lien Secured Super-Priority Debtor in Possession and Exit Credit and Guaranty Agreement, as amended (the "First Lien Credit Agreement"). Initially, the lenders under the First Lien Credit Agreement (collectively, any and all such lenders who at any time held First Lien Debt are the "First Lien Lenders") agreed to permit Yucaipa to take a position in the First Lien Debt, but only if Yucaipa purchased that debt in a manner that prevented Yucaipa from taking control over the exercise of remedies by creditors and only in a manner that required Yucaipa to "put its money where its mouth is," by contributing half of any purchase of First Lien Debt as capital into the company. Yucaipa controlled this process from the outset. Indeed, Yucaipa [redacted] while Allied sat idly by and let its controlling stockholder negotiate the terms of its outstanding First Lien Debt.

7. Nevertheless, and notwithstanding its control over and input into the amendment of the First Lien Credit Agreement, Yucaipa refused to purchase any First Lien Debt unless it could have complete control over the credit facility, as it had already accomplished in the Second Lien Facility (as defined below). Indeed, under the Third Amendment to the First Lien Credit Agreement (the "Third Amendment"), Yucaipa could not protect its equity investment by purchasing First Lien Debt because any such debt would have been non-voting, and, even if such debt was permitted to vote, the amendment ensured that Yucaipa could not acquire a sufficient

amount of First Lien Debt to enable it to block the exercise of remedies for defaults under the First Lien Credit Agreement.

8. Accordingly, instead of proceeding under the Third Amendment [redacted], Yucaipa began to affirmatively seek total control over Allied's outstanding secured debt. Thus, in the second step of its plan, Yucaipa launched a tender offer for the First Lien Debt in an effort to acquire a majority of the First Lien Debt and control over Allied's existing debt facilities. [redacted] Indeed, the existing First Lien Lenders knew full well that permitting the majority equity owner to take control over the outstanding secured debt could have disastrous consequences for the Company and its stakeholders, as it would permit the equity owner to control any bankruptcy of the Company, all in violation of the spirit, if not the letter, of the absolute priority rule.

9. Not surprisingly, Yucaipa's tender offer failed. However, Yucaipa was not dissuaded by the reaction of the market and instead undertook a more surreptitious route to attempt to reach its goal of total and complete control. In 2009, Yucaipa engaged in discussions with the then existing Requisite Lender under the First Lien Credit Agreement, ComVest Investment Partners III, L.P. ("ComVest"), [redacted].

10. Accordingly, [redacted]. This time, Yucaipa eventually convinced ComVest to attempt to use its status as the Requisite Lender to purport to amend the First Lien Credit Agreement through the purported Fourth Amendment to the First Lien Credit Agreement (the "Fourth Amendment") to enable Yucaipa to purchase a majority of the First Lien Debt and ascend to the status of the Requisite Lender, a position wherein Yucaipa could prevent the exercise of remedies against the Company.

11. Yucaipa was only able to pull off this scheme by promising ComVest something that no legitimate or actual lender would do; [redacted]. Indeed, Yucaipa treated its purchase of the ComVest debt like equity [redacted]. But this was not all. [redacted]

12. In the end, by [redacted] Yucaipa was able to maneuver itself to the front of the line, protect its equity investment, and essentially make an equity contribution to Allied without technically doing so. Through its manipulative scheme, Yucaipa gave itself the ability to prevent creditors from exercising rights against the Company that could have benefitted the Debtors and their creditors but would have adversely affected Yucaipa's equity interests, all for pennies on the dollar that it would have cost to give the Company an undisguised equity contribution.

13. What is more, throughout this period, Yucaipa utilized Allied and its limited funds to pay Yucaipa and Yucaipa's advisors to engage in the transactions that comprised Yucaipa's scheme to protect its equity investment. Allied was obligated to pay millions of dollars to Yucaipa, under the guise of a consulting agreement, whereby Yucaipa purportedly acted on behalf of Allied in negotiations with customers and employees of Allied. Additionally, Yucaipa caused Allied to pay millions of dollars in legal and other fees to advisors of Yucaipa in connection with [redacted], as well as in connection with litigation that arose out of Yucaipa's scheme to eliminate any threat to its equity investment. However, that is not all, as Yucaipa went so far as [redacted]. All told, Yucaipa's actions caused Allied to pay millions of dollars for services of agents and advisors whose services solely benefitted Yucaipa. All of these funds would otherwise have been available to Allied's legitimate creditors.

14. Once it had claimed to have taken control of the First Lien Debt, Yucaipa exercised its purported power as the Requisite Lender in ways that caused harm to all creditors of the Debtors. For instance, when the agent for the First Lien Lenders objected to the Fourth Amendment and Yucaipa's acquisition of ComVest's interests, Yucaipa caused Allied to bring suit against the agent [redacted].

15. Yucaipa's efforts were aided and enabled by the members of Allied's board of directors, who failed to fulfill their fiduciary obligations to the stakeholders and creditors of Allied. The Allied Directors were, or should have been, on notice of the possibility, if not certainty, that Yucaipa's interests, as Allied's primary equity holder, could conflict with the interests of Allied's legitimate creditors. Indeed, even prior to Allied's emergence from the first bankruptcy the possibility that a conflict between the interests of Yucaipa and Allied was apparent, as many of the prior board of directors noted that Yucaipa's actions could be unlawful.

16. Allied's Board, however, failed to take anything approaching reasonable steps to avoid the obvious conflicts of interests that arose from Yucaipa's control over the Debtors. For instance, while Allied nominally established a "Special Committee" (the "Special Committee") of purportedly independent board members to evaluate transactions involving Yucaipa, even if those board members could be deemed to be "independent," the Special Committee process was entirely flawed and deficient. Indeed, the Special Committee – which never retained any independent counsel or advisors until long into these bankruptcy cases – approved most, if not all, of the Yucaipa transactions, and did so without any independent evaluation. Instead, the Special Committee approved most, if not all, of these transactions only after the full Board, including the Yucaipa Board members, had already deliberated and received advice from the same advisors who represented the entire Board and whose retention was subject to the whims of Yucaipa and its Board members.

17. All told, Yucaipa's actions have cost the Debtors' estates and their stakeholders tens, if not hundreds, of millions of dollars that would otherwise be available for distribution to Allied's legitimate and actual creditors. Moreover, in addition to the payment of millions of dollars in benefits to Yucaipa, the Debtors and their creditors have been deprived of tens of

millions of dollars in capital contributions that Yucaipa was required to have made as a result of its acquisition of ComVest's First Lien Debt, which Yucaipa instead has purported to have transformed into First Lien Debt.

18. Accordingly, Plaintiff, the statutory fiduciary on behalf of the unsecured creditors of the Debtors and derivatively on behalf of the Debtors' estates, brings this action for: (i) equitable subordination of Yucaipa's purported debt holdings to all other claims asserted against the Debtors pursuant to section 510(c) of the Bankruptcy Code; (ii) recharacterization as equity of Yucaipa's purported debt holdings pursuant to section 105(a) of the Bankruptcy Code; (iii) breach of the Third Amendment by Yucaipa; (iv) specific performance of the Third Amendment against Yucaipa; (v) breach of fiduciary duties against Yucaipa; (vi) breach of fiduciary duties against the Allied Directors; (vii) aiding and abetting breach of fiduciary duty against Yucaipa and the Allied Directors; (viii) the avoidance and recovery of fraudulent transfers and obligations against Yucaipa pursuant to sections 548(a) and 550 of the Bankruptcy Code, (ix) the avoidance and recovery of fraudulent transfers, conveyances and obligations against Yucaipa pursuant to sections 544(b) and 550 of the Bankruptcy Code (x) the avoidance and recovery of preferential transfers against Yucaipa pursuant to sections 547 and 550 of the Bankruptcy Code; and (xi) disallowance of certain claims of Yucaipa pursuant to section 502(d) of the Bankruptcy Code.

## JURISDICTION AND VENUE

19. This is an adversary proceeding pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure.

20. This Court has original jurisdiction under 28 U.S.C. § 1334(b), in that this is a civil proceeding relating to the underlying case arising under title 11 of the United States Code.

21. This adversary proceeding is a "core" proceeding pursuant to 28 U.S.C. § 157(b).

22. This Court has personal jurisdiction over Defendants pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure.

23. Venue of this adversary proceeding in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409(a).

## STANDING

24. The Committee has sought and received consent from the Debtors to have standing to bring this action against the Defendants on behalf of the Debtors' estates, and in connection therewith, has contemporaneously filed a motion seeking standing and authority to bring the Committee's claims against Defendants in a motion filed in the Debtors' chapter 11 cases contemporaneously herewith.

## THE PARTIES

25. The Committee, as Plaintiff in this adversary proceeding, on behalf of the Debtors' estates and their unsecured creditors, was appointed on June 20, 2012, pursuant to Section 1102 of the Bankruptcy Code.[2] Pursuant to Section 1103 of the Bankruptcy Code, the Committee has investigated and continues to investigate the acts, conduct, assets, liabilities, and financial condition of the Debtors.

26. Upon information and belief, Yucaipa American Alliance Fund I, L.P. and Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund II, L.P. and Yucaipa American Alliance (Parallel) Fund II, L.P. are Delaware limited partnerships headquartered at 9130 West Sunset Boulevard, Los Angeles, California 90069.

27. Upon information and belief, Mark J. Gendregske is a citizen of the state of Georgia and the chief executive officer and a director of Allied.

[2] The Committee consists of Pension Benefit Guaranty Corporation; Central States, Southeast and Southwest Pension Fund; Teamsters National Automobile Transporters Industry Negotiating Committee; and General Motors LLC.

28. Upon information and belief, Jos Opdeweegh is a citizen of the state of Illinois, had previously served as an operating partner and advisor at The Yucaipa Companies, LLC, an affiliate of Yucaipa, and was a director of Allied.

29. Upon information and belief, James Frank is a citizen of the state of New York, is employed by The Yucaipa Companies, LLC, an affiliate of Yucaipa, and a director of Allied.

30. Upon information and belief, Derex Walker is a citizen of the state of California, a partner at The Yucaipa Companies, LLC, an affiliate of Yucaipa, and a director of Allied.

31. Upon information and belief, Jeff Pelletier is a citizen of the state of California, is an operating partner at The Yucaipa Companies, LLC, an affiliate of Yucaipa, and is a director of Allied.

32. Upon information and belief, Ira Tochner is a citizen of the state of California, is a partner at The Yucaipa Companies, LLC, an affiliate of Yucaipa, and is a director of Allied.

33. Upon information and belief, Joseph Tomczak is a citizen of the state of Illinois and was an operating partner at The Yucaipa Companies, LLC, an affiliate of Yucaipa, and was a director of Allied.

## FACTUAL ALLEGATIONS

34. Allied is a leading provider of distribution and transportation services to the automotive industry in North America, primarily focused on the delivery of new automobiles from manufacturing facilities to dealerships.

### (a) Allied's 2007 Bankruptcy, Yucaipa's Acquisition of the Majority of the Equity in Allied, and Board Members' Early Concerns About Yucaipa

35. Unfortunately, it is now clear that at least some of the seeds for the Debtors' current financial difficulties were sewn at the time of its last exit from bankruptcy in May 2007,

which saw Yucaipa ascend to the role of Allied's majority and controlling shareholder with the power to appoint three of its five directors and the ability to control Allied's senior management.

36. Allied filed its first petition for relief under the Bankruptcy Code on July 31, 2005 in the United States Bankruptcy Court for the Northern District of Georgia (the "2005 Bankruptcy"). Upon information and belief, in or about May 2006, Yucaipa purchased a majority stake of the then existing Senior Unsecured Notes of Allied at a substantial discount to their par value.

37. After Yucaipa's acquisition of its interests in Allied, and during the 2005 Bankruptcy process, members of Allied's Board were already focused on Yucaipa's tactics and voiced concerns about Yucaipa damaging Allied and its prospects. Among other things, members of the Board raised significant concerns about the propriety of Yucaipa's actions taken purportedly on behalf of Allied and concerns about the amount of control that Yucaipa was exerting over Allied's business. For instance, at a February 9, 2007 special meeting of the Board, a Board member raised his concern that there was "tort[i]ous interference" with the Company's business or contracts by Yucaipa.

38. During a February 20, 2007 special Board meeting, another Board member "indicated that he believed that Yucaipa is in the driver's seat and he and [another board member] agreed that once the Company[] signs the addendum, we would not be able to oppose what Yucaipa says or wants to do." At that time, the Board discussed creating "value" for "everyone, not just Yucaipa, even in the circumstance if equity is out of the money" and the desire that the "process . . . allow the Company some control over this issue."

39. Additionally, as early as February 12, 2007, the Board discussed whether Yucaipa had breached a confidentiality agreement that it had with Allied. The Board even discussed

whether Allied should bring a tortious interference claim against Yucaipa—so serious were these concerns, the Board asked Allied's regular outside counsel to explore potential claims against Yucaipa.

40. By mid-March 2007, it was apparent to the Board that, "in practical terms, Yucaipa may really be running and controlling the process."

41. Indeed, one member of the Board described the situation in stark terms at a March 16, 2007 special Board meeting, stating, "he believes that the Board has failed in its efforts in regard to the involvement of Yucaipa in the process." He was concerned "that the Board has exposure because the Company let Yucaipa do this to the Company," when it "should have required Yucaipa to sign some sort of agreement precluding it from" doing so, but "the Company never did" require such an agreement.

42. When Allied emerged from bankruptcy in May 2007, Yucaipa was in total control of Allied. As part of the exit plan, Yucaipa was permitted to name three of the five members of the board of directors of Allied, giving it a permanent majority and complete control of the board of directors. Not surprisingly, none of the prior directors who had voiced concerns about Yucaipa's actions were retained as members of the board of the reorganized Allied.

43. Moreover, the Second Amended Joint Plan of Reorganization of Allied Holdings, Inc. And Affiliated Debtors Proposed By The Debtors, Yucaipa, And The Teamsters National Automobile Transportation Industry Negotiating Committee (the "2007 Reorganization Plan"), approved by the United States Bankruptcy Court for the Northern District of Georgia on May 18, 2007 and effective as of May 29, 2007, demonstrates that the "independent" directors were hardly independent at all. Indeed, one of the two so-called "independent" directors was the Chief Executive Officer of the Company, "who shall be selected by Yucaipa and shall be

reasonably acceptable to TNATINC [i.e., the Teamsters] and the Creditors' Committee," in addition to the "three other members selected by Yucaipa." (Allied Form 8-K, dated May 24, 2007, at Ex. 2.1 § 7.2.)

44. The other "independent" director had served as the financial advisor to the Creditors' Committee in the first Allied bankruptcy. While this member was not employed by Yucaipa or Allied, the 2007 Reorganization Plan makes clear that even though this individual was to be "chosen by the Creditors' Committee," he or she "shall be reasonably acceptable to Yucaipa." (Id.) Thus, following Allied's emergence from bankruptcy in May 2007, Yucaipa effectively controlled all five Board members: it directly appointed 3 directors, its selection of the CEO and fourth Board member was subject only to being "reasonably acceptable" to certain other creditors, and the fifth Board member, while chosen by the Creditors' Committee, was to be "reasonably acceptable to Yucaipa."

45. In addition to its ability to control Allied's Board, through the 2007 Reorganization Plan, Yucaipa held 67% of the equity of Allied, which, upon information and belief, has increased to an approximate 70% equity stake.

46. Through the 2005 Bankruptcy, Yucaipa acquired approximately two-thirds of a series of unsecured notes that Allied had issued in the principal amount of $150 million; it facilitated the $15.1 million financing of certain rigs represented by certain notes that were converted to equity; it supported the conversion of general unsecured debt into equity under the 2007 Reorganization Plan, of which Yucaipa held 67%; and it aided Allied in securing exit financing. Accordingly, through its below-par purchase of Allied's then existing Unsecured Notes, Yucaipa was able to cancel the existing equity and take complete control over Allied thereafter. Not only did Yucaipa own the majority of the newly issued equity in Allied, but it

controlled at least two-thirds of the Board and, in reality, controlled one hundred percent of the Board.

(b) **The Secured Debt Structure After Allied's Exit from its First Bankruptcy**

47. Allied exited bankruptcy with financing through a $315 million credit facility, comprised of a $265 million senior secured first priority credit facility (the "First Lien Facility"), and a $50 million second lien facility (the "Second Lien Facility").

48. The First Lien Facility was comprised of $180 million of term loans; a $35 million revolving credit facility from The CIT Group/Business Credit, Inc. ("CIT"); and a $50 million letter of credit facility.

49. The First Lien Facility is governed by the First Lien Credit Agreement, entered into by and among Allied Holdings, Inc., Systems, certain subsidiaries of Allied Holdings, Inc. and Systems as Guarantors, various lenders, Goldman Sachs Credit Partners L.P. ("Goldman Sachs"), as Lead Arranger and Syndication Agent, and CIT, as Administrative Agent and Collateral Agent.

50. The Second Lien Facility was comprised of $50 million of loans.

51. The Second Lien Facility is governed by that certain Second Lien Secured Super-Priority Debtor in Possession and Exit Credit and Guaranty Agreement, dated May 15, 2007 (the "Second Lien Credit Agreement"), entered into by and among Allied Holdings, Inc., Systems, certain subsidiaries of Allied Holdings, Inc. and Systems as Guarantors, various lenders, and Goldman Sachs, as Lead Arranger, Syndication Agent, Administrative Agent and Collateral Agent.

52. Allied has been in default under both the First Lien Credit Agreement and Second Lien Credit Agreement since August 2008. Specifically, and only by way of example among many other Events of Default, Allied has failed to pay required principal and interest

payments—at times at Yucaipa's express insistence—even when Allied had the cash on hand to make the payments.

### C. The First Lien Credit Agreement and Second Lien Credit Agreement Were Expressly Drafted and Always Intended to Prevent Yucaipa, as the Majority Equity Holder, from Gaining Control Over the Outstanding Debt

53. Given the size of Yucaipa's equity holdings, its control of Allied's Board and, indeed, its control over all of Allied, it was always intended that Yucaipa would be precluded from taking control over the First Lien Debt and the outstanding debt under Second Lien Facility (the "Second Lien Debt"). This intention was hardly surprising and, indeed, standard in such secured debt offerings. Secured creditors had the right to know that the majority equity holder would not attempt to prevent creditors from enforcing rights that could harm the interests of equity holders. Similarly, unsecured creditors and other stakeholders wanted to ensure that Yucaipa, as the majority equity holder, would not be able to control the outstanding secured debt of the company in a manner that would favor equity holdings over legitimate debt holders.

54. The First Lien Credit Agreement set forth a mechanism designed to ensure that a majority of the holders of the First Lien Debt would be able to control most of the actions taken by the lending group. In particular, the First Lien Credit Agreement provides that "Requisite Lenders"—defined as holders of debt under the First Lien Facility representing more than 50% of the sum of the aggregate "Term Loan Exposure" of all lenders, the aggregate letter of credit exposure, and the aggregate revolving credit exposure (First Lien Credit Agreement § 1.1)—have the power to make certain key decisions affecting all First Lien Lenders.

55. Among other things, the Requisite Lenders under the First Lien Facility have the authority to declare or not declare "Events of Default" under the First Lien Credit Agreement. (Id. §§ 8.1, 9.8.)

56. The First Lien Credit Agreement expressly prevented Yucaipa from becoming eligible to become a Requisite Lender under the First Lien Credit Agreement because, as Allied's majority shareholder and "Sponsor," it was not a lender under the First Lien Facility and could not become such a lender. (Id. §§ 1.1, 10.6.)

57. The First Lien Credit Agreement was amended or, in the case of the "Fourth Amendment," purportedly amended, on four occasions. The Third Amendment[3] and purported Fourth Amendment,[4] are relevant to this proceeding.

58. The Second Lien Credit Agreement was amended on three occasions. The "Second Lien Third Amendment" is relevant to this proceeding.

59. Notwithstanding the clear prohibition in the respective First Lien Credit Agreement and Second Lien Credit Agreement that prohibited Yucaipa from acquiring the secured debt of Allied, Yucaipa refused to acknowledge or abide by those terms. [redacted] Yucaipa would subsequently [redacted] that it could take control over the secured debt facilities of Allied.

(d) **Yucaipa Causes the Second Lien Credit Agreement to be Amended and Acquires the Outstanding Second Lien Facility**

60. On May 6, 2008, as part of its scheme to take control over the entirety of Allied's financial structure, Yucaipa acquired the face amount of $40 million in term loans under the Second Lien Facility and exchanged $20 million of it for 21,396 shares of preferred stock that is

[3] The Third Amendment refers to that certain Amendment No. 3 To Credit Agreement and Consent, dated as of April 17, 2008, to the Amended and Restated First Lien Secured Super-Priority Debtor In Possession and Exit Credit and Guaranty Agreement, dated as of May 15, 2007.

[4] The Fourth Amendment refers to that certain Amendment No. 4 To Credit Agreement, dated as of August 21, 2009, to the Amended and Restated First Lien Secured Super-Priority Debtor In Possession and Exit Credit and Guaranty Agreement, dates as of May 15, 2007.

convertible into common stock. The $40 million face value acquired by Yucaipa represented approximately 80% of the outstanding amount of the term loans under the Second Lien Facility. Upon information and belief, Yucaipa acquired its holdings of the Second Lien Facility at a substantial discount to its par value.

61. In connection with Yucaipa's acquisition of the Second Lien Debt, the Second Lien Credit Agreement was amended to allow Yucaipa to become an Eligible Assignee with no restrictions on its right to vote or control the Second Lien Facility. Accordingly, Yucaipa became the Requisite Lender under the Second Lien Facility. Upon information and belief, Yucaipa, not Allied, controlled the negotiations of the amendment to the Second Lien Facility that enabled Yucaipa to take control over the Second Lien Facility.

(e) **Yucaipa Causes the Third Amendment to the First Lien Facility to be Executed by Allied to Permit Yucaipa to Purchase a Limited Amount of First Lien Debt**

62. Upon information and belief, not long after Allied emerged from the first bankruptcy, notwithstanding the terms of the First Lien Credit Agreement but consistent with Yucaipa's belief [redacted], Yucaipa began to push to acquire First Lien Debt. [redacted]

63. [redacted] By contrast, Allied took a back seat and went along for the ride while Yucaipa [redacted].

64. [redacted]

65. Under the Third Amendment, a "Restricted Sponsor Affiliate" was defined as the "Sponsor and its Affiliates," and, under the First Lien Credit Agreement, the Sponsor is Yucaipa. (First Lien Credit Agreement § 1.1.) Accordingly, in light of the Restricted Sponsor Affiliate definition and under the terms of the Third Amendment, Yucaipa could acquire certain First Lien Debt. However, Yucaipa was precluded from becoming a Requisite Lender under the Third Amendment, and, to the extent Yucaipa decided to acquire any First Lien Debt, it would be subject to the following restrictions, among others:

- Yucaipa could not accumulate more than 25% of the aggregate principal amount of the Term Loan Exposure held by all Lenders (Third Amendment § 2.7(c));
- Yucaipa could not accumulate more than $50 million of the principal amount of Term Loans (id. § 2.7(c));
- Yucaipa could not exercise any voting rights that it would otherwise have as a Lender, including the right to consent to any amendment to the Credit Agreement or the right to vote its debt in any Allied bankruptcy (id. §§ 2.1(e), 2.7(a), 2.7(b), 2.7(e)); and
- Within ten days of its acquisition of any Term Loans, Yucaipa was required to make a capital contribution to Allied of at least 50% of the aggregate principal amount of those Term Loans (id. § 2.7(e)).

66. Notwithstanding its restrictions, the fact that the Third Amendment permitted Yucaipa, as a Sponsor, to acquire any of Allied's First Lien Debt was a unique achievement for Yucaipa. [redacted]

[redacted]

67. [redacted] Yucaipa was not interested in acquiring any debt subject to the restrictions [redacted] in the Third Amendment. Indeed, in these bankruptcy proceedings, Yucaipa has averred that it "never intended to purchase any debt claims that would make it bound by the Third Amendment's provisions." (Adv. Pro. No. 12-50947 (Bankr. D. Del.), D.I. 65 at ¶25(a).) Yucaipa has made plain to this Court that it "never would have acquired any first lien debt while the Third Amendment's restrictions and conditions limiting Yucaipa's potential ownership rights existed." (Id. at ¶ 50.) Accordingly, unsatisfied by the terms of the Third Amendment that it solicited and [redacted], Yucaipa continued with its scheme to take total control over the financial structure of Allied in order to protect its equity investment, to the detriment of all of Allied's other creditors.

(f) **Yucaipa's Control Over Allied's Purported Special Committee's Review of Potential Yucaipa Transactions**

68. During the spring of 2008, in connection with the Third Amendment that Yucaipa apparently never actually wanted, Yucaipa continued to pursue ways to take total control over the financial affairs of Allied. Throughout this period, Allied's Board simply went along for the ride. Indeed, notwithstanding the appointment of a so-called "Special Committee" of allegedly independent directors, who were supposed to evaluate any transaction involving Yucaipa, including the Third Amendment, to ensure that it was beneficial to Allied and its stakeholders, the Board, and ultimately the Special Committee, largely sat idly by [redacted]

[redacted]

69. On March 31, 2008 the Special Committee was formed. The Committee consisted of the two purportedly "independent" directors not formally appointed by Yucaipa, Brian Cullen ("Cullen") and Defendant Gendregske, with Cullen appointed as its Chairman. Other individuals, including Allied's counsel, attended Special Committee meetings at the Special Committee's request.

70. The purpose of the Special Committee was purportedly to supposedly negotiate on behalf of Allied in connection with any transaction in which Yucaipa would be involved. This necessarily would have included the Third Amendment, which for the first time permitted Yucaipa to acquire First Lien Debt. However, neither Allied nor its Special Committee took any control [redacted].

71. In addition, the Special Committee never took any steps to ensure that it was represented by or advised by independent professionals who could have taken steps to ensure that the interests of Allied, as opposed to those of Yucaipa, were being represented at the bargaining table over the Third Amendment or any subsequent transaction involving Yucaipa. At no time did the Special Committee retain independent counsel or independent financial advisors to assist its considerations of proposed transactions and whether to make certain recommendations to the Board.[5] Indeed, throughout its entire existence until well into these chapter 11 cases, the Special Committee's legal and other advisors have been the same advisors that have assisted the full Board.

72. At an April 1, 2008 Special Committee meeting, a transaction was discussed whereby Yucaipa would purchase Allied's First Lien Debt, potentially at a discount, and then

[5] Only after months had passed in these current bankruptcy cases did the Special Committee ever retain independent advisors.

would turn around and forgive that debt as a contribution to Allied in exchange for equity. Two weeks later, the Special Committee discussed Yucaipa's willingness to acquire and then to convert up to $25 million of First Lien Debt into equity, subject to a material adverse change clause.

73. Three days later, on April 17, 2008, the Special Committee was advised that Defendant Walker, on behalf of Yucaipa, had stated that Yucaipa was only willing to convert $20 million of First Lien Debt into equity, despite the fact that Allied's negotiators had advised that they would be more comfortable at the previously discussed $25 million conversion amount. Nevertheless, at the conclusion of the Special Committee's April 17, 2008 meeting, the Special Committee unanimously agreed to return a term sheet to Yucaipa containing the $20 million commitment that Yucaipa preferred.

74. Yucaipa would ultimately be unwilling, however, [redacted]. Notwithstanding the enactment of the Third Amendment that [redacted]

(g) **Yucaipa Continues to Seek Approval to Acquire a Majority of the First Lien Debt to Protect its Equity Investment**

75. Throughout 2008, Yucaipa was [redacted]

76. [redacted]

[redacted]

77. [redacted]

78. During the same time that Yucaipa was cementing its control, Allied was suffering financially and was informed of the heightened duties that it owed to its creditors as a result. On December 10, 2008, Cullen advised the Board that it should "consider the possibility that the Company was in the zone of insolvency and may have altered responsibilities as a consequence."

79. Nevertheless, while discussions concerning Yucaipa's potential acquisition of First Lien Debt continued, the Board and the Special Committee failed to take even rudimentary steps to ensure that any transaction would be fair to Allied and its stakeholders. For instance, on January 24, 2009, the Special Committee determined that it would not seek a fairness opinion concerning a contemplated transaction where Yucaipa would only acquire a minority amount of the First Lien Debt. Ultimately, Allied failed to ever obtain a fairness opinion concerning any acquisition of First Lien Debt by Yucaipa, including when Yucaipa ultimately purported to acquire the majority of outstanding First Lien Debt.

80. Notably, while the Special Committee and the Board failed to take steps to protect the interests of Allied and its stakeholders, the true motives of Yucaipa were obvious to, and known by, Allied's directors. For instance at a February 3, 2009 Special Committee meeting, Cullen stated in no uncertain terms that "he believed that Yucaipa was putting more money into the Company in an effort to retain and protect its ownership position." The Special Committee shared Cullen's views, as the minutes from that same meeting reflect that the "Special Committee noted that Yucaipa's additional infusion of cash in the Company suggested that it would remain willing to augment the Company's cash position to protect its investment." Still, the Allied Directors failed to take appropriate steps to ensure that the interests of the Company, as opposed to the interests of Yucaipa, were protected and fulfilled.

81. Throughout this time, Yucaipa continued to [redacted]

82. [redacted]

[redacted]

83. [redacted]

84. [redacted], on February 4, 2009, Yucaipa launched a tender offer to the existing holders of the First Lien Debt that, if successful, would have permitted Yucaipa "to be Lenders under [First Lien] Credit Agreement without any capital contributions to [Allied] and without any limit on the amount of Loans and LC Deposits that can be purchased." As part of the tender offer, Yucaipa offered to purchase the outstanding debt at substantial discounts to par, namely term loans and letter of credit deposits for approximately 15 cents on the dollar and revolving credit commitments for approximately 13 cents on the dollar. Simultaneously, Yucaipa caused Allied to seek to secure lender consent to an amendment to the First Lien Credit Agreement that, if successful, would have permitted Yucaipa to become the Requisite Lender under the First Lien Facility.

85. However, the existing lenders to the First Lien Facility would not tender or consent to Yucaipa's desire to take control over the First Lien Facility. Accordingly, the proposed tender offer and amendment strategy failed.

(h) **Yucaipa Initiates Its Backup Plan to Take Total Control Over Allied Utilizing ComVest to Enable Yucaipa to Become the Requisite Lender Over the First Lien Facility**

86. Having failed in its efforts to convince the First Lien Facility lenders to permit Yucaipa to take total control over the First Lien Facility, Yucaipa initiated its backup plan to take complete control over Allied. Accordingly, Yucaipa turned its sights on another entity, ComVest, to give Yucaipa the total control it so desired.

87. At a March 6, 2009 Allied Board meeting, Defendant Walker informed the Board about a contemplated transaction between Yucaipa and ComVest to acquire ComVest's Allied debt holdings. At that meeting, Defendant Walker advised the Board that

> Yucaipa and Com-Vest reached an agreement under which Com-Vest would retain its debt holdings, but would allow Yucaipa full voting control over those holdings, as well as any future Allied debt acquired by Com-Vest. Com-Vest further agreed not to undertake any other activities in the carhaul sector. Com-Vest and Yucaipa reached an agreement as to how the two companies would share any recovery in the event of a liquidation by Allied. Under that agreement, any payments to Com-Vest/Yucaipa would be provided first to Com-Vest for the first $70 million, then to Yucaipa up to an amount equal to the amount invested by Yucaipa in purchasing first lien debt, with any remaining funds shared between the companies pro-rata. Yucaipa planned to launch a tender offer for remaining first lien debt at twenty-three cents on the dollar. Finally, under the agreement, Allied was to provide Com-Vest a warrant for 25% of the outstanding shares in Allied. . . . Mr. Walker pointed out that in exchange for the 25% of the Company's equity, the Company would receive an amendment that would cure all defaults and set covenants at a level selected by the Company as achievable. It would also put requisite lender approval in the hands of Yucaipa, more closely aligning the interests of the Company and those of the requisite lenders.

88. After Defendant Walker's presentation, the Board "went on to discuss the ramifications of the proposed transaction, including the impact of the proposed transaction on minority shareholders, and other lenders." As part of that discussion, Defendant Walker stated that ComVest's intention, absent an agreement on the proposed transaction, would be to "push

the Company into bankruptcy and force a 363 sale in which it would likely credit bid its loans in order to obtain an order to purchase the Company."

89. At this Board meeting, Cullen inquired as to whether a Special Committee meeting was needed and whether the Board should obtain a fairness opinion. The Board "directed the Special Committee to meet and return to the full Board with a recommendation on whether to authorize the Company to enter into the proposed transaction." The Board meeting was simply suspended momentarily to permit the Special Committee to meet. As usual, the Special Committee received no independent advice regarding the proposed transaction. Shortly thereafter the Board reconvened, and the Special Committee advised that it had unanimously decided to recommend that the Board approve of the proposed transaction and what would ultimately lead to the Fourth Amendment.

90. Yucaipa's intent throughout this period was clear. Having failed in its earlier attempts to convince the holders of the First Lien Debt to voluntarily consent to permit Yucaipa to become the Requisite Lender, Yucaipa would utilize Allied in whatever fashion it desired in order to effectuate Yucaipa's efforts to protect its equity investment.

91. Yucaipa's intentions throughout this period were not unknown to the Allied Directors. All involved understood that Yucaipa, having already succeeded in its efforts to take control over the Second Lien Facility, was seeking approval to obtain First Lien Debt in an effort to support its equity investment in Allied. Nevertheless, the Allied Directors took no measures to stop Yucaipa, or even to ensure that any takeover by Yucaipa of the First Lien Facility would not be inimical to the interests of Allied or its creditors.

(i) **Yucaipa Causes Allied and the Allied Directors to Fail to Negotiate with the First Lien Lenders Concerning a Consensual Restructuring of the First Lien Facility**

92. Notwithstanding Defendant Walker's representation to the Allied Board in March 2009, upon information and belief, Yucaipa and ComVest did not have any agreement at that time. To the contrary, ComVest was interested in pursuing a consensual restructuring of the outstanding debt of Allied in a manner that would have involved a potential consensual reorganization of Allied's debt structure.

93. Upon information and belief, in the spring and summer of 2009, ComVest repeatedly approached Allied in an effort to engage in discussions concerning a potential conversion of the outstanding First Lien Debt into equity of a reorganized Allied. The precise parameters of this potential consensual restructuring were not set in stone, but could have taken a number of different forms, including potentially a strategic combination with other parties in the long-haul auto industry or other potential structures.

94. The benefits of a potential voluntary restructuring of the outstanding debt of the Company should have been clear to the Allied Directors at the time. Indeed, by the spring of 2009, Allied had been in perpetual default of its obligations under the First Lien Facility for almost a year. A voluntary restructuring of the First Lien Debt in a manner that involved the conversion of the outstanding debt into equity of a reorganized Allied would have significantly benefitted Allied and its creditors, as it could have potentially de-levered Allied's balance sheet. Accordingly, given the obvious benefits to the Company and its stakeholders, it was incumbent upon the Allied Directors to at least pursue discussions with ComVest, as the Requisite Lender, concerning a potential voluntary restructuring.

95. The one party that would not have benefitted, however, from such a voluntary restructuring or strategic combination would have been the existing equity holders of Allied. In

particular, to the extent that the Company entered into such a restructuring or combination, it is likely, if not certain, that Yucaipa would have seen the value of its existing equity holdings diminished and would potentially see its super-majority control over Allied be eliminated or at least reduced.

96. Unfortunately, upon information and belief, the Allied Directors failed to even attempt to engage or direct the officers of Allied to engage in discussions or negotiations with ComVest concerning a potential voluntary restructuring of Allied's outstanding First Lien Debt. Although the precise reasons for the failure of the Allied Board to fulfill its fiduciary obligations is not known to date, given Yucaipa's control over the Board and its decision making, it is hardly surprising that Allied failed to even attempt to engage in discussions concerning a potential transaction that could have greatly enhanced the value of the Company where it would not advance Yucaipa's self-serving interests.

97. Accordingly, upon information and belief, ComVest, having been rebuffed in its efforts to effectuate a voluntary out-of-court restructuring of Allied's debt structure, went back to the drawing board and began serious negotiations with Yucaipa.

**(j) Yucaipa Causes Allied to Fail to Pay Under the First Lien Facility In Order to Benefit Yucaipa in its Negotiations with ComVest**

98. Not content to simply pursue its backup plan to take control over Allied's entire financial structure, Yucaipa also took measures to put pressure on the existing First Lien Lenders through its control over Allied's equity and its Board. What is more, Yucaipa utilized Allied's existing funds as a cudgel to assist Yucaipa in connection with negotiations with ComVest, all to the detriment of the existing creditors of Allied.

99. For example, at an August 3, 2009 Board meeting called for the purpose of discussing Allied's "liquidity, especially with respect to the approximately $4.8 million interest

payment due to the first lien lenders the next day," the Board was advised that Defendant Walker "had suggested that the Company might be well-advised not to make the payment."

100. At that meeting, Defendant Walker "updated the Board on the status of negotiations with ComVest, stating that ComVest and Yucaipa were back in discussions," that Yucaipa believed a deal could be reached, but "warned, however, that it was critical that the Company have adequate liquidity to provide a sufficient runway for negotiations, and that a free fall into bankruptcy could be highly disruptive to the Company and to the ongoing negotiations." Defendant Walker further "advised that based upon his conversations with ComVest, he did not believe that failure to make the payment would lead to precipitous action by the lenders or anyone else", because, according to Defendant Walker, "ComVest, as the Requisite Lenders, would not seek to exercise any rights and would not allow others to do so given the current state of negotiations between ComVest and Yucaipa."

101. At this same meeting, Scott Macaulay advised the Board that Allied had $16.5 million of cash on hand, of which $12.3 million was immediately available. Of that $12.3 million, $2 million was needed for insurance premium payments, leaving, as a practical matter, $10.3 million in immediately available cash on hand. Mr. Macaulay advised that making the interest payment of $4.8 million to the First Lien Facility lenders would leave Allied with $5.5 million of immediately available cash on hand. Accordingly, Allied had sufficient funds available to make its payment and to stay current on its payment obligations under the First Lien Facility.

102. Nevertheless, notwithstanding the fact that Allied had sufficient liquidity to pay debt service under the First Lien Facility, in order to facilitate Yucaipa's interests in negotiations with ComVest, Defendant Walker's motion that Allied forego the quarterly interest payment that

it owed the First Lien Facility lenders on August 4, 2009 carried unanimously. Based upon the information disclosed to the Committee to date, it does not appear that the Special Committee ever met to consider or evaluate Defendant Walker's motion, notwithstanding the clear involvement of Yucaipa's interests in the decision of Allied's board to not make payments owing under the First Lien Facility.

103. Of course, these were hardly the only defaults by Allied under the First Lien Credit Agreement. Indeed, since August 2008, Allied had been in continuous default under the First Lien Credit Agreement, as it failed to meet financial covenants set forth in the First Lien Credit Agreement. Additionally, Allied later disclosed that as of August 30, 2008, it had failed to fulfill its requirement under the First Lien Credit Agreement to disclose Yucaipa's acquisition of Second Lien Debt in June and July 2008. The failure to disclose Yucaipa's purchase of that debt also constituted an Event of Default under the First Lien Credit Agreement. Upon information and belief, Yucaipa directed or caused Allied to fail to disclose the acquisition of debt by Yucaipa in June and July 2008.

(k) **Yucaipa Completes Its Backup Plan to Take Total Control Over Allied's Financial Structure, as it [redacted] Causes Allied to Execute The Purported Fourth Amendment**

104. While it was causing Allied to further default on its obligations to its creditors, Yucaipa continued negotiations with ComVest to complete its backup plan to cement its total control over Allied. During this time, Yucaipa [redacted]

105. [redacted]

[redacted]

106. [redacted]

[redacted]

107. [redacted] Yucaipa had struck a deal with ComVest whereby those parties agreed to amend the terms of the First Lien Agreement to provide precisely the opposite of what was always intended, namely that Yucaipa would now be permitted to control the entirety of Allied's debt structure. [redacted]

[redacted]

108. [redacted] The transaction was ultimately approved by Allied's Board on August 19, 2009, at the recommendation of the purportedly independent Special Committee. Despite the approval, neither Allied's Special Committee, nor the full Board, played any significant role in the negotiations of the terms of the Fourth Amendment. Instead, the Allied Directors simply went along for the ride as Yucaipa completed its backup plan to cement its control over Allied.

109. [redacted]

110. The purported Fourth Amendment purported to eliminate all of the Third Amendment's restrictions on Yucaipa's ability to obtain First Lien Debt. The Fourth Amendment purports to amend the First Lien Agreement's definitions of "Eligible Assignee" and "Term Loan Exposure" such that Yucaipa's ability to acquire certain First Lien Debt is no longer capped. (Fourth Amendment § 2.1(b).) It further purports to eliminate the voting restrictions for debt obtained by Yucaipa, purports to remove the $50 million cap, and purports to eliminate the capital contribution requirement. (Id. § 2.4(a).)

111. [redacted] Yucaipa now purports to hold "$114,712,088.66 of Term Loans and $30,400,458.40 of LC Commitments (*i.e.* deposits to support letter of credit), totaling $145,112,547.06 of the $265,000,000 maximum first lien loans authorized by the First Lien Credit Agreement," according to Yucaipa's Cross-Claims. (Adv. Pro. No. 12-50947 (Bankr. D. Del.), D.I. 65 at ¶17.) [redacted]

112. [redacted]

113. Following the execution of the Fourth Amendment, [redacted] Yucaipa contended that it is the

Requisite Lender under the Credit Agreement.

(l) **Having Executed its Backup Plan Through the Fourth Amendment, Yucaipa Plans to Eliminate the Threat to Its Equity Position**

114. Having succeeded in its backup plan to take control over the entire secured debt structure of Allied, Yucaipa next turned to planning a reorganization of Allied that would further cement and protect its equity holdings in the Company.

115. [redacted]

116. During this time, Yucaipa pursued discussions with other parties and entities that had an interest in the First Lien Facility concerning the potential of a reorganization of Allied whereby the existing debt of Allied would be converted to equity or wiped out. Upon information and belief, neither Yucaipa nor the Allied Directors considered during this time whether such a reorganization strategy would be consistent with the fiduciary obligations owed by Yucaipa and the Allied Directors to Allied as a whole and its stakeholders, including its creditors.

117. Additionally, following the execution of the Fourth Amendment, [redacted] Yucaipa took additional steps to protect its equity position at the expense of Allied's legitimate creditors. As noted above, beginning in August 2009, Allied, at Yucaipa's direction, began to refuse to make regularly scheduled payments of principal and interest under the First Lien Facility. Additionally, upon information and belief, Yucaipa also caused Allied to fail to reimburse collateral accounts that secured the First Lien Facility's letter of credit facility, to attempt to terminate certain control agreements, and to retain excess cash all in violation of the terms of the First Lien Credit Agreement. These steps frustrated the rights of secured and unsecured creditors to attempt to remedy defaults committed by Allied, all during a period in which Allied was insolvent and in default of its obligations to creditors.

(m) **Litigation Surrounding the Purported Fourth Amendment**

118. Although Yucaipa has claimed to be the Requisite Lender under the Credit Agreement in light of the purported Fourth Amendment, its claim to that position has been hotly contested around the country and has been an issue in at least three separate proceedings (the third of which includes multiple adversary proceedings in the Delaware Action).[6]

(i) **The Georgia Litigation**

119. Approximately one month after the execution of the Fourth Amendment and affiliated agreements, the majority of the other First Lien lenders objected to Yucaipa's acquisition and instructed CIT, which acted as the Administrative Agent and Collateral Agent under the First Lien Credit Agreement, to object to Yucaipa's claim to be the Requisite Lender and to challenge the validity of the Fourth Amendment.

[6]The Petitioning Creditors (as defined below) commenced on January 25, 2013 an adversary proceeding before this Court related to the same issues. *BDCM Opportunity Fund II, LP, et al. v. Yucaipa American Alliance Fund, I, LP et al.*, Adv. Pro. No. 13-50499 (CSS) (Bankr. D. Del.).

120. Following CIT's objection to the Fourth Amendment, Yucaipa and Allied, at Yucaipa's direction, brought suit against CIT in the Superior Court of Fulton County, Georgia (the "Georgia Action"),[7] seeking, among other things, a declaratory judgment that the Fourth Amendment was valid and that Yucaipa was the Requisite Lender. In response, CIT filed counterclaims seeking, among other things, a declaration that the Fourth Amendment was invalid and stating claims for breach of fiduciary duty against the Allied Board and aiding and abetting breach of fiduciary duty against Yucaipa.

121. Shortly after filing a motion for partial summary judgment in its favor, CIT entered into a settlement agreement with Allied and Yucaipa. The Settlement Agreement made clear that the settlement was made solely by CIT in its individual capacity and did not release any claims that may have existed on behalf of "any other person."

(ii) **The New York Action**

122. On January 17, 2012, just weeks after the settlement of Yucaipa and Allied's lawsuit against CIT, BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd., and Spectrum Investment Partners, L.P. (collectively, the "Petitioning Creditors") commenced an action against Yucaipa in the Supreme Court of the State of New York (the "New York Action") seeking a declaration from the court that "(i) the Purported Fourth Amendment is null and void, ineffective, and not binding," and (ii) that "Yucaipa is not Requisite Lenders under the Credit Agreement."

[7] In addition to the Georgia Litigation, the purported Fourth Amendment spawned a separate lawsuit against ComVest in Florida state court. In that case, Michael T. Riggs and affiliated entities sued ComVest, claiming that by entering into the transaction with Yucaipa that ComVest had breached various letters of intent and other agreements that contemplated a transaction involving Allied. That lawsuit has apparently been stayed pending these bankruptcy cases.

123. Yucaipa's motion to dismiss the New York Action was denied at a May 30, 2012 hearing without a written opinion, and the transcript of that hearing was "So Ordered" on August 2, 2012.

124. The Petitioning Creditors moved for summary judgment on August 27, 2012. At oral argument on that motion on November 19, 2012, the court indicated it would grant the motion for summary judgment and indicated it would subsequently issue a written order, as Yucaipa has acknowledged (Adv. Pro. No. 12-50947 (Bankr. D. Del.), D.I. 65 at ¶88).

(n) **Yucaipa Has Failed to Perform Under the Third Amendment**

125. By virtue of the ruling in the New York Action, the Fourth Amendment has now been found to be invalid such that reliance on the Fourth Amendment now is misplaced. Accordingly, the Third Amendment is again the operative amendment to the First Lien Credit Agreement and its terms, including the contribution provisions and limitations upon Yucaipa's debt holdings, are binding and controlling.

126. However, notwithstanding the ruling in the New York Action, Yucaipa has refused to perform in accordance with the terms of the First Lien Credit Agreement, as amended by the Third Amendment. Indeed, even if the forthcoming written ruling in the New York Action withstands any appeal that Yucaipa claims it will bring, Yucaipa expressly contends in this proceeding that it would refuse to perform the obligations contained in the First Lien Credit Agreement, as amended by the Third Amendment. (Adv. Pro. No. 12-50947 (Bankr. D. Del.), D.I. 65 ¶¶ 109, 118-122, 130).

(o) **The Filing of These Bankruptcy Cases and Yucaipa's Attempt to Fulfill its Plan to Protect its Equity Investment**

127. On May 18, 2012, the Petitioning Creditors filed these involuntary bankruptcy proceedings, alleging that Yucaipa had caused Allied to be mismanaged and had caused Allied to be in default under the First Lien Credit Agreement. Subsequently, Allied consented to the bankruptcy cases and filed a voluntary petition under chapter 11 of the Bankruptcy Code.

128. Since that time, Yucaipa has sought to complete its long-standing plans for Allied. In particular, Yucaipa has repeatedly stated that it was preparing to bid to takeover Allied. Upon information and belief, Yucaipa would essentially retain its control over Allied's equity through any bid and eliminate existing debt of Allied, both secured and unsecured.

## CLAIMS FOR RELIEF

### First Claim for Relief

**Equitable Subordination Pursuant to 11 U.S.C. § 510(c) against Yucaipa**

129. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 128 as if fully set forth herein.

130. The equities in this case demand that the amounts allegedly owed to Yucaipa on account of the First and Second Lien Facilities should be subordinated to all other claims except those of equity interest holders under 11 U.S.C. § 510(c).

131. Yucaipa, as the owner of a super-majority of the outstanding equity in the Debtors and having been able to appoint at least three of the five directors on Allied's board of directors, was at all times, and still is, an insider of the Debtors.

132. Yucaipa and its agents, including the members of Allied's board of directors appointed by Yucaipa, breached their fiduciary duties of good faith, honest governance, loyalty

and care to Allied and its creditors by, among other wrongs, looting and engaging in self-dealing transactions for Yucaipa's own benefit and to the detriment of the Debtors and their creditors.

133. Yucaipa's inequitable conduct injured Allied and its creditors by, among other things, causing the Company to fail to repay amounts outstanding under its various debt facilities and to expend millions of dollars in fees and other amounts that served no one's interest but those of Yucaipa. In addition, Yucaipa acted inequitably toward Allied by improperly exercising its control over Allied and causing Allied to pay for and consent to a series of transactions effectuating Yucaipa's purported acquisition of a majority of the outstanding secured debt of Allied, all with the express intention of causing Allied to sell its assets to Yucaipa through the rubric of a bid that would eliminate legitimate debt of Allied while protecting the equity interests of Yucaipa at the expense of the Debtors and their creditors.

134. Plaintiff believes that equitable subordination of Yucaipa's purported debt holdings to all other claims except those of equity interest holders is consistent with the provisions of the Bankruptcy Code. Yucaipa should not be permitted to profit from an illicit scheme that it willingly, and intentionally, wrought upon Allied and its creditors, in violation of its fiduciary duties of good faith and loyalty.

135. For the reasons set forth above, Yucaipa's claims, in total, against the Debtors should be subordinated to all other claims asserted against the Debtors pursuant to section 510(c) of the Bankruptcy Code because Yucaipa's inequitable conduct resulted in injury to the Debtors' creditors as a whole and conferred an unfair advantage on Yucaipa, and such subordination would be consistent with the provisions of the Bankruptcy Code.

**Second Claim for Relief**

**Recharacterization Pursuant to 11 U.S.C. § 105(a) of Yucaipa's Purported Debt Holdings Under the First and Second Lien Facilities against Yucaipa**

136. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 135 as if fully set forth herein.

137. The substance and character of Yucaipa's purported debt holdings under the First Lien Facility and Second Lien Facility is one of an equity contribution.

138. Considering the totality of the circumstances surrounding Yucaipa's scheme to take control of Allied's outstanding debt, including, but not limited to, its acquisition of Second Lien Debt, the Third Amendment to the First Lien Credit Agreement, the Fourth Amendment to the First Lien Credit Agreement, [redacted] Yucaipa's claims against the Debtors should be recharacterized as equity interests based on, but not limited to, the following factors:

a) Since at least the spring of 2008, [redacted];

b) Yucaipa's goal of obtaining First and Second Lien Debt was a transparent effort to control both sides of the lending equation—it has controlled the borrower through its majority equity holdings and accompanying power to appoint a majority of the Board, and it has sought to control the First Lien and Second Lien Debt by becoming the Requisite Lender under both facilities;

c) Yucaipa has never sought to obtain First or Second Lien Debt as debt, as it never intended to enforce the right of a debt holder to receive regularly scheduled payments of principal and interest on the debt;

d) Indeed, given the restrictions that would have attended any First Lien Debt that it would have acquired under the Third Amendment, in Yucaipa's Cross-Claims in these proceedings and in the New York Action, it has admitted that it did not acquire any First Lien Debt under the Third Amendment, "never would have," and "never intended to purchase any debt claims that would make it bound by the Third Amendment's provisions" (Adv. Pro. No. 12-50947 (Bankr. D. Del.), D.I. 65 at p. 15), an admission that it was only interested in acquiring First Lien Debt

to the extent that it could achieve Requisite Lender status in furtherance of its equity interests;

e) Yucaipa's acquisition of First and Second Lien Debt was in the nature of an equity contribution because it was only acquired in furtherance of Yucaipa's equity interest in Allied [redacted].

139. For the reasons set forth above, Yucaipa's claims against the Debtors under the First Lien Facility and Second Lien Facility should be recharacterized as equity pursuant to section 105(a) of the Bankruptcy Code.

**Third Claim for Relief**

**Breach of Third Amendment to the First Lien Credit Agreement against Yucaipa**

140. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 139 as if fully set forth herein.

141. As a purported holder of First Lien Debt, Yucaipa is bound by the terms of the First Lien Credit Agreement, as amended.

142. Pursuant to the terms of the Third Amendment, Yucaipa is obligated to make a capital contribution of fifty (50) percent of the face value of certain First Lien Debt holdings that it acquired within ten days of the acquisition of such debt.

143. Yucaipa acquired a total of $145,112,547.06 in First Lien Debt, $114,712,088.66 in the form of Term Loans.

144. The court in the New York Action has declared that the Fourth Amendment is invalid. Accordingly, because the Fourth Amendment has been found to be null and void, the Third Amendment is enforceable and its terms govern the holdings of any holders of First Lien Debt, including Yucaipa.

145. Yucaipa has materially breached the terms of the First Lien Facility, as amended by the Third Amendment, by, among other things, failing to pay the required capital contribution of not less than $57,356,044.33, representing fifty (50) percent of its Term Loan holdings of First Lien Debt, and acquiring First Lien Debt for which it was not an "Eligible Assignee" under the Third Amendment.

146. Yucaipa's breach of the First Lien Facility, as amended by the Third Amendment, has caused, and will continue to cause, substantial monetary damages to the Debtors and their creditors, in an amount to be determined at trial, but reasonably believed to be an amount not less than $57,356,044.33, plus interest.

**Fourth Claim for Relief**

**Specific Performance of Third Amendment to the First Lien Credit Agreement against Yucaipa**

147. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 146 as if fully set forth herein.

148. Even after giving effect to the terms of the First Lien Facility, as amended by the Third Amendment, requiring Yucaipa to pay the requisite capital contribution of not less than $57,356,044.33, Yucaipa is still in material breach of the terms of the First Lien Facility, as amended by the Third Amendment.

149. Under the terms of the Third Amendment, at most, Yucaipa would be permitted to hold no more than $50 million of the principal amount of Term Loans under the First Lien Facility and no Revolving Loans or LC Deposit Loans under the First Lien Facility.

150. Yucaipa purports to hold $114,712,088.66 in Term Loans under the First Lien Facility, which, even after reducing such amount by an award of monetary damages or

conversion of such holdings into a capital contribution by $57,356,044.33, is still $7,356,044.33 greater than permitted under the First Lien Facility, as amended by the Third Amendment.

151. Additionally, Yucaipa purports to hold $30,400,458.40 of LC Commitments, none of which it is permitted to hold under the terms of the First Lien Facility, as amended by the Third Amendment.

152. Plaintiff has no adequate remedy at law for the harm that will continue to be caused by Yucaipa's continued breach of the First Lien Facility, as amended by the Third Amendment, even after Yucaipa is required to make the requisite capital contribution as damages as set forth in Plaintiff's Third Claim for relief.

153. Accordingly, Plaintiff is entitled to a decree of specific performance by Yucaipa of its obligations under the First Lien Facility, as amended by the Third Amendment, to, among other things, divest itself of not less than $7,356,044.33 of Term Loans under the First Lien Facility and its entire holdings of LC Commitments under the First Lien Facility.

**Fifth Claim for Relief**

**Breach of Fiduciary Duty against Yucaipa**

154. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 153 as if fully set forth herein.

155. As the controlling shareholder of Allied, Yucaipa owed Allied and, as of early 2008, its creditors, fiduciary duties of good faith, honest governance, loyalty and care.

156. In addition to its ability to influence Allied by yielding no less than 67% of the voting power of equity, Yucaipa exercised further improper influence over Allied by entering into a consulting agreement with Allied as of May 29, 2007. Through this "Monitoring and Management Services Agreement" ("MMSA"), Allied was induced to and did repose confidence

in Yucaipa and its alleged superior knowledge and capabilities in negotiating with Allied's customers and its employees. However, Yucaipa engaged in a self-serving campaign that extracted unnecessary and unreasonable fees from Allied and acted to ensure that Yucaipa and its interests would be served before the interests of Allied and its creditors.

157. In violation of its fiduciary duties, Yucaipa engaged in inequitable conduct with regard to Allied and its creditors by entering into the transactions described above, whereby Yucaipa purported to seize control over the First and Second Lien Facilities with the intention of protecting its equity investment in the Debtors, while knowing that Allied was, at best, undercapitalized and insolvent. Yucaipa further engaged in inequitable conduct through its control of the board of directors of Allied, by causing the directors to fail to even consider potential transactions that could have benefitted Allied if such transactions held even the potential of harming Yucaipa's equity interests. Yucaipa abused its position of trust and control over the Debtors by structuring transactions that were nominally in the name of the Debtors but were, in reality, actually structured in a manner to ensure and protect Yucaipa's existing equity investments in Allied.

158. The Debtors and their creditors have suffered damages in an amount to be proved at trial as a result of Yucaipa's breaches of its fiduciary duties.

**Sixth Claim for Relief**

**Breach of Fiduciary Duty against the Allied Directors**

159. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 158 as if fully set forth herein.

160. As members of the Board, the Allied Directors owed Allied and, as of at least early 2008, when Allied became insolvent, owed its creditors fiduciary duties of loyalty and care.

161. The Allied Directors breached their fiduciary duty of loyalty to Allied by consciously and intentionally disregarding the responsibilities they bore to deal with Allied's debt structure in a manner that did not unduly benefit Yucaipa as Allied's primary equity holder. In abdicating their responsibilities they violated their fiduciary duties to act loyally to the corporation and in good faith.

162. Specifically, the Allied Directors consciously and intentionally turned away from their responsibilities to Allied when they failed to ensure that Allied, and not Yucaipa, [redacted] In derogation of those duties, however, the Allied Directors consciously permitted Yucaipa to control the drafting of the Third Amendment and the Fourth Amendment to the First Lien Debt Facilities in a manner that attempted to ensure that Yucaipa could control the outstanding secured debt of the company in a manner that would protect Yucaipa's interests, without regard to the interests of Allied and its creditors.

163. Additionally, the Allied Directors consciously and intentionally failed to consider potential transactions that could have potentially greatly benefitted Allied if such transaction held even the potential of harming Yucaipa's equity interests in the Company. In derogation of their duties to benefit the Company, not Yucaipa, the Allied Directors failed to even engage in negotiations with lenders concerning potential restructuring alternatives that could have benefitted the Company and its balance sheet, if such transactions were not likely beneficial to Yucaipa.

164. The Allied Directors also consciously and intentionally disregarded their obligations to the corporation by repeatedly failing to make legitimate or conscientious efforts to

ensure that any transactions involving the Company and Yucaipa, including the acquisition of outstanding secured debt, were in the Company's interests, not only Yucaipa's interests. While the board of directors appointed a purported "Special Committee" of independent directors to evaluate any transaction involving Yucaipa, the committee was neither special nor independent and utterly failed in its purpose. Indeed, the "Special Committee" never hired independent advisors, and repeatedly failed to engage in deliberations separate and apart from deliberations with the Yucaipa directors, but instead would merely meet and deliberate after presentations by and deliberations with the conflicted Yucaipa directors and the ordinary advisors to the Company, whose retention was subject to the whims of Yucaipa and its control over Allied.

165. Additionally, the Allied Directors violated their duties of loyalty and care to the corporation by permitting and approving the payment of millions of dollars in purported fees paid to or on behalf of Yucaipa. The Allied Directors failed to ensure that Allied received any benefit from the millions of dollars that were scheduled to be paid to or on behalf of Yucaipa were necessary and appropriate

166. The Allied Directors further violated their duties of care through their gross negligence of their obligation to seek information about Yucaipa's intentions once and if it acquired a majority stake in the outstanding secured debt of the Company. This failure to act, and the approvals of the amendments to the secured debt facilities that enabled Yucaipa to seize complete control over every aspect of the Debtors' capital structure, were breaches of the Allied Directors fiduciary duties of loyalty and care.

167. The Debtors have suffered damages in an amount to be proved at trial as a result of the Allied Directors' breach of fiduciary duties.

**Seventh Claim for Relief**

**Aiding and Abetting Breach of Fiduciary Duty against All Defendants**

168. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 167 as if fully set forth herein.

169. If and to the extent that any Defendant is found not to have owed a fiduciary duty to the Debtors at the time of the transactions complained of herein, each Defendant is nevertheless liable for having aided and abetted the breach of fiduciary duty of one or more of the other Defendants who are found to have direct responsibility for the breaches of such duties.

170. Each of the Defendants knowingly participated in or acquiesced to, benefitted from and aided and abetted the breach of fiduciary duty engaged in by the other Defendants.

171. The Allied Directors knowingly participated in Yucaipa's breach of fiduciary duty by encouraging and approving the transactions described above which have injured the Debtors and its creditors.

172. Yucaipa knew that the Allied Directors breached their fiduciary duties to Allied by entering into the transactions described above. Yucaipa knowingly participated in the Allied Directors' breach by controlling and dictating the terms of the transactions that were nominally entered into by the Debtors but were at all times performed for and perpetrated by Yucaipa.

173. As a result of the insider transactions, which the Allied Directors and Yucaipa aided and abetted, the creditors of Allied have been damaged in an amount to be proved at trial in this action. At a minimum, the damages suffered by the Company, and thereby its creditors, include fees and interest paid to and on behalf of Yucaipa in connection with, among other things, the Third Amendment, the Fourth Amendment [redacted] and the

Georgia Litigation, through which Yucaipa received, or received the benefit of having Allied pay for, millions of dollars in fees paid by Allied.

**Eighth Claim for Relief**

**Avoidance and Recovery of Intentional and Constructive Fraudulent Transfers against Yucaipa Pursuant to 11 U.S.C. §§ 548(a) and 550**

174. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 166 as if fully set forth herein.

175. Upon information and belief, for Yucaipa's benefit, the Debtor Allied Systems Holdings, Inc. or one of its Debtor affiliates transferred legal fees to Kasowitz, Benson, Torres & Friedman LLP ("Kasowitz") totaling not less than $2,458,549.76 (the "Kasowitz Transfers").

176. The Kasowitz Transfers are as follows:

a) December 23, 2009: $19,155.09.

b) March 8, 2010: $100,379.58.

c) April 13, 2010: $38,128.38.

d) April 16, 2010: $13,359.04.

e) May 13, 2010: $98,894.79.

f) July 26, 2010: $101,538.66.

g) September 15, 2010: $191,526.39.

h) September 20, 2010: $304,033.11.

i) October 6, 2010: $209,165.47.

j) November 2, 2010: $360,447.42.

k) December 16, 2010: $111,808.98.

l) December 21, 2010: $4,897.50.

m) March 7, 2011: $237,893.64.

n) June 30, 2011: $100,000.00.

o) September 7, 2011: $117,321.71.

p) October 12, 2011: $200,000.00.

q) November 23, 2011: $100,000.00.

r) December 9, 2011: $75,000.00.

s) December 15, 2011: $75,000.00.

177. Upon information and belief, for Yucaipa's benefit, the Debtor Allied Systems Holdings, Inc. or one of its Debtor affiliates transferred legal fees to Latham & Watkins LLP ("Latham") totaling not less than $1,911,949.17 (the "Latham Transfers," together with the Kasowitz Transfers, the "Law Firm Transfers").

178. The Latham Transfers are as follows:

a) November 19, 2007: $13,701.44.

b) December 11, 2007: $26,064.71.

c) December 13, 2007: $196,295.99.

d) January 2, 2008: $8,408.82.

e) May 2, 2008: $18,642.50.

f) October 15, 2008: $36,461.28.

g) December 31, 2008: $1,280,000.00.

h) December 23, 2009: $15,276.86.

i) December 31, 2009: $26,961.67.

j) February 4, 2010: $4,495.50.

k) September 23, 2010: $33,220.53.

l) October 6, 2010: $46,285.93.

m) December 9, 2010: $1,235.00.

n) December 31, 2010: $39,106.45.

o) March 11, 2011: $26,536.16.

p) December 27, 2011: $139,256.33.

179. Additionally, since May 29, 2007, the Debtors were required to transfer an annual management services fee of $1,500,000.00 per year to Yucaipa pursuant to the MMSA, whether or not Yucaipa provided such services (the "Yucaipa Transfers").

180. [redacted] collectively with the Law Firm Transfers and any Yucaipa Transfers, the "Fraudulent Transfers") whereby, in connection with the Fourth Amendment and the [redacted], Yucaipa obtained ComVest's First Lien Debt holdings.

181. The Debtors were controlled and dominated by Yucaipa on the date of each of the Fraudulent Transfers.

182. The Debtors were controlled and dominated by Yucaipa when [redacted].

183. Each of the Fraudulent Transfers constituted a transfer of an interest in property of the Debtors that were made to, or for the benefit of, Yucaipa.

184. The Debtors incurred one or more obligations that gave rise to each of the Fraudulent Transfers, and those obligations shall be defined as the "Fraudulent Obligations."

185. The Debtors made each of the Fraudulent Transfers and incurred the Fraudulent Obligations with actual intent to hinder, delay, or defraud any entity to which the Debtors were

or became, on or after the date that each such Fraudulent Transfer and Fraudulent Obligation was made, indebted.

186. The Debtors received less than a reasonably equivalent value in exchange for each of the Fraudulent Transfers and Fraudulent Obligations. Moreover, each of the Fraudulent Transfers and Fraudulent Obligations was made or incurred by the Debtors without a fair consideration.

187. At the time each of the Fraudulent Transfers was made and each of the Fraudulent Obligations was incurred, the Debtors (i) were insolvent, or became insolvent as a result of each such transfer or obligation; (ii) were engaged in business or a transaction, or were about to engage in business or a transaction, for which the property remaining with them was an unreasonably small amount of capital or was unreasonably small in relation to the business or transaction; and (iii) intended to incur, or believed that it would incur, debts that would be beyond its ability to pay as such debts matured or became due.

188. None of the recipients of the Fraudulent Transfers or the Fraudulent Obligations took such transfers or obligations for value and in good faith.

189. Yucaipa was either the initial transferee of the Fraudulent Transfers, the entity for whose benefit the Fraudulent Transfers were made or an immediate or mediate transferee of the initial transferee of the Fraudulent Transfers.

190. The Fraudulent Transfers and Fraudulent Obligations made on or within two (2) years of the "Petition Date" (May 17, 2012 for Allied and Systems and June 10, 2012 for the other Debtors) constitute transfers or obligations avoidable by Plaintiff pursuant to section 548(a) of the Bankruptcy Code and such transfers are recoverable from Yucaipa pursuant to section 550 of the Bankruptcy Code. For the foregoing reasons, Yucaipa is liable to the Debtors for the

return of these Fraudulent Transfers, or their value, in an amount to be determined at trial, but not less than the sum of those transfers and conveyances, plus interest from the transfer dates, and costs and fees to the extent available for the benefit of the Debtors' estates. Each Yucaipa Defendant is jointly and severally liable for the entire amount of each Fraudulent Transfer.

**Ninth Claim for Relief**

**Avoidance and Recovery of Intentional and Constructive Fraudulent Transfers and Conveyances against Yucaipa Pursuant to 11 U.S.C. §§ 544(b) and 550**

191. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 190 as if fully set forth herein.

192. At all relevant times, there has been at least one creditor – including but not limited to the members of the Committee – holding an unsecured claim against the Debtors that is allowable under section 502 of the Bankruptcy Code or that is not allowable only under section 502(e) of the Bankruptcy Code.

193. Each of the Fraudulent Transfers and Fraudulent Obligations identified above was made to a creditor whose claim arose before the transfer or obligation was made, and was made to an insider for an antecedent debt.

194. At the time each of the Fraudulent Transfers was made, the Debtors were insolvent and the insider receiving the Fraudulent Transfer had reasonable cause to believe that the Debtors were insolvent.

195. The Fraudulent Transfers identified above constitute transfers and conveyances avoidable by Plaintiff pursuant to section 544(b) of the Bankruptcy Code and applicable state law[8] and such transfers are recoverable from Yucaipa pursuant to section 550 of the Bankruptcy

[8] Applicable state law may include, without limitation, Cal. Civ. Code § 3439.01 *et seq.*, Del. Code § 1301 *et seq.*, Fla. Stat. § 726.101 *et seq.*, and Ga. Code Ann. § 18-2-70 *et seq.*, and, if the Court should determine that this action is governed by the laws of other states, the applicable laws of such other states.

Code. The Fraudulent Obligations constitute obligations avoidable by Plaintiff pursuant to section 544(b) of the Bankruptcy Code and applicable state law as set forth above. Yucaipa is liable to the Debtors for the return of these Fraudulent Transfers, or their value, in an amount to be determined at trial, but not less than the sum of those transfers and conveyances, plus interest from the transfer dates, and costs and fees to the extent available for the benefit of the Debtors' estates. Each Yucaipa Defendant is jointly and severally liable for the entire amount of each Fraudulent Transfer.

**Tenth Claim for Relief**

**Preferential Transfers against Yucaipa Pursuant to 11 U.S.C. §§ 547 and 550**

196. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 192 as if fully set forth herein.

197. As described above, Yucaipa was at all relevant times, including at the times of the Fraudulent Transfers, and still is, an insider of the Debtors.

198. The Fraudulent Transfers that were made within one (1) year of the Petition Date (collectively, the "Preferential Transfers") were made (i) to or for the benefit of a creditor, (ii) for or on account of an antecedent debt owed by the Debtors before such Preferential Transfers were made, (iii) made while the Debtors were insolvent or presumed insolvent as a matter of law, and (iv) enabled such creditor would receive if (a) the case were a case under chapter 7 of the Bankruptcy Code, (b) the Preferential Transfers had not been made; and (c) such creditor received payment of such debt to the extent provided by the Bankruptcy Code.

199. The Preferential Transfers are transfers avoidable by Plaintiff pursuant to section 547 of the Bankruptcy Code, and recoverable from Yucaipa pursuant to section 550 of the Bankruptcy Code.

200. For the foregoing reasons, Yucaipa is liable to the Debtors for the return of the Preferential Transfers, or their value, in an amount to be determined at trial, but not less than the sum of those transfers.

**Eleventh Claim for Relief**

**Disallowance of Claim against Yucaipa**

201. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 201 as if fully set forth herein.

202. For Yucaipa's benefit, the Debtors transferred millions of dollars, all of which is either recoverable or avoidable pursuant to the Bankruptcy Code.

203. By reason of the foregoing, pursuant to section 502(d) of the Bankruptcy Code, the Court shall disallow an amount, to be proven at trial, of Yucaipa's claims.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests that the Court enter an order

a) subordinating Yucaipa's claim, in total, against the Debtors to all other claims;

b) recharacterizing Yucaipa's claim against the Debtors under the First Lien Facility and Second Lien Facility as equity;

c) entering judgment in favor of Plaintiff and Debtors for money damages due to Yucaipa's breach of the First Lien Facility not less than $57,356,044.33, but in an amount to be proven at trial, plus pre-judgment interest;

d) decreeing that Yucaipa specifically perform its obligations under the First Lien Facility, as amended by the Third Amendment;

e) entering judgment in favor of Plaintiff and Debtors for damages due to Yucaipa's breach of fiduciary duties in an amount not less than $57,356,044.33, but in an amount to be proven at trial, plus pre-judgment interest;

f) entering judgment in favor of Plaintiff and Debtors for damages due to the Allied Directors' breach of fiduciary duties in an amount not less than $57,356,044.33, but in an amount to be proven at trial, plus pre-judgment interest;

g) entering judgment in favor of Plaintiff and Debtors for damages due to Defendants' aiding and abetting breach of fiduciary duty in an amount not less than $57,356,044.33, but in an amount to be proven at trial, plus pre-judgment interest;

h) entering judgment for Plaintiff to recover the value of the preferential and fraudulent transfers that Yucaipa caused the Debtors to make, in an amount to be proven at trial, plus pre-judgment interest;

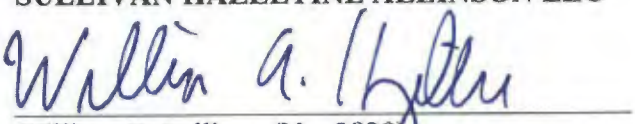
i) disallowing an amount to be proven at trial of Yucaipa's claim pursuant to section 502(d) of the Bankruptcy Code;

j) awarding Plaintiff all reasonable attorneys' fees, costs and disbursements in this action; and

k) granting such other or further relief as is just, proper and equitable.

Dated: Wilmington, Delaware
February 1, 2013

**SULLIVAN HAZELTINE ALLINSON LLC**



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*Counsel for the Official Committee of Unsecured Creditors*

# Appendix "D"

IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

| | |
|---|---|
| In re: | Chapter 11 |
| ALLIED SYSTEMS HOLDINGS, INC. *et al.*,[1] | Case No. 12 -11564 (CSS) (Jointly Administered) |
| Debtors. | Ref. Nos. 858, 876 and 1006 |

**ORDER (A) GRANTING MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR STANDING TO PROSECUTE CERTAIN CLAIMS OF THE DEBTORS ESTATES, (B) GRANTING MOTION OF PETITIONING CREDITORS FOR LEAVE TO INTERVENE, AND (C) GRANTING RELATED RELIEF**

Upon consideration of (a) the Motion Of The Official Committee Of Unsecured Creditors For An Order Authorizing The Committee To Pursue Certain Claims And Causes Of Action Of The Debtors' Estates [D.I. 858] (the "Committee's Motion") and (b) the Motion And Memorandum Of Law Of Petitioning Creditors For Entry Of An Order (I) Pursuant To U.S.C. §105(a) Granting Standing To Petitioning Creditors To Prosecute Certain Claims Of The Debtors Estates For, *Inter Alia,* Equitable Subordination, Breach Of Fiduciary Duty, Aiding And Abetting Breach Of Fiduciary Duty And Breach Of Contract, Or Alternatively (II) Granting Petitioning Creditors Leave To Intervene As Plaintiffs In Adversary Proceeding No. 13-50530 Pursuant To Federal Rule Of Civil Procedure 24 [D.I. 876] (the "Petitioning Creditors' Motion", and together with the Committee Motion, the "Standing Motions"), and; the Court finding that (i)

[1] The Debtors in these cases, along with the federal tax identification number (or Canadian business number where applicable) for each of the Debtors, are: Allied Systems Holdings, Inc. (58-0360550); Allied Automotive Group, Inc. (58-2201081); Allied Freight Broker LLC (59-2876864); Allied Systems (Canada) Company (90-0169283); Allied Systems, Ltd. (L.P.) (58-1710028); Axis Areta. LLC (45-5215545); Axis Canada Company (875688228); Axis Group, Inc. (58-2204628); Commercial Carriers, Inc. (38-0436930); CT Services. Inc. (38-2918187); Cordin Transport LLC (38-1985795); F.J. Boutell Driveaway LLC (38-0365100); GACS Incorporated (58-1944786); Logistic Systems. LLC (45-4241751); Logistic Technology, LLC (45-4242057): QAT, Inc. (59-2876863): RMX LLC (31-0961359); Transport Support LLC (38-2349563); and Terminal Services LLC (91-0847582).

it has jurisdiction over the Standing Motions pursuant to 28 U.S.C. §§ 157 and 1334, (ii) the Standing Motions are core proceedings pursuant to 28 U.S.C. § 157(b)(2); and (iii) venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that proper and adequate notice has been given with respect to the Standing Motions and no other or further notice is necessary; and the Court having conducted a hearing in respect of the Standing Motions on February 27, 2013 (the "Hearing"); and the Court having considered all arguments of counsel and objections raised at the Hearing, and the submissions of parties-in-interest, including (without limitation) (x) the Debtors' Consolidated Response To: (A) Motion Of The Official Committee Of Unsecured Creditors For An Order Authorizing The Committee To Pursue Certain Claims and Causes of Action Of The Debtors' Estates and (B) Motion And Memorandum Of Law Of Petitioning Creditors For Entry Of An Order (I) Pursuant To U.S.C. §105(a) Granting Standing To Petitioning Creditors To Prosecute Certain Claims Of The Debtors Estates For, *Inter Alia,* Equitable Subordination, Breach Of Fiduciary Duty, Aiding And Abetting Breach Of Fiduciary Duty And Breach Of Contract, Or Alternatively (II) Granting Petitioning Creditors Leave To Intervene As Plaintiffs In Adversary Proceeding No. 13-50530 Pursuant To Federal Rule Of Civil Procedure 24 [D.I. 907] ("Debtors' Response"), (y) Defendant Mark Gendresgske's Response to Standing Motions [D.I. 906] ("Gendreske Objection"), and (z) the Response of the Official Committee of Unsecured Creditors to the Motion And Memorandum Of Law Of Petitioning Creditors For Entry Of An Order (I) Pursuant To U.S.C. §105(a) Granting Standing To Petitioning Creditors To Prosecute Certain Claims Of The Debtors Estates For, *Inter Alia,* Equitable Subordination, Breach Of Fiduciary Duty, Aiding And Abetting Breach Of Fiduciary Duty And Breach Of Contract, Or Alternatively (II) Granting Petitioning Creditors Leave To Intervene As Plaintiffs In Adversary Proceeding No. 13-50530

Pursuant To Federal Rule Of Civil Procedure 24 [D.I. 925] (the "Committee Response"); and sufficient cause having been shown; and for the reasons stated by the Court on the record at the Hearing, it is hereby ORDERED as follows:

1. The Committee Motion is granted as set forth herein. The Committee shall have standing to prosecute the claims and causes of action (the "Claims") set forth in the Adversary Proceeding No. 13-50530 (as the same may be amended from time to time; the "Committee Adversary Proceeding") on behalf of the Debtors' estates.

2. The Petitioning Creditors' request for standing to prosecute the claims in the Adversary Proceeding No. 13-50499 (the "Petitioning Creditors' Adversary Proceeding") is withdrawn ~~without prejudice~~.

3. The Petitioning Creditors' request to intervene in the Committee Adversary Proceeding as plaintiffs, on behalf of themselves and not on behalf of the Debtors' estates, is granted. The Petitioning Creditors shall be bound by orders, decisions and all proceedings in this case as if they were the plaintiffs.

4. The caption of the Committee Adversary Proceeding shall be amended to read as follows:

| | |
|---|---|
| In re: | Chapter 11 |
| Allied Systems Holdings, Inc. *et al*, | Case No.: 12-11564 (CSS) (Jointly Administered) |
| Debtors. | |
| The Official Committee of Unsecured Creditors of Allied Systems Holdings, Inc. and its Affiliated Debtors, on behalf of Allied Systems Holdings, Inc. and it Affiliated Debtors, | Adversary Proceeding No. 13-50530 |
| Plaintiffs, | |
| Black Diamond Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd., and Spectrum Investment Partners, L.P., | |
| Intervenors, | |
| - against - | |
| Yucaipa American Alliance Fund, I, LP, Yucaipa American Alliance (Parallel) Fund I, L.P., Yucaipa American Alliance Fund, II, LP, Yucaipa American Alliance (Parallel) Fund II, L.P., Mark Gendregske, Jos Opdeweegh, James Frank, Derex Walker, Jeff Pelletier, Ira Tochner and Joseph Tomczak, | |
| Defendants. | |

5. The Debtors' Response and the Committee Response, to the extent not withdrawn at the Hearing or otherwise resolved by entry of this Order, and the Gendregske Objection, are hereby overruled.

6. The Petitioning Creditors' Adversary Proceeding shall be dismissed without prejudice, and all discovery heretofore issued in the Petitioning Creditors' Adversary Proceeding shall be deemed withdrawn.

7. The Petitioning Creditors, as intervenors, will be entitled to participate in the Committee Adversary Proceeding, including, without limitation, discovery, mediation and trial. Notwithstanding the foregoing, the Petitioning Creditors shall rely upon the discovery heretofore issued by the Committee, provided however, that the Petitioning Creditors shall have the rights to issue supplemental discovery requests as contemplated by the Scheduling Order [Dkt. No. 919].

8. The Petitioning Creditors and the Committee shall use reasonable best efforts to avoid duplication and burden, including with respect to discovery. The Petitioning Creditors and Committee shall coordinate with respect to depositions so as to comply with Rule 7030 of the Federal Rules of Bankruptcy Procedure. For the avoidance of doubt, the examination of each witness deposed shall be limited to 1 day of 7 hours unless otherwise authorized by the Court and/or applicable law.

9. The Petitioning Creditors and Committee shall coordinate whether or not to file an amended complaint (if appropriate) in the Committee Adversary Proceeding.

10. The Committee shall have ultimate decision making authority to prosecute the claims and causes of action contained in the Committee Adversary Proceeding, including, without limitation, the decision whether to file an amended complaint. However, the Committee shall consult with the Petitioning Creditors in good faith before any such decisions are made by the Committee.

11. The Committee shall have the right to seek relief from the Court to modify the scope of the Petitioning Creditors' intervention in the Committee Adversary Proceeding in the event the Committee determines, in good faith, that the Petitioning Creditors' conduct as intervening plaintiffs is not in the best interests of the Debtors' estates and their creditors. All other parties to the adversary proceeding may seek relief from the Court to modify the scope of the Petitioning Creditors' intervention in the Committee Adversary Proceeding solely on the basis that the Petitioning Creditors are acting in bad faith and the movant is suffering unfair prejudice as a result of the Petitioning Creditors' bad faith.

12. The Committee, the Petitioning Creditors and the Debtors are each hereby vested with the authority to settle Claims. Any settlement of the Claims shall only be approved pursuant to an Order of the Bankruptcy Court authorizing and approving such settlement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (a "9019 Order"), and all parties, including the Debtors, reserve the right to object to the entry of any such 9019 Order.

13. The Petitioning Creditors shall bear their own costs and expenses incurred as Intervening Plaintiffs in connection with their participation in the Committee Adversary Proceeding, provided, however, that the Petitioning Creditors reserve the right to seek payment of those costs and expenses as a "substantial contribution" from the Debtors' estates under Section 503(b) of the Bankruptcy Code. The rights of all parties in interest with respect to any such request are hereby preserved.

14. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

Dated: March 21, 2013
Wilmington, Delaware

THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

# Appendix "E"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | |
|---|---|
| In re: | Chapter 11 |
| ALLIED SYSTEMS HOLDINGS, INC., *et al.*,[1] | Case No. 12-11564 (CSS) |
| | (Jointly Administered) |
| Debtors. | Re: Docket Nos. 78, 110, 124 & ___ |

CERTIFIED: AS A TRUE COPY: ATTEST:
DAVID D. BIRD, CLERK
U.S. BANKRUPTCY COURT
BY: Deputy Clerk
7/13/12

**FINAL ORDER AUTHORIZING PAYMENT OF WAGES, PAYROLL TAXES, CERTAIN EMPLOYEE BENEFITS AND RELATED EXPENSES DUE PRIOR TO THE COMMENCEMENT OF THE CHAPTER 11 CASES, AND OTHER COMPENSATION TO EMPLOYEES, OWNER-OPERATORS AND INDEPENDENT CONTRACTORS**

This matter is before the Court on the motion (the "**Motion**") of Allied Systems Holdings, Inc. and its U.S. and Canadian subsidiaries (collectively, the "**Debtors**") seeking authority to pay wages, compensation, payroll taxes, certain employee benefits and related expenses which were earned before the commencement of these Chapter 11 Cases[2] by Employees, owner-operators and independent contractors.

The Court has considered the Motion, the Declaration of Scott D. Macaulay in Support of Chapter 11 Petitions and First Day Motions, and the matters reflected in the record of the hearing held on the Motion. It appears that the Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334; that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); that the Debtors have provided appropriate notice of the Motion and the opportunity for a hearing on

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[1] The Debtors in these cases, along with the federal tax identification number (or Canadian business number where applicable) for each of the Debtors, are: Allied Systems Holdings, Inc. (58-0360550); Allied Automotive Group, Inc. (58-2201081); Allied Freight Broker LLC (59-2876864); Allied Systems (Canada) Company (90-0169283); Allied Systems, Ltd. (L.P.) (58-1710028); Axis Areta, LLC (45-5215545); Axis Canada Company (875688228); Axis Group, Inc. (58-2204628); Commercial Carriers, Inc. (38-0436930); CT Services, Inc. (38-2918187); Cordin Transport LLC (38-1985795); F.J. Boutell Driveaway LLC (38-0365100); GACS Incorporated (58-1944786); Logistic Systems, LLC (45-4241751); Logistic Technology, LLC (45-4242057); QAT, Inc. (59-2876863); RMX LLC (31-0961359); Transport Support LLC (38-2349563); and Terminal Services LLC (91-0847582). The location of the Debtors' corporate headquarters and the Debtors' address for service of process is 2302 Parklake Drive, Bldg. 15, Ste. 600, Atlanta, Georgia 30345.

[2] Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the Motion.



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the Motion under the circumstances and that no further notice is necessary; and that the relief sought in the Motion is in the best interests of the Debtors, their estates, and their creditors; and that good and sufficient cause exists for such relief.

Accordingly, it is hereby **ORDERED** as follows:

1. The Motion is **GRANTED** as set forth herein on a final basis.

2. The Debtors are authorized, but not directed, to pay the Employee Obligations (as defined in the Motion) that were earned by virtue of the services rendered or equipment furnished by their employees or owner-operators before the commencement of these Chapter 11 Cases.

3. The Employee Obligations that the Debtors are authorized, but not directed, to pay include, without limitation: (i) wages, salaries, compensation and lease payments; (ii) payroll taxes; (iii) vacation, sick and holiday pay; (iv) qualified 401(k) plan obligations; (v) health and welfare benefits; (vi) severance amounts; (vii) flexible spending account programs; (viii) qualified pension plans; (ix) life insurance plans; (x) miscellaneous payroll deductions; and (xi) other benefits, in an aggregate amount not to exceed $15,500,000 (inclusive of the $10,500,000 cap authorized by the Interim Order).

4. The Debtors are authorized, but not directed, to continue to honor, pay and maintain, in their sole discretion, all of their employee benefit plans to the extent such benefit plans were in effect as of the commencement of these Chapter 11 Cases.

5. The banks and other financial institutions that process, honor and pay any and all checks on account of Employee Obligations may rely on the representation of the Debtors as to which checks are issued and authorized to be paid in accordance with this Order without any duty of further inquiry and without liability for following the Debtors' instructions.

6. Neither this Order, nor the Debtors' payment of any amounts authorized by this Order, shall (i) result in any assumption of any executory contract by the Debtors; (ii) result in a commitment to continue any plan, program, or policy of the Debtors; (iii) be deemed an admission as to the validity of the underlying obligations or a waiver of any rights the Debtors may have to subsequently dispute such obligations; or (iv) impose any administrative, pre-petition, or post-petition liabilities upon the Debtors.

7. Except with respect to Employee Obligations due Union Employees and compensation due owner-operators under Union Agreements, no payment by the Debtors to any individual employee for Employee Obligations earned before the commencement of these Chapter 11 cases shall exceed $11,725.

8. The Debtors are authorized to make all payments permitted hereunder whether due before or after the commencement of these Chapter 11 Cases.

9. Notwithstanding any other provision of this Order, no payments which implicate 11 U.S.C. § 503(c) shall be made by the Debtors, except upon further order of this Court.

10. Nothing herein shall be deemed to alter, modify or waive the Debtors' obligations under applicable Canadian law.

11. Notice of the Motion as provided therein shall be deemed good and sufficient and the requirements of Local Rule 6004(a) and the Local Rules are satisfied by such notice.

12. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

13. This Court shall retain jurisdiction to interpret and enforce this Order.

Dated: July 10, 2012
Wilmington, Delaware

THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

# Appendix "F"

DUFF & PHELPS

# Second Report to Court of Duff & Phelps Canada Restructuring Inc. as Information Officer of Allied Systems Holdings, Inc., Allied Systems (Canada) Company, Axis Canada Company and those other companies listed on Schedule "A" hereto

July 26, 2012

DUFF & PHELPS

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**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**

**SECOND REPORT OF DUFF & PHELPS CANADA RESTRUCTURING INC. AS INFORMATION OFFICER OF ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO**

**July 26, 2012**

## 1.0 Introduction

On May 17, 2012, involuntary petitions were filed by BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P. ("Black Diamond/Spectrum") against Allied Systems Holdings, Inc. ("Allied Systems US") and its subsidiary, Allied Systems, Ltd. (L.P.) ("ASL") pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11") ("Involuntary Petitions") in the United States Bankruptcy Court for the District of Delaware ("U.S. Court").

On June 10, 2012, voluntary petitions were filed with the U.S. Court for relief under Chapter 11 by several subsidiaries of Allied Systems US ("Subsidiaries")[1] (Allied Systems US, ASL and the Subsidiaries are collectively referred to as the "Chapter

[1] The U.S. subsidiaries are: Allied Automotive Group, Inc.; Allied Freight Broker LLC; Axis Areta, LLC; 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. The Canadian subsidiaries are Allied Systems (Canada) Company and Axis Canada Company.

11 Debtors" or "Allied Group"), including Allied Systems (Canada) Company ("Allied Canada") and Axis Canada Company ("Axis Canada") (jointly, the "Canadian Debtors"). In connection therewith, Allied Systems US and ASL consented to the Involuntary Petitions. The cases commenced or consented to by the Chapter 11 Debtors in the U.S. Court are herein defined as the "Chapter 11 Proceedings".

The Chapter 11 Debtors were granted ancillary relief under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") pursuant to an Order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012 (the "Initial Order") and a Court Order dated June 13, 2012 (the "Supplemental Order", and together with the Initial Order, the "Orders"). Copies of the Orders, without attachments, are provided in Appendix "A".

Pursuant to the Orders, *inter alia*: a) the Chapter 11 Proceedings were recognized as a "foreign main proceeding" pursuant to Part IV of the CCAA; b) Allied Systems US was appointed as Allied Group's foreign representative ("Foreign Representative"); c) certain orders made by the U.S. Court dated June 12, 2012 (the "First Day Orders") were recognized; and d) Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed as information officer (the "Information Officer").

On July 16, 2012, this Court made an Order (the "July 16 Order"): a) recognizing certain final orders of the U.S. Court that had previously been granted on an interim basis; b) approving certain ancillary relief in respect of Allied Group's cash management system; and c) amending the Supplemental Order to provide for increased priority for the Administration Charge and the DIP Lender's Charge (as both terms are defined in the Supplemental Order). A copy of the July 16 Order, without attachments, is provided in Appendix "B".

This report ("Report") is filed in D&P's capacity as Information Officer.

## 1.1 Purposes of this Report

The purposes of this Report are to:

a) Provide background information about Allied Group; and

b) Provide information with respect to the Foreign Representative's request for the Court to:

- Grant a Directors' Charge (defined below); and
- Further amend the Supplemental Order to provide for priority to the Directors' Charge.

### 1.2 Currency

All currency references in this Report are to Canadian dollars, unless otherwise noted.

### 1.3 Definitions

Certain capitalized terms used in this Report and not otherwise defined herein have the meanings ascribed to them in the affidavit of John Blount, Senior Vice President, Chief Administrative Officer, Secretary and General Counsel of Allied Systems US, sworn on July 25, 2012 (the "Blount Affidavit").

### 1.4 Restrictions

In preparing this Report, the Information Officer has relied upon unaudited financial information prepared by Allied Group's representatives, Allied Group's books and records and discussions with its representatives. The Information Officer has not performed an audit or other verification of such information. The Information Officer expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Report, or relied upon by the Information Officer.

## 2.0 Background

### 2.1 Business Overview

Allied Group is primarily engaged in the "car-haul" business, being the transport by specially designed tractor trailers of vehicles, such as automobiles, sport-utility vehicles and light trucks, from manufacturing plants, ports, auctions, and railway distribution points to automobile dealerships in the United States and Canada. In Canada, this business is conducted by Allied Canada.

Allied Group also operates a logistics business which, among other things, arranges for and manages vehicle distribution services, automobile inspections, auction and yard management services, vehicle tracking, vehicle accessorizing, and dealer preparation services for the automotive industry in the United States and Canada, and provides yard management services in Mexico. In Canada, this business is conducted by Axis Canada.

Allied Group's operations are centralized from its head office located in Atlanta, Georgia. Allied Group employs approximately 1,835 individuals, including approximately 600 active employees in Canada[2]. Approximately 390 active Canadian employees are members of the International Brotherhood of Teamsters or the Canadian Auto Workers' unions.

Further information concerning Allied Group's background is provided in the affidavit of Scott Macaulay, Senior Vice President and Chief Financial Officer of Allied Systems US, sworn June 11, 2012 ("Macaulay Affidavit"), in the Report to Court of D&P as Proposed Information Officer dated June 11, 2012 and the First Report to Court of the Information Officer dated July 11, 2012 ("IO Reports"). The Macaulay Affidavit, the IO Reports and other materials filed with the Court in the Canadian proceedings are available on D&P's website at www.duffandphelps.com/restructuringcases. Information regarding the Chapter 11 Proceedings is posted on the "Restructuring News" portion of Allied Group's website at www.alliedautomotive.com.

## 3.0 Directors' Charge

As a Canadian transportation carrier, Allied Canada is subject to the *Canada Labour Code* ("CLC"). Section 251.18 of the CLC imposes joint and several liability on directors of a company for wages, severance and termination pay, among other things. Axis Canada is not subject to the CLC as its primary business is logistics services.

Prior to the Chapter 11 Proceedings, Allied Canada had two directors and four officers. The Information Officer understands that, shortly after the Chapter 11 Proceedings commenced, both directors of Allied Canada resigned due to, among other things, their concerns with potential personal liability, including liabilities set out in the CLC. The two former directors remain employees of Allied Group.

Axis Canada's two directors and three officers have remained in such capacities since the Chapter 11 Proceedings commenced. Their potential liabilities are more limited than those of Allied Canada due to the size (twelve employees) and nature of the business (not subject to the CLC). As discussed below, Allied Group wishes to offer them the same protections as Allied Canada's directors and officers.

[2] The number of active Canadian employees varies by season. As of June 15, 2012, Allied Canada and Axis Canada employed 578 and 12 individuals, respectively. The number of Allied Canada employees includes 37 operators of tractors and/or trailers ("Owner Operators") who provide services to Allied Canada and are treated, in some respects, as employees.

The Canadian Debtors are seeking to indemnify their directors and officers (current and former, actual and deemed) for liabilities associated with severance and termination ("Severance and Termination Obligations") arising before and after the commencement of the Chapter 11 Proceedings and other statutory obligations ("Other Obligations"), such as wages, withholdings and sales taxes, arising after the commencement of the Chapter 11 Proceedings. In connection with the indemnity, the Foreign Representative is seeking Court approval of a charge on the collateral of the Chapter 11 Debtors located in Canada, in the maximum amount of $9.9 million (the "Directors' Charge"). Access to the Directors' Charge would only be available if the directors' and officers' insurance maintained by Allied Group is not applicable or is not sufficient.

The potential obligations supporting the $9.9 million Directors' Charge are described below.

## 3.1 Severance and Termination Obligations

### *3.1.1 Previously Laid Off Employees*

Over the last fourteen months, Allied Canada has laid off approximately 260 employees. Pursuant to the CLC, individuals employed for twelve consecutive months or more are eligible for severance pay except where the termination is by way of dismissal for just cause. Pursuant to Section 235(1) of the CLC, the amount of severance is the greater of:

a) two days' wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer; and

b) five days' wages at the employee's regular rate of wages for his regular hours of work.

Allied Canada provided all eligible laid-off employees with the option to: a) receive severance payments; or b) postpone the receipt of severance and elect to retain recall rights and seniority for a period of time.

Since the commencement of the Chapter 11 Proceedings, Allied Canada has continued to make severance payments to its laid-off employees who elected to receive same, as authorized in the Final Wages Order (as defined in the July 16 Order). A copy of the Final Wages Order is provided in Appendix "C".

Allied Canada's current severance obligation to those employees laid off prior to the Chapter 11 Proceedings, including those employees that elected to retain their recall rights and seniority, is approximately $1.7 million.

### 3.1.2 *Active Employees*

Allied Canada has also considered its severance and termination obligations pursuant to the CLC in a worst case scenario should all remaining employees be terminated without advance notice ("Worst Case Scenario"). If that were to occur, Allied Canada's employees would be entitled to the severance provisions referenced above and termination pay pursuant to Section 230(1) of the CLC, which provides that: "...an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either:

a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or

b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice."

Based on Allied Canada's calculations, in the Worst Case Scenario, Allied Canada's severance and termination obligations could be as high as $6.1 million.

Accordingly, the total Severance and Termination Obligations, both existing and potential, are estimated to be $7.8 million.

## 3.2 Other Obligations

Allied Canada's employees, other than the Owner Operators[3], are paid weekly. Allied Canada's June 15, 2012 payroll was approximately $1.8 million, including withholdings, an accrual for vacation pay and payment to the Owner Operators. Allied Canada has continued to pay employees in the normal course since the date of the Initial Order.

Allied Canada generally files its sales tax returns on a monthly basis. The average monthly remittance in the May, 2011 to July, 2011 period was $209,000. Allied Canada advised that due to sales tax audits that occurred in 2012, its remittances in recent months are not representative of typical monthly payments as they include adjustments resulting from the audits. Allied Canada estimates that its monthly remittances will be approximately $200,000.

Accordingly, Allied Canada has calculated an exposure for Other Obligations of $2.1 million, comprised of the payroll amount ($1.8 million), sales taxes ($200,000) and a provision for variances ($100,000).

[3] Owner Operators are paid every two weeks.

## 3.3 Priority

Pursuant to the July 16 Order, the Administration Charge and the DIP Lender's Charge (the "Charges") rank in priority to the existing security interests created pursuant to the First Lien Credit Facility ("First Facility"), the Second Lien Credit Facility (both as defined in the Macaulay Affidavit and together, the "Facilities") and other trusts, liens, charges and encumbrances, claims of secured creditors or otherwise (collectively, "Encumbrances")[4].

The Foreign Representative is seeking to have the Court issue an order amending the Supplemental Order and the July 16 Order such that the Court-ordered charges would be as follows:

a) Administration Charge (to the maximum amount of $600,000);

b) Directors' Charge with respect to severance obligations in connection with employees laid off prior to the Chapter 11 Proceedings (to a maximum amount of $1.7 million) and Other Obligations in connection with weekly gross wages, withholdings and sales taxes (to a maximum amount of $2.1 million);

c) DIP Lender's Charge; and

d) Directors' Charge for Severance and Termination Obligations if the remaining employees of the Canadian Debtors are terminated during the Chapter 11 Proceedings (to a maximum amount of $6.1 million).

## 3.4 Information Officer's View

The Information Officer believes that the relief being sought is appropriate because:

- The Information Officer has reviewed the Canadian Debtors' calculations of the amounts underlying the Directors' Charge. The quantification of the Directors' Charge appears to be reasonable;

[4] The Charges do not rank ahead of: a) Encumbrances, if any, that are valid, perfected by registration or possession, non-avoidable and senior to the Encumbrances securing the First Facility as of the date of the Final Financing Order (as defined in the July 16 Order); b) The Carve-Out (as defined in the Final Financing Order and generally includes certain professional fees associated with the Chapter 11 Proceedings).

- The Directors' Charge is, in effect, secondary protection. The severance obligations owing in respect of those employees laid off for over twelve months (and who have elected to start receiving severance) are currently being paid per the Final Wages Order. Further, the Canadian Debtors have acknowledged that access to the Directors' Charge would only be sought once (or if) Allied Group's directors' and officers' insurance is exhausted or will not provide coverage;

- In order to effectively and efficiently restructure Allied Canada, director oversight is highly beneficial. The Information Officer understands that Allied Canada has identified an employee of Allied Group willing to serve as a director if the Directors' Charge is granted;

- The DIP Lender and companies affiliated with it that are participants in the Facilities have consented to the granting of the Directors' Charge as well as the proposed priority of the Directors' Charge. The Information Officer understands that Black Diamond/Spectrum, which are also participants in the Facilities, do not support the relief being sought;

- Allied Group has considered alternatives for the Canadian Debtors, such as the appointment of a restructuring officer or a receiver or securing additional insurance coverage, in the event the Directors' Charge is not granted and no individual is willing to serve as a director of Allied Canada. These alternatives are costly and may not be as effective as simply having a director in place – operational disruption is possible and the costs could be significant, both in dollar terms and to the outcome of the restructuring process;

- There is a risk that Allied Canada's officers may resign without the protection of the Directors' Charge due to concerns of them being "deemed" directors. Their resignations would impact the viability of Allied Canada's business; and

- As the Information Officer has previously reported in the context of the Administration Charge and the DIP Lender's Charge, based on the advances made under the Facilities compared to the Information Officer's understanding of the approximate value of Allied Group's business and assets, the Information Officer is of the view that in these circumstances there will be no prejudice to the Canadian unsecured creditors of Allied Group if the Court grants the proposed Order.

Based on the foregoing, the Information Officer believes that the Directors' Charge and its proposed priority are appropriate in the circumstances.

## 3.5 Application and Scope of the Directors' Charge

The relief being requested by the Foreign Representative extends the protection of a Directors' Charge to current, former, actual and deemed directors and officers of Allied Canada and Axis Canada and provides an indemnity and charge for potential director and officer liabilities that arose (or arise) both prior to and after the Filing Date (as defined in the draft Order).

### *3.5.1 Current and Former Directors and Officers*

All of the potential director and officer liabilities identified in the Blount Affidavit and in this Report arose (or may arise) after May 1, 2011. The appointed directors of Allied Canada on May 1, 2011 were two individuals, Keith Rentzel and Robert Ferrell, who continued as directors until June 18, 2012, when they resigned. No other directors of Allied Canada have been appointed since May 1, 2011. The appointed directors of Axis Canada since May 1, 2011 have been Messrs. Macaulay and Blount, who continue in office.

The appointed officers of Allied Canada on May 1, 2011 were Messrs. Rentzel, Macaulay, Blount and John Jansen. Mr. Rentzel resigned as an officer on June 22, 2012. The other officers continue in office. The appointed officers of Axis Canada, since May 1, 2011, have been Jorge Lopez and Messrs. Macaulay and Blount, who continue in office.

### *3.5.2 Actual or Deemed*

The Information Officer is working on the assumption that the reference in the proposed Order to "actual" directors and officers refers to duly appointed directors and officers.

The identity of "deemed" or "de facto" directors is more uncertain. The CLC, as noted above, imposes certain liability on "directors" of a corporation governed by the CLC, but does not define "directors". The corporate statute governing the Canadian Debtors, being the Nova Scotia *Companies Act*, defines "director" as "includes any person occupying the position of director by whatever name called"[5].

[5] Nova Scotia *Companies Act*, Section 2(f).

The Information Officer is aware that a somewhat similar provision in the British Columbia *Company Act* has been applied to impose liability on a person who had formally resigned as a director, but continued to be the directing mind of the company[6].

The Information Officer also notes that the Nova Scotia *Companies Act* provides that a company governed by that statute "shall have at least one director",[7] so there may be some question as to whether the resignation of the last-remaining director would be recognized under the *Companies Act* and/or the CLC.

It therefore appears that there are questions as to both: a) whether one of Messrs. Rentzel or Ferrell remains an "actual" director; and b) whether one or both of these individuals might be a "deemed" director for some indefinite period of time after they tendered their resignations as directors of Allied Canada, due to their continued involvement with Allied Group.

### 3.5.3 *Pre- and Post-Filing Obligations*

As noted above, Allied Canada's current severance obligation to those employees laid off prior to the commencement of the Chapter 11 Proceedings and the CCAA proceedings is approximately $1.7 million.

The remaining potential director and officer liabilities relate to active employees and the payment of other potential post-filing amounts such as sales taxes.

### 3.5.4 *Discussion*

Section 11.51 of the CCAA contemplates an indemnity and charge to indemnify a 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". However, Section 49 of the CCAA allows the Court to make "any order that it considers appropriate" if it is satisfied that it is necessary for the protection of the debtor companies' property or the interest of a creditor or creditors.

The Information Officer also notes that the Orders made by the U.S. Court and recognized in Canada have been made on the basis that Allied Group is and remains a going concern, and have therefore authorized the payment of some pre-filing liabilities, including pre-filing employee liabilities relating to severance pay.

---

[6] *Baratta* v. *Belter*, [2001] C.L.A.D. No. 583; at the time of this case, the B.C. *Company Act* defined a director to include "every person, by whatever name designated, who performs the functions of a director".

[7] Nova Scotia *Companies Act*, Section 93.

The information in the Blount Affidavit suggests that it is important to the Canadian Debtors that Messrs. Rentzel and Ferrell remain as officers of Allied Group, even though they are not directors or officers of the Canadian Debtors. The Information Officer agrees with this view; given the integrated nature of Allied Group's business, the loss of their services would adversely affect the Canadian Debtors as well.

While it is not clear that these individuals will resign as officers of Allied Group if they are not given the entire protection of the Directors' Charge (for pre- and post-filing liabilities), their resignation has been identified as a risk. The Information Officer is not aware of the specific legal advice that has been given to these individuals, which might also impact that decision.

### *3.5.5 Conclusion*

Given the potential liability that these individuals have, quite possibly even for future liabilities (if they remain with Allied Group and continue to be key individuals with respect to the operations of the Canadian Debtors), the Information Officer is of the view that extending the benefit of the Directors' Charge to these two individuals is appropriate in the unique circumstances of this case, even though they are no longer formally appointed as directors or officers of the Canadian Debtors.

The other issue is the scope of the protection that is given to Messrs. Rentzel and Ferrell – that is, whether they should also be indemnified for potential pre-filing obligations. In practical terms, the Information Officer would be supportive of this approach, if it is necessary in order for Allied Group to retain the services of these individuals.

## 4.0 Conclusion

Based on the foregoing, it is the Information Officer's view that the relief being sought by the Foreign Representative is reasonable.

* * *

All of which is respectfully submitted,

Duff & Phelps Canada Restructuring Inc.

**DUFF & PHELPS CANADA RESTRUCTURING INC.**
**IN ITS CAPACITY AS INFORMATION OFFICER OF**
**ALLIED SYSTEMS HOLDINGS, INC., ALLIED SYSTEMS (CANADA) COMPANY, AXIS CANADA COMPANY AND THOSE OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO AND NOT IN ITS PERSONAL CAPACITY**

# Appendix "G"

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

| | |
|---|---|
| **In re:** | **Chapter 11** |
| **ALLIED SYSTEMS HOLDINGS, INC., *et al.*,[1]** | **Case No. 12-11564 (CSS)** |
| **Debtors.** | **(Jointly Administered)** |
| | **Re: Docket Nos. 1020 & 1078** |

**ORDER (I) APPROVING CAW SETTLEMENT AGREEMENT AND (II) GRANTING AUTHORITY TO MOVE THE ONTARIO SUPERIOR COURT OF JUSTICE TO ESTABLISH DIRECTORS' CHARGE ON PROPERTY OF ALLIED SYSTEMS (CANADA) COMPANY**

Upon consideration of *Debtors' Motion for Approval of CAW Settlement Agreement and for Authority to Move the Ontario Superior Court of Justice to Establish a Directors' Charge on Property of Allied Systems (Canada) Company* (the "**Motion**"), filed by the above-captioned debtors and debtors in possession (collectively "**Allied**" or the "**Debtors**" ), the Court having determined after due deliberation that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; that venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409; that this is a core proceeding pursuant to 28 U.S.C. § 157(b); that due and proper notice of the Motion and the hearing thereon has been given; and that granting the relief sought in the Motion is in the best interest of the Debtors, their estates, creditors and all parties in interest; and that the legal and factual bases set forth in the Motion establish cause for granting the relief sought in the Motion,

[1] The Debtors in these cases, along with the federal tax identification number (or Canadian business number where applicable) for each of the Debtors, are: Allied Systems Holdings, Inc. (58-0360550); Allied Automotive Group, Inc. (58-2201081); Allied Freight Broker LLC (59-2876864); Allied Systems (Canada) Company (90-0169283); Allied Systems, Ltd. (L.P.) (58-1710028); Axis Areta, LLC (45-5215545); Axis Canada Company (875688228); Axis Group, Inc. (58-2204628); Commercial Carriers, Inc. (38-0436930); CT Services, Inc. (38-2918187); Cordin Transport LLC (38-1985795); F.J. Boutell Driveaway LLC (38-0365100); GACS Incorporated (58-1944786); Logistic Systems, LLC (45-4241751); Logistic Technology, LLC (45-4242057); QAT, Inc. (59-2876863); RMX LLC (31-0961359); Transport Support LLC (38-2349563); and Terminal Services LLC (91-0847582). The location of the Debtors' corporate headquarters and the Debtors' address for service of process is 2302 Parklake Drive, Bldg. 15, Ste. 600, Atlanta, Georgia 30345.

**IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED.

2. The CAW Settlement Agreement [2] between Allied Canada and CAW is hereby approved.

3. Allied is hereby authorized to move the Ontario Superior Court of Justice to enter an order (the "**Canadian Approval Order**") recognizing this U.S. Approval Order and establishing the Directors' Charge, as described in the CAW Settlement Agreement, with respect to CAW Employee Severance Obligations, and as described in this Motion, with respect to Non-Bargaining CLC Severance Obligations.

4. On entry of the Canadian Approval Order and the establishment of the Directors' Charge, as provided in paragraph 2 of the CAW Settlement Agreement, Allied Canada's obligation to pay CAW Employees Severance Obligations shall be an administrative expense in the Chapter 11 Case of Allied Canada.

5. On entry of the Canadian Approval Order and the establishment of the Directors' Charge, as provided in paragraph 6 of the CAW Settlement Agreement, any recovery with respect to a CAW Claim asserted against any director (whether past, present, future, actual or deemed of Allied Canada or any affiliate of Allied Canada (the "**Releasees**")), which cannot be recovered from Allied Canada shall be limited to any proceeds that the CAW may recover from the Director's Policies, and any other CAW Claim against the Releasees, whether known or unknown, matured or unmatured, direct, indirect, foreseen, unforeseen, existing or hereafter arising, shall be forever released and discharge.

[2] Capitalized terms defined solely in the Motion and used in this Order shall have the meaning ascribed to them in the Motion. Capitalized terms defined in the CAW Settlement Agreement, whether or not also defined in the Motion, shall have the meaning that is ascribed to them in the CAW Settlement Agreement.

6. This Court retains jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: April 11, 2013
Wilmington, Delaware

THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

# Appendix "H"

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, HELPERS and MISCELLANEOUS WORKERS
Local 927

Affiliated with the International Brotherhood of Teamsters

Affiliated with Teamsters Canada

19 Alma Crescent, Halifax, Nova Scotia B3N 2C4
Telephone 445-5301 • Fax 445-5303

Mr. John Jansen

January 21, 2013

Executive Vice President Of Customer
Relations & Business Development
Allied Systems (Canada) Company
45 Goderich Road
Hamilton ON L8E 4W8

Dear John:

**RE: Bankruptcy proceedings of Allied Systems (Canada) Company ("Allied Canada") and others pursuant to Chapter 11 of the United States Bankruptcy Code, jointly administered under Case No. 12-11564 (CSS) and pursuant to Part IV o the companies' Creditors Arrangement Act, Court File No 12-CV-9757-00CL (the "Bankruptcy Proceedings")**

**RE: Teamsters Local Union No 927 (the "Union")**

You have advised that the directors of Allied Canada have resigned and that Allied Canada requires a new director for the benefit of the enterprise in order to increase the likelihood that it be maintained as a going concern and to increase the chances of maximizing value in its Bankruptcy Proceedings. You have also advised that any possible new directors are concerned about possible personal liability under section 251.18 (Civil Liability of Directors) of the Canada Labour Code ("CLC") and, as such, you have asked for the Union's confirmation that it will not pursue individuals for such liability.

I write to advise that the Union will not pursue any claims or enforce grievance(s) against any current or future director of Allied Canada personally if, during the current Bankruptcy Proceedings, there is a default by Allied Canada pursuant to its obligations to pay nay amounts for which a director may have personal liability either under the collective agreement of Section 235(1) of the CLC, except to the extent that those claims may be satisfied from the proceeds of directors insurance or the assets of Allied.

We are agreeing to this restriction because we believe that our members' interests are increasing the likelihood that the enterprise continues as a going concern and increasing the likelihood of ongoing employment.

Yours truly,

Derek Doiron
Secretary Treasurer

# GENERAL TEAMSTERS, LOCAL UNION NO. 362

SECRETARY-TREASURER
R. EICHEL

PRESIDENT
A.M. PORTER

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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January 2, 2013

MR. JOHN JANSEN
EXECUTIVE VICE PRESIDENT OF CUSTOMER
RELATIONS & BUSINESS DEVELOPMENT
ALLIED SYSTEMS (CANADA) COMPANY
45 GODERICH ROAD
HAMILTON ON L8E 4W8

Dear John:

**RE: Bankruptcy proceedings of Allied Systems (Canada) Company ("Allied Canada") and others pursuant to Chapter 11 of the United States Bankruptcy Code, jointly administered under Case No. 12-11564 (CSS) and pursuant to Part IV o the *Companies' Creditors Arrangement Act*, Court File No. 12-CV-9757-00CL (the "Bankruptcy Proceedings")**

**RE: Teamsters Local Union No. 362 (the "Union")**

You have advised that the directors of Allied Canada have resigned and that Allied Canada requires a new director for the benefit of the enterprise in order to increase the likelihood that it be maintained as a going concern and to increase the chances of maximizing value in its Bankruptcy Proceedings. You have also advised that any possible new directors are concerned about possible personal liability under Section 251.18 (Civil Liability of Directors) of the *Canada Labour Code* (*"CLC"*) and, as such, you have asked for the Union's confirmation that it will not pursue individuals for such liability.

I write to advise that the Union will not pursue or make any claim or enforce any grievance against any current or future director of Allied Canada personally if, during the current Bankruptcy Proceedings , there is a default by Allied Canada pursuant to its obligations to pay any amounts for which a director may have personal liability either under the collective agreement or Section 235(1) of the *CLC*, except to the extent that those claims may be satisfied from the proceeds of directors insurance or the assets of Allied.

We are agreeing this restriction because we believe that our member's interests are best served by increasing the likelihood that the enterprise continue as a going concern and increasing the likelihood of ongoing employment.

Yours truly,

Richard S. Eichel
Secretary-Treasurer

# GENERAL TEAMSTERS
## LOCAL UNION No. 979

AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
AND TEAMSTERS CANADA
C.L.C

B1-1680 DUBLIN AVENUE, WINNIPEG, MANITOBA R3H 1A8
TELEPHONE: (204) 694-9798 FAX: (204) 633-2554


MR. JOHN JANSEN

January 9, 2013

EXECUTIVE VICE PRESIDENT OF CUSTOMER
RELATIONS & BUSINESS DEVELOPMENT
ALLIED SYSTEMS (CANADA) COMPANY
45 GODERICH ROAD
HAMILTON ON L8E 4W8

Dear John:

**RE: Bankruptcy proceedings of Allied Systems (Canada) Company ("Allied Canada") and others pursuant to Chapter 11 of the United States Bankruptcy Code, jointly administered under Case No. 12-11564 (CSS) and pursuant to Part IV o the *Companies' Creditors Arrangement Act*, Court File No. 12-CV-9757-00CL (the "Bankruptcy Proceedings")**

**RE: Teamsters Local Union No. 979 (the "Union")**

You have advised that the directors of Allied Canada have resigned and that Allied Canada requires a new director for the benefit of the enterprise in order to increase the likelihood that it be maintained as a going concern and to increase the chances of maximizing value in its Bankruptcy Proceedings. You have also advised that any possible new directors are concerned about possible personal liability under Section 251.18 (Civil Liability of Directors) of the *Canada Labour Code* (*"CLC"*) and, as such, you have asked for the Union's confirmation that it will not pursue individuals for such liability.

I write to advise that the Union will not file or pursue any grievance(s) against any current or future director of Allied Canada personally if, during the current Bankruptcy Proceedings, there is a default by Allied Canada pursuant to its obligations to pay any amounts for which a director may have personal liability either under the collective agreement or Section 235(1) of the *CLC*,except to the extent that those claims may be satisfied from the proceeds of directors insurance or the assets of Allied.

We are agreeing to this restriction because we believe that our members' interests are best served by increasing the likelihood that the enterprise continues as a going concern and increasing the likelihood of ongoing employment. However, the Union`s agreement to not file or pursue any grievance(s) is not meant to limit the rights of or otherwise bar individual employees from pursuing individual claims which may be available to them outside of the grievance procedure.

Yours truly,

Kelly Gorzen
Secretary-Treasurer

Randy Powers
Secretary - Treasurer

#235 - 1055 PARK STREET
REGINA, SASKATCHEWAN S4N 5H4
(306) 569-9259
FAX: (306) 352-5499


Dave Phipps
Business Agent

#203 - 135 ROBIN CR.
SASKATOON, SASKATCHEWAN S7L 6M3
(306) 382-7866
FAX: (306) 653-2888

rec'd 1/15/13

Teamsters Local Union No. 395

January 10, 2013

MR. JOHN JANSEN
EXECUTIVE VICE PRESIDENT OF CUSTOMER
RELATIONS & BUSINESS DEVELOPMENT
ALLIED SYSTEMS (CANADA) COMPANY
45 GODERICH ROAD
HAMILTON ON L8E 4W8

Dear John:

**RE: Bankruptcy proceedings of Allied Systems (Canada) Company ("Allied Canada") and others pursuant to Chapter 11 of the United States Bankruptcy Code, jointly administered under Case No. 12-11564 (CSS) and pursuant to Part IV o the *Companies' Creditors Arrangement Act*, Court File No. 12-CV-9757-00CL (the "Bankruptcy Proceedings")**

**RE: Teamsters Local Union No. 362 (the "Union")**

You have advised that the directors of Allied Canada have resigned and that Allied Canada requires a new director for the benefit of the enterprise in order to increase the likelihood that it be maintained as a going concern and to increase the chances of maximizing value in its Bankruptcy Proceedings. You have also advised that any possible new directors are concerned about possible personal liability under Section 251.18 (Civil Liability of Directors) of the *Canada Labour Code* ("*CLC*") and, as such, you have asked for the Union's confirmation that it will not pursue individuals for such liability.

I write to advise that the Union will not pursue or make any claim or enforce any grievance against any current or future director of Allied Canada personally if, during the current Bankruptcy Proceedings , there is a default by Allied Canada pursuant to its obligations to pay any amounts for which a director may have personal liability either under the collective agreement or Section 235(1) of the *CLC*, except to the extent that those claims may be satisfied from the proceeds of directors insurance or the assets of Allied.

We are agreeing with this restriction because we believe that our member's interests are best served by increasing the likelihood that the enterprise continue as a going concern and increasing the likelihood of ongoing employment.

Yours truly,

Randy Powers
Secretary-Treasurer

**TEAMSTERS**
**QUÉBEC LOCAL 106**
Affilié / La fraternité internationale des Teamsters
Affiliated / International Brotherhood of Teamsters

**Montreal, January 16th 2013**

**Mr. John Jansen**
**Executive Vice-president of Customer**
**Relations & Business Development**
**Allied Systems (Canada) Company**
**45 Goderich Road**
**Hamilton (Ontario)**
**L8E 4W8**

**REF.: Bankruptcy proceedings of Allied Systems (Canada) Company ("Allied Canada") and others pursuant to Chapter 11 of the United States Bankruptcy Code, jointly administered under Case No. 12-11564 (CSS) and pursuant to Part IV of the Companies' Creditors Arrangement Act, Court File No. 12-CV-9757-00CL (the "Bankruptcy Proceedings")**

**Teamsters Local Union 106 (the "Union")**

Dear Sir:

You have advised that the directors of Allied Canada have resigned and that Allied Canada requires a new director for the benefit of the enterprise in order to increase the likelihood that it be maintained as a going concern and to increase the chances of maximizing value in its Bankruptcy Proceedings. You have also advised that any possible new directors are concerned about possible personal liability under Section 251.18 (Civil Liability of Directors) of the *Canada Labour Code ("CLC")* and, as such, you have asked for the Union's confirmation that it will not pursue individuals for such liability.

I write to advise that the Union will not pursue or make any claim or enforce any grievance against any future director for Allied Canada personally if, during the current Bankruptcy Proceedings, there is a default by Allied Canada pursuant to its obligations to pay any amounts for which a director may have personal liability either under the collective agreement or Section 235(1) of the *CLC*, except to the extent that those claims may be satisfied from the proceeds of directors insurance or the assets of Allied.

We are agreeing this restriction because we believe that our member's interests are best served by increasing the likelihood that the enterprise continues as a going concern and increasing the likelihood of ongoing employment.

Yours truly,

**JEAN CHARTRAND**
**President**

**JC/fd**

# Teamsters Local Union No. 213

Affiliated with the International Brotherhood of Teamsters, Teamsters Canada and the Canadian Labour Congress.

490 East Broadway, Vancouver, B.C. V5T 1X3
Telephone: (604) 876-5213 Fax: (604) 872-8604

E-mail: team213@teamsters213.org


December 19, 2012

**VIA COURIER**

Mr. John Jansen
Executive Vice President of Customer
Relations & Business Development
Allied Systems (Canada) Company
45 Goderich Road
Hamilton, Ontario L8E 4W8

Dear John:

Re: Bankruptcy proceedings of Allied Systems (Canada) Company (**"Allied Canada"**) and others pursuant to Chapter 11 of the United States Bankruptcy Code, jointly administered under, Case No. 12-11564 (CSS) and pursuant to Part IV of the *Companies' Creditors Arrangement Act*, Court File No. 12-CV-9757-00CL (the **"Bankruptcy Proceedings"**)

And re: Teamsters Local Union No. 213 (the **"Union"**)

You have advised that the directors of Allied Canada have resigned and that Allied Canada requires a new director for the benefit of the enterprise in order to maintain a going concern and increase the changes of maximizing value in its Bankruptcy Proceedings. You have also advised that any possible new directs are concerned about the possible personal liability under Section 251.18 (Civil Liability of Directors) of the *Canada Labour Code* (**"CLC"**) and, as such, you have asked for the Union's confirmation that it will not pursue individuals for such liability.

I write to advise that the Union will not pursue or make any claim against any current or future director of Allied Canada, should there be a default by Allied Canada pursuant to its obligation to pay any amounts for which a director may have personal liability either under the collective agreement or Section 235(1) of the CLC other than any claims that may be recoverable wholly through insurance.

On Monday December 10, 2012, the Union met with its members to discuss the Bankruptcy Proceedings of Allied Canada and to inform them of the Union's position

with respect to our recent discussions. I trust you understand the Union's position. I am willing to discuss this matter further with you if you so desire.

Yours truly,

Walter Canta
Secretary-Treasurer

WC/pmh

# Appendix "I"

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**

# AFFIDAVIT OF MITCH VININSKY
**(sworn April 9, 2013)**

I, **MITCH VININSKY**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am a Director of Duff & Phelps Canada Restructuring Inc. ("D&P"), the court-appointed Information Officer of Allied Systems Holdings, Inc., Allied Systems (Canada) Company, Axis Canada Company and those other companies listed on Schedule "A" hereto (collectively, "Allied" or the "Company"), (in such capacity, the "Information Officer") and as such, have knowledge of the matters herein deposed to.

2. On June 13, 2012, D&P was appointed by the Ontario Superior Court of Justice (Commercial List) ("Court") as Information Officer.

3. Attached hereto as Exhibit "A" to this my affidavit is a list of the accounts of D&P for the period from the commencement of its services in respect of this engagement to March 31, 2013.

4. Attached as Exhibit "B" to this my affidavit is a summary of additional information with respect to all members of D&P who have worked on this matter, their roles, their rates and the average rate of D&P, and I hereby confirm that list represents an accurate account of such information.

5. Attached hereto as Exhibit "C" to this my affidavit are true copies of the accounts of D&P for the above-noted periods ("Accounts"). I confirm that the Accounts accurately reflect the services provided by D&P in this matter for these periods and the fees and disbursements claimed by it for these periods.

6. The Accounts summarize the Information Officer's activities with respect to Allied and include:

- Corresponding extensively with Gowling Lafleur Henderson LLP ("Gowlings") and Troutman Sanders LLP ("Troutman"), the Company's counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");

- Reviewing background information on the Company and its business;

- Reviewing the involuntary petitions filed by BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P. (collectively, "BD/Spectrum") against the Company on May 17, 2012;

- Reviewing and commenting on multiple drafts of materials filed in the context of the Canadian Proceedings, including: the affidavit of Scott Macaulay sworn June 11, 2012; four supplemental affidavits of Chris Eustace sworn on June 11 and 12, 2012; Allied's factum returnable June 12, 2012; and draft Court orders;

- Reviewing and commenting on multiple drafts of materials filed in the context of the Chapter 11 Proceedings, including the Declaration of Scott Macaulay sworn June 10, 2012; and certain first day orders filed in the United States Bankruptcy Court for the District of Delaware which were recognized by the Court ("US Court");

- Corresponding with counsel representing the Company and Yucaipa American Alliance Fund II, L.P. and related entities, one of the Company's secured creditors and debtor-in-possession lender, regarding the Company's operations and funding requirements during the Chapter 11 Proceedings and the Canadian Proceedings;

- Reviewing and commenting on multiple drafts of materials filed in the context of the Canadian Proceedings in connection with the Company's motion on July 16, 2012, including: the affidavit of Scott Macaulay sworn on July 11, 2012; the supplemental affidavit of Ava Kim sworn on July 13, 2012; Allied's factum returnable July 16, 2012; and Court Order dated July 16, 2012;

- Reviewing materials filed in the context of the Chapter 11 Proceedings, including: Final Wages Order; Final Insurance Order; Final Critical Vendors Order; Final Customs Duties, Warehousemen, Common Carriers and Cargo Claims Order; Final Utilities Service Order; and Amended Sales and Use Tax Order;

- Reviewing severance and termination calculations provided by the Company related to its Canadian employees and independent contractors in support of a proposed Directors' and Officers' charge ("Directors' Charge");

- Reviewing and commenting on multiple drafts of materials filed in the context of the Canadian Proceedings in connection with the Company's motion on July 31, 2012 for a Directors' Charge, including: the affidavit of John Blount sworn on July 25, 2012; draft Factum of Allied; and draft Court Order dated July 31, 2012;

- Considering matters related to the proposed Directors' Charge, including liabilities prescribed by the Canada Labour Code;

- Corresponding with Goodmans LLP, Canadian legal counsel representing BD/ Spectrum, regarding the Directors' Charge;

- Corresponding with Osler, Hoskin & Harcourt LLP, the Company's debtor-in-possession lender's Canadian counsel, regarding the Canadian Proceedings and the Directors' Charge;

- Reviewing and commenting on settlement materials related to the Directors' Charge;

- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including monthly US Court dockets and motion materials related to the retention of Rothschild, the "Requisite Lender" and complaints filed by the Official Committee of Unsecured Creditors;

- Reviewing schedules of intercompany transactions prepared by Allied from the commencement of the Chapter 11 Proceedings;

- Corresponding regularly with Allied's representatives in Canada and the United States, including with respect to the Company's operations and the Company's sale process ("Sale Process");

- Reviewing the Company's Confidential Information Memorandum, prepared by Rothschild Inc. ("Rothschild"), the Company's financial advisor, which was distributed to interested parties as part of the Sale Process,

- Corresponding regularly with Rothschild;

- Corresponding with key stakeholders in these proceedings, including the Company, creditors and employees;

- Corresponding regularly with Gowlings and Norton Rose regarding the proceedings;

- Preparing the Report of the Proposed Information Officer dated June 11, 2012;

- Preparing the Information Officer's First Report to Court dated July 11, 2012;

- Preparing the Information Officer's Second Report to Court dated July 26, 2012;

- Preparing the Information Officer's Third Report to Court dated October 11, 2012;
- Preparing the Information Officer's Fourth Report to Court dated January 11, 2013; and
- Preparing the Information Officer's Fifth Report to Court, to be filed.

**SWORN BEFORE ME** at the City of Toronto, on April 9, 2013.

Commissioner for taking Oaths

Rajinder Kashyap, a Commissioner, etc., Province of Ontario, for Duff & Phelps Canada Restructuring Inc., Trustee in Bankruptcy. Expires April 11, 2015.

**Mitch Vininsky**

## 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

# Exhibit "A"

*This is Exhibit* "A" *referred to in the affidavit of* Mitch Vininsky *sworn before me, this* 9th *day of* April *20*13

.....
A COMMISSIONER FOR TAKING AFFIDAVITS

Rajinder Kashyap, a Commissioner, etc.,
Province of Ontario, for Duff & Phelps Canada
Restructuring Inc., Trustee in Bankruptcy.
Expires April 11, 2015.

**EXHIBIT "A"**

**List of Accounts of D&P**

| Period | Fees ($) | Disbursements($) | HST($) | Total($) |
|---|---|---|---|---|
| June 4 to June 16, 2012 | 48,025.00 | 0.00 | 6,243.25 | 54,268.25 |
| June 17 to June 30, 2012 | 21,575.00 | 5,339.08 | 3,498.83 | 30,412.91 |
| July 1 to July 21, 2012 | 38,831.25 | 5,223.48 | 5,727.11 | 49,781.84 |
| July 22 to August 10, 2012 | 20,295.00 | 11.55 | 2,639.85 | 22,946.40 |
| August 11 to August 31, 2012 | 11,312.50 | 0.00 | 1,470.63 | 12,783.13 |
| September 1 to September 30, 2012 | 11,712.50 | 0.00 | 1,522.63 | 13,235.13 |
| October 1 to October 31, 2012 | 23,996.25 | 0.00 | 3,119.51 | 27,115.76 |
| November 1 to November 30, 2012 | 8,260.00 | 0.00 | 1,073.80 | 9,333.80 |
| December 1, 2012 to January 31, 2013 | 20,018.75 | 8.79 | 2,603.58 | 22,631.12 |
| February 1, 2013 to March 31, 2013 | 24,955.00 | 0.00 | 3,244.15 | 28,199.15 |
| **Total** | **228,981.25** | **10,582.90** | **31,143.34** | **270,707.49** |

# Exhibit "B"

This is Exhibit "B" referred to in the affidavit of Mitch Vininsky sworn before me, this 9th day of April 2013

A COMMISSIONER FOR TAKING AFFIDAVITS

Rajinder Kashyap, a Commissioner, etc., Province of Ontario, for Duff & Phelps Canada Restructuring Inc., Trustee in Bankruptcy. Expires April 11, 2015.

**Allied Systems Holdings Inc. and Related Entities**
**Schedule of Professionals' Time and Rates**
For the Period of June 4, 2012 to March 31, 2013

| Name | Role | Billing Rate ($ Per Hour) | Total Hours |
|---|---|---|---|
| Bobby Kofman | File management | 650 | 79 |
| Mitch Vininsky | Reporting, operational matters | 500 | 231 |
| Noah Goldstein | Reporting, creditor correspondence | 375 - 400 | 155 |
| Renee Schwartz | Report review | 290 | 3 |
| Raj Kashyap | Administration | 100 | 17 |
| Veronica Budac | Administration | 100 | 3 |
| Total hours | | | 487 |
| Total fees | | $ 228,981 | |
| Average hourly rate | | $ 470 | |

# Exhibit "C"

This is Exhibit "C" referred to in
affidavit of Mitch Vinnsky
sworn before me, this 9th
day of April 2013

Raj Kash
A COMMISSIONER FOR TAKING AFFIDAVITS

Rajinder Kashyap, a Commissioner, etc.,
Province of Ontario, for Duff & Phelps Canada
Restructuring Inc., Trustee in Bankruptcy.
Expires April 11, 2015.

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr NE, Suite 600
Atlanta, GA, USA, 30345

June 22, 2012

Invoice#: TP00107781
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from June 4, 2012 to June 16, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Court-appointed Information Officer ("Information Officer") of the Company, including:

- Corresponding extensively with Gowling Lafleur Henderson LLP ("Gowlings") and Troutman Sanders LLP ("Troutman"), the Company's counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Reviewing background information on the Company and its business;
- Reviewing the involuntary petitions filed by BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P. against the Company on May 17, 2012;
- Attending a conference call with the Company, Gowlings, and Troutman on June 5, 2012 to discuss, among other things, the Company's cash management procedures;
- Attending conference calls with the Company, Gowlings and/or Troutman on June 6, 7, 8, 10 and 13, 2012 regarding the Company's restructuring proceedings, materials to be filed with the courts in Canada and the United States and procedural matters;

Duff & Phelps Canada Restructuring Inc.
200 King Street West
Suite 1002, P.O. Box 77
Toronto, Ontario, M5H 3T4

T +1 416 932 6228
F +1 647 497 9490

bobby.kofman@duffandphelps.com
www.duffandphelps.com

- Reviewing and commenting on multiple drafts of materials filed in the context of the Canadian Proceedings, including the:
  - Affidavit of Scott Macaulay sworn on June 11, 2012;
  - First Supplemental Affidavit of Chris Eustace sworn on June 11, 2012;
  - Second Supplemental Affidavit of Chris Eustace sworn on June 12, 2012;
  - Third Supplemental Affidavit of Chris Eustace sworn on June 12, 2012;
  - Fourth Supplemental Affidavit of Chris Eustace sworn on June 12, 2012;
  - Factum of the Applicant returnable June 12, 2012;
  - Initial Recognition Order dated June 12, 2012;
  - Supplemental Order regarding Initial Foreign Recognition Application dated June 13, 2012;
- Reviewing and commenting on multiple drafts of materials filed in the context of the Chapter 11 Proceedings, including the:
  - Declaration of Scott Macaulay sworn June 10, 2012;
  - Certain first day orders filed in the United States Bankruptcy Court for the District of Delaware which were recognized by the Ontario Superior Court of Justice ("Court"), including:
    - Foreign Representative Order;
    - Cash Management Order;
    - Financing Order;
    - Pre-petition Wages & Benefits Order;
    - Insurance Program & Insurance Premium Financing Order;
    - Pre-petition Customers, Warehousemen, Common Carriers and Cargo Claims Order;
    - Pre-petition Sales & Use Tax Order;
    - Utilities Service Order; and
    - Critical Vendors Order;

- Reviewing certain financial and other information provided by Gowlings and/or the Company, including:
  - Consolidated financial statements for the fiscal year ended December 31, 2011.
  - Financial statements for the Company, Allied Systems (Canada) Company and Axis Canada Company for the year-to-date period ended April, 2012;
  - Fleet appraisal;
  - 13-week cash flow projection;
  - Projection model for fiscal 2012 and 2013;
  - Organization chart;
  - Communications package;
  - Canadian and US bank account structure;
  - Canadian personal property search summaries;
  - Canadian accounts receivable listing;
  - Canadian accounts payable listing;
  - Secured creditor listing; and
  - Canadian employee listing;
- Preparing an information request list and reviewing the information provided by the Company in response thereto;
- Corresponding with counsel representing the Company and Yucaipa American Alliance Fund II, L.P. and related entities, one of the Company's secured creditors and debtor-in-possession lender, regarding the Company's operations and funding requirements during the Chapter 11 Proceedings and the Canadian Proceedings;
- Drafting the Report of the Proposed Information Officer dated June 11, 2012;
- Attending at Court on June 12th and 13th, 2012;
- Corresponding with Omni Bankruptcy ("Omni"), the Company's Claims Agent, in connection with Omni's website dedicated to the Company and reference to the Canadian Proceedings;

- Arranging for a Notice of Recognition Order to be published on June 19, 2012 in *The Globe and Mail (National Edition)*;
- Completing and submitting Form 1 to the Superintendent of Bankruptcy in connection with CCAA regulations;
- Corresponding with Gowlings with respect to a proposed sale process regarding the Company's business and assets;
- Corresponding extensively with key stakeholders in these proceedings, including the Company, its counsel and certain creditors; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | | |
|---|---|---|
| Total fees and disbursements per attached time summary | $ | 48,025.00 |
| HST | | 6,243.25 |
| Total | $ | 54,268.25 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period June 4, 2012 to June 16, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 27.00 | 17,550.00 |
| Mitch Vininsky | 500 | 50.90 | 25,450.00 |
| Noah Goldstein | 375 | 9.50 | 3,562.50 |
| Other Staff and Administration | | | 1,462.50 |
| Subtotal | | | 48,025.00 |
| HST | | | 6,243.25 |
| Total | | | 54,268.25 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr NE, Suite 600
Atlanta, GA, USA, 30345

July 5, 2012

Invoice#: TP00108944
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from June 17, 2012 to June 30, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings") and Troutman Sanders LLP ("Troutman"), the Company's counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Reviewing severance calculations provided by the Company related to its Canadian employees and independent contractors in support of a proposed Directors' and Officers' charge;
- Attending telephone calls with John Jansen, Vice-President of Allied Systems (Canada) Inc. ("Allied Canada"), on June 19, 22, and 26, 2012;
- Attending a conference call with representatives of Axis Canada Company and Gowlings on June 19, 2012;
- Attending a meeting at Allied Canada's head office on June 21, 2012;
- Attending a telephone call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., on June 22 and 25, 2012;
- Attending a conference call with the Rothschild Inc., the Company's financial advisor, on June 29, 2012 in connection with the sale process;

Duff & Phelps Canada Restructuring Inc.
200 King Street West
Suite 1002, P.O. Box 77
Toronto, Ontario, M5H 3T4

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bobby.kofman@duffandphelps.com
www.duffandphelps.com

- Reviewing a draft notice of motion and Court order from National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and related entities ("CAW");
- Corresponding with Gowlings regarding the relief proposed by CAW;
- Reviewing revisions proposed by Gowlings to the Cash Management Order;
- Arranging for a Notice of Recognition Order to be published on June 25, 2012 in *The Globe and Mail (National Edition)*;
- Completing and submitting Form 2 to the Superintendent of Bankruptcy in connection with CCAA regulations;
- Drafting the Information Officer's First Report to Court;
- Corresponding extensively with key stakeholders in these proceedings, including the Company, its counsel and certain secured creditors;
- Reviewing numerous emails and extensive correspondence on a daily basis;
- Responding to creditor inquiries; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | | |
|---|---|---|
| Total fees and disbursements per attached time summary | $ | 26,914.08 |
| HST | | 3,498.83 |
| Total | $ | 30,412.91 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period June 17, 2012 to June 30, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 10.75 | 6,987.50 |
| Mitch Vininsky | 500 | 21.60 | 10,800.00 |
| Noah Goldstein | 375 | 9.50 | 3,562.50 |
| Other Staff and Administration | | | 225.00 |
| Subtotal | | | 21,575.00 |
| Out of Pocket Disbursements | | | 5,339.08 |
| | | | 26,914.08 |
| HST | | | 3,498.83 |
| Total | | | 30,412.91 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

July 26, 2012

Invoice#: TP00109728
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from July 1, 2012 to July 21, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings") and Troutman Sanders LLP ("Troutman"), the Company's counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Corresponding with Osler, Hoskin & Harcourt LLP ("Osler"), the Company's debtor-in-possession lender's Canadian counsel, regarding the Canadian Proceedings and provisions in the Company's draft amended Court orders;
- Attending telephone calls with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., on July 4, 19 and 20, 2012;
- Reviewing revisions proposed by the Company to the Cash Management Order;
- Reviewing and commenting on multiple drafts of materials filed in the context of the Canadian Proceedings in connection with the Company's motion on July 16, 2012, including the:
  - Affidavit of Scott Macaulay sworn on July 11, 2012;
  - Supplemental Affidavit of Ava Kim sworn on July 13, 2012;
  - Factum of the Applicant returnable July 16, 2012; and
  - Court Order dated July 16, 2012;

- Reviewing and commenting on multiple drafts of materials filed in the context of the Chapter 11 Proceedings, including the Final Orders described below ("Final Orders"):
  - Final Wages Order;
  - Final Insurance Order;
  - Final Critical Vendors Order;
  - Final Customs Duties, Warehousemen, Common Carriers and Cargo Claims Order;
  - Final Utilities Service Order; and
  - Amended Sales and Use Tax Order;
- Preparing the Information Officer's First Report to Court dated July 11, 2012;
- Reviewing correspondence dated July 12, 2012 between Gowlings and CAW Canada, one of the unions representing certain of the Company's Canadian employees, as well as correspondence subsequent thereto;
- Attending at Court on July 16, 2012 in respect of a motion to, among other things, recognize the Final Orders and grant a priority charge to the Administration Charge and the DIP Lender's Charge;
- Reviewing severance and termination calculations provided by the Company related to its Canadian employees and independent contractors in support of a proposed Directors' and Officers' charge ("Directors' Charge");
- Considering matters related to the proposed Directors' Charge, including liabilities prescribed by the *Canada Labour Code*;
- Corresponding with Canadian legal counsel representing BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P. regarding the Directors' Charge;
- Reviewing the Company's correspondence with Osler regarding the Directors' Charge;
- Preparing the Information Officer's Second Report to Court, to be filed;
- Corresponding extensively with key stakeholders in these proceedings, including the Company, its counsel and certain secured creditors;
- Reviewing numerous emails and extensive correspondence on a near daily basis;
- Responding to creditor inquiries; and

- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees per attached time summary | $ 38,831.25 |
| Disbursement (notice of Recognition Order in *The Globe & Mail*) | 5,223.48 |
| Subtotal | 44,054.73 |
| HST | 5,727.11 |
| Total | $ 49,781.84 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period July 1, 2012 to July 21, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 9.50 | 6,175.00 |
| Mitch Vininsky | 500 | 44.10 | 22,050.00 |
| Noah Goldstein | 375 | 27.75 | 10,406.25 |
| Other Staff and Administration | | | 200.00 |
| Subtotal | | | 38,831.25 |
| Out of Pocket Disbursements | | | 5,223.48 |
| | | | 44,054.73 |
| HST | | | 5,727.11 |
| Total | | | 49,781.84 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

August 16, 2012

Invoice#: TP00111018
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from July 21, 2012 to August 10, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings") and Troutman Sanders LLP ("Troutman"), the Company's counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Attending a conference call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc. ("Allied") and Gowlings on July 23, 2012;
- Reviewing severance and termination calculations prepared by the Company related to its Canadian employees and independent contractors in support of a proposed Directors' and Officers' charge ("Directors' Charge");
- Considering matters related to the proposed Directors' Charge, including liabilities prescribed by the *Canada Labour Code*;
- Corresponding with Goodmans LLP, Canadian legal counsel representing BDCM Opportunity Fund II, LP, Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P., regarding the Directors' Charge;
- Preparing the Information Officer's Second Report to Court dated July 26, 2012;
- Corresponding with Osler, Hoskin & Harcourt LLP, the Company's debtor-in-possession lender's Canadian counsel, regarding the Canadian Proceedings and the July 31 Motion;

- Reviewing and commenting on multiple drafts of materials filed with the Court in the Canadian Proceedings in connection with the Company's motion that had been scheduled to be heard on July 31, 2012 ("July 31 Motion"), including the:
  - Affidavit of John Blount sworn on July 25, 2012;
  - Company's Factum; and
  - Draft Court Order dated July 31, 2012;
- Reviewing the Court's endorsement in connection with the adjournment of the July 31 Motion;
- Reviewing and commenting on the terms of a draft settlement agreement among Allied Systems (Canada) Company, the National Automobile, Aerospace, Transportation and General Works Union of Canada and Teamsters Union in connection with severance and termination obligations, including a:
  - Draft term sheet; and
  - Draft Court order;
- Corresponding extensively with key stakeholders in these proceedings, including the Company, its counsel and certain secured creditors;
- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings;
- Corresponding with Norton Rose in respect of requests made by Canadian counsel representing the Unsecured Creditors Committee in the Chapter 11 Proceedings;
- Reviewing emails and correspondence related to the proceedings;
- Responding to creditor inquiries; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees per attached time summary | $ 20,295.00 |
| Disbursement | 11.55 |
| Subtotal | 20,306.55 |
| HST | 2,639.85 |
| Total | $ 22,946.40 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period July 21, 2012 to August 10, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 5.35 | 3,477.50 |
| Mitch Vininsky | 500 | 30.00 | 15,000.00 |
| Noah Goldstein | 375 | 4.00 | 1,500.00 |
| Other Staff and Administration | | | 317.50 |
| Subtotal | | | 20,295.00 |
| Out of Pocket Disbursements | | | 11.55 |
| | | | 20,306.55 |
| HST | | | 2,639.85 |
| Total | | | 22,946.40 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

September 11, 2012

Invoice#: TP00112147
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from August 11, 2012 to August 31, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings") and Troutman Sanders LLP, the Company's counsel, and Norton Rose Canada LLP, the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Attending a call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., on August 15, 2012 in order to discuss the Company's operations and the sale process being conducted by Rothschild Inc. ("Rothschild"), the Company's financial advisor ("Sale Process");
- Reviewing a comparison of the Company's projected-to-actual results from commencement of the Chapter 11 Proceedings to August 12, 2012;
- Attending a call with John Jansen, Vice-President of Allied Systems (Canada) Inc., on August 28, 2012 to discuss the Company's Canadian operations;
- Attending a conference call on August 30, 2012 with Mr. Macaulay and Gowlings to discuss the Company's proceedings and the Sale Process;
- Continuing to consider matters related to the Company's proposed Directors' Charge in the context of settlement discussions between the Company and its stakeholders;
- Reviewing and commenting on settlement materials related to the Directors' Charge;

- Corresponding with the Minister of Finance from the Province of Saskatchewan regarding the Company's Provincial Sales Tax account;
- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including materials by the Company seeking the US Court's approval of the retention of Rothschild and objections related thereto;
- Drafting the Information Officer's Third Report to Court, to be filed;
- Corresponding extensively with key stakeholders in these proceedings, including the Company, its counsel and certain secured creditors;
- Reviewing emails and correspondence related to the proceedings;
- Responding to creditor inquiries; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees per attached time summary | $ 11,312.50 |
| HST | 1,470.63 |
| Total | $ 12,783.13 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period August 11, 2012 to August 31, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 2.00 | 1,300.00 |
| Mitch Vininsky | 500 | 9.90 | 4,950.00 |
| Noah Goldstein | 375 | 13.50 | 5,062.50 |
| Subtotal | | | 11,312.50 |
| HST | | | 1,470.63 |
| Total | | | 12,783.13 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

October 9, 2012

Invoice#: TP00113826
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered during September, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings"), the Company's counsel, and Norton Rose Canada LLP, the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Attending a call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., on September 7 and September 28, 2012 in order to discuss the Company's operations and an update on the Company's sale process ("Sale Process");
- Reviewing the Company's Confidential Information Memorandum, prepared by Rothschild Inc., the Company's financial advisor, which was distributed to interested parties as part of the Sale Process,
- Reviewing materials filed in the context of the Chapter 11 Proceedings, including the Company's Key Employee Retention Plan;
- Reviewing a schedule of intercompany transactions from the commencement of the Chapter 11 Proceedings to July 31, 2012;
- Attending a telephone call on September 21, 2012 with Gowlings to discuss the Company's proceedings and the Sale Process;
- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including court dockets and materials by the Company seeking the US Court's approval of the retention of Rothschild and objections related thereto;

- Continuing to deal with issues related to the Company's motion in Canada for a D&O charge, including emails between Gowlings and the service list in respect of scheduling and periodic status calls between Gowlings and the Information Officer;
- Drafting the Information Officer's Third Report to Court, to be filed;
- Reviewing emails and correspondence related to the proceedings;
- Responding to creditor inquiries; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees per attached time summary | $ 11,712.50 |
| HST | 1,522.63 |
| Total | $ 13,235.13 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period September 1, 2012 to September 30, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 6.75 | 4,387.50 |
| Mitch Vininsky | 500 | 9.40 | 4,700.00 |
| Noah Goldstein | 375 | 7.00 | 2,625.00 |
| Subtotal | | | 11,712.50 |
| HST | | | 1,522.63 |
| Total | | | 13,235.13 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

November 8, 2012

Invoice#: TP00116264
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered during October, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings"), the Company's counsel, Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, and Troutman Sanders, LLP, the Company's US Counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");

- Attending calls with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., on October 2 and October 29, 2012 to discuss the Company's operations and the status of its sale process;

- Preparing the Information Officer's Third Report to Court dated October 11, 2012 ("Third Report");

- Reviewing a schedule prepared by the Company of intercompany transactions from the commencement of the Chapter 11 Proceedings to August 31, 2012;

- Attending periodic calls with Gowlings regarding the Company's motion for a Court-ordered charge for its directors and officers, including calls on October 11 and October 24, 2012;

- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including materials with respect to a motion to confirm the "Requisite Lender" under the Company's first lien debt, materials related to the US Court's approval of the retention of Rothschild, Inc. as the Company's financial advisor and the Company's monthly operating reports;

- Continuing to review correspondence and settlement documents related to the Company's motion in Canada for a D&O charge;
- Reviewing correspondence related to the proceedings and, among other things, a personal injury action commenced against the Company prior to commencement of the proceedings;
- Responding to creditor inquiries; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees per attached time summary | $ 23,996.25 |
| HST | 3,119.51 |
| Total | $ 27,115.76 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period October 1 2012 to October 31, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 6.75 | 4,387.50 |
| Mitch Vininsky | 500 | 22.10 | 11,050.00 |
| Noah Goldstein | 375 | 22.25 | 8,343.75 |
| Other Staff and Administration | | | 215.00 |
| Subtotal | | | 23,996.25 |
| HST | | | 3,119.51 |
| Total | | | 27,115.76 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

December 19, 2012

Invoice#: TP00118935
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered during November, 2012 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings"), the Company's counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Attending a call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., and a representative from Rothschild Inc. ("Rothschild"), on November 27, 2012, to discuss the Company's operations and the status of its sale process;
- Attending periodic calls and corresponding with Gowlings regarding the Company's motion for a Court-ordered charge for its directors and officers ("D&O");
- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including materials with respect to a motion to determine the "Requisite Lender" under the Company's first lien debt ("Requisite Lender Issue") and the Company's monthly operating reports;
- Reviewing the transcript of a summary judgment issued by the New York State Supreme Court in favour of BDCM Opportunity Funds II, LP, Black Diamond CLO 2005-1 LTD and Spectrum Investment Partners L.P in respect of the Requisite Lender Issue;
- Continuing to review correspondence and settlement documents related to the Company's motion in Canada for a D&O charge;
- Responding to creditor inquiries; and

- To all other meetings, correspondence, etc. pertaining to this matter.

| | | |
|---|---|---|
| Total fees per attached time summary | $ | 8,260.00 |
| HST | | 1,073.80 |
| Total | $ | 9,333.80 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period November 1, 2012 to November 30, 2012

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 3.65 | 2,372.50 |
| Mitch Vininsky | 500 | 6.80 | 3,400.00 |
| Noah Goldstein | 375 | 6.50 | 2,437.50 |
| Other Staff and Administration | | | 50.00 |
| Subtotal | | | 8,260.00 |
| HST | | | 1,073.80 |
| Total | | | 9,333.80 |

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA, USA, 30345

February 20, 2013

Invoice#: TP00121741
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from December 1, 2012 to January 31, 2013 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings"), the Company's Canadian counsel, Troutman Sanders, LLP, the Company's US counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");
- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including materials with respect to a motion to determine the "Requisite Lender" ("Requisite Lender Issue") and the Company's monthly court dockets;
- Attending a call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., and with a representative of Rothschild Inc. ("Rothschild"), on December 21, 2012, to discuss with:
    - Mr. Macaulay, the Company's operations and the Requisite Lender Issue; and
    - Rothschild, the status of the Company's sale process;
- Corresponding regularly with Mr. Macaulay regarding the Company's operations;
- Reviewing a schedule prepared by the Company of intercompany transactions from the commencement of the Chapter 11 Proceedings to November 30, 2012;

- Attending periodic calls and corresponding with Gowlings regarding the Company's motion for a Court-ordered charge for its directors and officers ("D&O");
- Reviewing settlement documents regarding the D&O charge;
- Attending a call with Mr. Macaulay on January 9, 2013 regarding the Company's cash flow projections and transaction between the Company's Canadian and US entities;
- Preparing the Information Officer's Fourth Report to Court dated January 11, 2013;
- Continuing to review correspondence and settlement documents related to the Company's motion in Canada for a D&O charge;
- Responding to creditor inquiries; and
- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees and disbursements per attached time summary | $ 20,027.54 |
| HST | 2,603.58 |
| Total | $ 22,631.12 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period December 1, 2012 to January 31, 2013

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 4.00 | 2,600.00 |
| Mitch Vininsky | 500 | 14.20 | 7,100.00 |
| Noah Goldstein | 375 - 400 [1] | 26.00 | 10,218.75 |
| Other Staff and Administration | | | 100.00 |
| Subtotal | | | 20,018.75 |
| Out of Pocket Disbursements | | | 8.79 |
| | | | 20,027.54 |
| HST | | | 2,603.58 |
| Total | | | 22,631.12 |

1. Mr. Goldstein's hourly rate increased from $375/hr to $400/hr effective January 1, 2013.

DUFF & PHELPS

Allied Systems Holdings, Inc.
2302 Parkdale Dr. NE, Suite 600
Atlanta, GA 30345
USA

April 9, 2013

Invoice#: TP00124957
Client No.: 1933628
Reference: 41915

**INVOICE**

**Re: Allied Systems Holdings Inc. and Related Entities (collectively, the "Company")**

For professional services rendered from February 1, 2013 to March 31, 2013 by Duff & Phelps Canada Restructuring Inc. in its capacity as Information Officer ("Information Officer") of the Company appointed pursuant to an order of the Ontario Superior Court of Justice ("Court") dated June 12, 2012, including:

- Corresponding with Gowling Lafleur Henderson LLP ("Gowlings"), the Company's Canadian counsel, Troutman Sanders, LLP, the Company's US counsel, and Norton Rose Canada LLP ("Norton Rose"), the Information Officer's counsel, in connection with the Company's proceedings pursuant to Chapter 11 of Title 11 of the *United States Code* ("Chapter 11 Proceedings") and the *Companies' Creditors Arrangement Act* ("Canadian Proceedings");

- Reviewing materials posted on the Company's claims agent's website in the Chapter 11 Proceedings, including:

  - Adversary Cases filed by the Official Committee of Unsecured Creditors and by Black Diamond CLO 2005-1 Ltd. and Spectrum Investment Partners, L.P. in connection with, *inter alia*, subordinating claims of the "Yucaipa" companies in the proceedings (jointly, the "Complaints");

  - Monthly operating reports filed by the Company; and

  - The Company's monthly court dockets.

- Attending a call with Scott Macaulay, Senior Vice-President and Chief Financial Officer of Allied Systems Holdings Inc., John Blount, the Company's internal legal counsel, and with a representative of Rothschild Inc. ("Rothschild"), on February 14, 2013 and March 22, 2013, to discuss with:

  - Mr. Macaulay, the Company's operations;

  - Rothschild, the status of the Company's sale process; and

  - Mr. Blount, the litigation in the proceedings, including the Complaints.

- Corresponding regularly with Mr. Macaulay regarding the Company's operations;

- Reviewing the Company's 13 week cash flow projection for the period ending June 9, 2013;

- Attending periodic calls and corresponding with Gowlings regarding the Company's motion for a Court-ordered charge for its directors and officers ("D&O Charge");

- Reviewing and commenting on materials filed in Chapter 11 Proceedings related to the D&O Charge, including the:

  - Agreement between Allied Systems (Canada) Company ("Allied Canada") and National Automobile, Aerospace, Transportation and General Works Union of Canada (CAW) dated March 15, 2013 ("CAW Settlement Agreement");

  - Correspondence from various local Teamsters unions to Allied Canada;

  - Draft order approving the CAW Settlement Agreement and the D&O Charge ("US Approval Order");

- Reviewing and commenting on a draft notice of motion in the Canadian Proceedings to recognize the U.S. Approval Order;

- Preparing the Information Officer's Fifth Report to Court, to be filed;

- Responding to creditor inquiries; and

- To all other meetings, correspondence, etc. pertaining to this matter.

| | |
|---|---|
| Total fees per attached time summary | $ 24,955.00 |
| HST | 3,244.15 |
| Total | $ 28,199.15 |

Duff & Phelps Canada Restructuring Inc.
Allied Systems Holdings, Inc. and its Subsidiaries
**Time Summary**
For the Period February 1, 2013 to March 31, 2013

| Personnel | Rate ($) | Hours | Amount ($) |
|---|---|---|---|
| Bobby Kofman | 650 | 3.70 | 2,405.00 |
| Mitch Vininsky | 500 | 22.10 | 11,050.00 |
| Noah Goldstein | 400 | 28.75 | 11,500.00 |
| Subtotal | | | 24,955.00 |
| HST | | | 3,244.15 |
| Total | | | 28,199.15 |

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

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

**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

**AFFIDAVIT OF MITCH VININSKY**
**(sworn April 9, 2013)**

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

**Tony Reyes** LSUC#: 28218V
Tel: 416-216-4825

**Evan Cobb** LSUC#: 55787N
Tel: 416.216.1929
Fax: 416.216.3930

Lawyers for the Information Officer,
Duff & Phelps Canada Restructuring Inc.

# Appendix "J"

# Appendix "J"

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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**

# AFFIDAVIT OF JUAN ANTONIO REYES
**(sworn April 9, 2013)**

I, **JUAN ANTONIO REYES**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY**:

1. I am a partner with the law firm of Norton Rose Canada LLP ("**Norton Rose**"), solicitors for Duff & Phelps Canada Restructuring Inc., in its capacity as Information Officer of Allied Systems Holdings, Inc., Allied Systems (Canada) Company, Axis Canada Company and those other companies listed on Schedule "A" hereto, and as such, have knowledge of the matters herein deposed to.

2. I hereby confirm that attached as Exhibit "A" hereto is a list of the accounts of Norton Rose for the periods indicated.

3. Attached hereto as Exhibit "B" to this my affidavit is a summary of additional information with respect to our accounts, indicating all members of Norton Rose who worked on this matter for the period indicated, their year of call to the Bar (where applicable), their rates, and the aggregate blended rate. I confirm that the list represents an accurate summary of such information.

4. Attached as Exhibit "C" to this my affidavit are true copies of the accounts of Norton Rose for the above-noted periods. I confirm that these accounts accurately reflect the services provided by Norton Rose in this matter for these periods and the fees and disbursements claimed by it for these periods.

**SWORN BEFORE ME** at the City of Toronto, on April 9th, 2013.

Commissioner for taking Oaths

**Juan Antonio Reyes**

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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

**EXHIBIT "A"**

**List of Accounts of Norton Rose**

| Date of Account | Fees | Costs | HST/GST | Total |
|---|---|---|---|---|
| June 15, 2012 | 41,256.00 | | 5,363.28 | 46619.28 |
| June 30, 2012 | 3,931.00 | | 511.03 | 4442.03 |
| July 18, 2012 | 12,422.00 | | 1,614.86 | 14036.86 |
| July 31, 2012 | 21,096.00 | 242.80 | 2,774.04 | 24112.84 |
| August 17, 2012 | 2,761.50 | 8.93 | 360.16 | 3130.59 |
| September 18, 2012 | 1,918.00 | | 249.34 | 2167.34 |
| November 29, 2012 | 3,788.00 | | 492.44 | 4280.44 |
| December 31, 2012 | 273.00 | 20.43 | 38.15 | 331.58 |
| March 25, 2013 | 5,213.50 | 466.92 | 738.45 | 6,418.87 |
| TOTAL: | **$ 92,659.00** | **$ 739.08** | **$ 12,141.75** | **$ 105,539.83** |

*This is Exhibit* "A" *referred to in the affidavit of* JUAN ANTONIO REYES *sworn before me, this* 9TH *day of* APRIL 2013

A COMMISSIONER, ETC.

## EXHIBIT "B"

## Blended Rate Table for Norton Rose

| Name | Year of Call (if applicable) | Billing Rate 2012 | Billing Rate 2013 | Number of Hours worked | Total Dollar Amount Billed |
|---|---|---|---|---|---|
| Tony Reyes | 1988 | $910.00 | $960.00 | 83.6 | $76,256 |
| Evan Cobb | 2008 | 400.00 | 440.00 | 37.4 | $15,108 |
| Kaitlind De Jong | N/A | 185.00 | 185.00 | 0.6 | $111.00 |
| Leo Wang | N/A | 185.00 | 185.00 | 0.8 | $148.00 |
| Benjamin Reingold | N/A | 185.00 | 185.00 | 3.7 | $684.50 |
| Steven Zuccarelli | N/A | 185.00 | 185.00 | 0.7 | $129.50 |
| Todd Melchior | N/A | 185.00 | 185.00 | 1.2 | $222.00 |
| | | | | **128** | **$92,659.00** |

**Summary of Aggregate Fees and Disbursements (excluding unbilled additional fees and costs):**

| | |
|---|---|
| Fees: | 92,659.00 |
| Disbursements: | 739.08 |
| GST/HST: | 12,141.75 |
| **Total:** (including GST/HST) | **$105,539.83** |

| | |
|---|---|
| **Blended Rate:** (excluding Disbursements and GST)<br>**$92,659.00 ÷ 128 hours =** | **$723.90** |

This is Exhibit "B" referred to in the affidavit of JUAN ANTONIO REYES sworn before me, this 9TH day of APRIL, 2013.
A COMMISSIONER, ETC.

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**EXHIBIT "C"**

**INVOICE**

Invoice Number: 1174644
Date: June 15, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC. FORMERLY RSM RICHTER
RE: Allied Systems Holdings, Inc.
Matter No.: 02004267-0059

NORTON ROSE

Barristers & Solicitors / Patent & Trade-mark Agents

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

T: +1 416.216.4000
F: +1 416.216.3930
toronto@nortonrose.com
**nortonrose.com**

On January 1, 2012, Macleod Dixon joined Norton Rose OR to create Norton Rose Canada.

GST: R111340006

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending June 14, 2012. | |
|---|---|
| FEES | $41,256.00 |
| DISBURSEMENTS (Taxable) | 0.00 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | $41,256.00 |
| HST | 5,363.28 |
| TOTAL FOR THIS INVOICE | $46,619.28 |

*This is Exhibit "C" referred to in the affidavit of* JUAN ANTONIO REYES *sworn before me, this* 9TH *day of* APRIL 2013

A COMMISSIONER, ETC.

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 5/6/12 | Tony Reyes | Telephone conversation with Bobby Kofman. Reading U.S. materials regarding background. Telephone conversation with Jennifer Stam. Review of Canadian cases regarding COMI issue and memo regarding same. |
| 5/6/12 | Kaitlind De Jong | Researching COMI criteria. |
| 6/6/12 | Tony Reyes | Various emails regarding provision of information. Emails regarding retainer and retainer letter. Participating in conference call with Jennifer Stam, Bobby Kofman and Mitch Vininsky. Reviewing memorandum regarding proposed first-day orders. Reviewing and commenting on form of retainer letter. Circulating draft orders to Duff & Phelps and Gowlings. Telephone conversation with Jennifer Stam. |
| 7/6/12 | Tony Reyes | Review of affidavit from 2005 filing by Allied. Review of Timminco case. Discussion with Mario Forte regarding Nova Scotia ULC as debtor company. Email to Jennifer Stam regarding Nova Scotia ULC company and shareholders. Review of corporate statutes governing Nova Scotia ULC company. Review of email regarding scope of Canadian recognition, service, charges in Canadian order, critical vendors, cash management, etc. Emails regarding administrative charge. Emails regarding drop in sales and increasing losses. Several emails regarding balance sheet questions. Emails regarding DIP. Conference call with Jennifer Stam, Bobby Kofman, Mitch Vininsky and Scott Macaulay. |
| 8/6/12 | Evan Cobb | Reviewing and commenting on Macaulay affidavit. Attending at conference call with Canadian and US working group. Reviewing past recognition orders in which directors' and officers' charges have been granted. |
| 8/6/12 | Tony Reyes | Review of draft DIP term sheet. Review of draft U.S. motion materials, including motion to authorize payment of pre-petition employee obligations and motion to maintain existing cash management systems. Review of numerous other documents, including draft Canadian affidavit. Telephone conversation with Jennifer Stam. Telephone conversation with Mitch Vininsky. Telephone conversation with Jennifer Stam. Discussion with Evan Cobb regarding directors' and officers' charge. Review of remaining materials and review of cases regarding directors' and officers' charge. Conference call with Gowlings, Oslers, Duff & Phelps, U.S. counsel, etc., Yucapia, etc., regarding Canadian filing and issues. Additional calls with counsel for Yucaipa, and with Duff & Phelps. Review of first day orders to be sought in the U.S. |

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

| Date | Timekeeper | Description |
|---|---|---|
| 9/6/12 | Tony Reyes | Review of revised affidavit and comments on same. Various emails. Review of other first-day materials and orders for U.S. proceedings. Review of revised declaration of Scott Macaulay. Review of draft Duff & Phelps report. Discussion with Evan Cobb regarding same. Telephone conversation with Jennifer Stam. Providing substantial comments to Duff & Phelps. Review of U.S. first day orders to be recognized. Discussion with Jennifer Stam regarding same. Various other emails and conversations. |
| 9/6/12 | Evan Cobb | Reviewing report of proposed information officer and commenting on same. Reviewing cash management issues in past recognition orders in connection with protections for Bank of Nova Scotia. Reviewing and commenting on draft orders in Canadian proceedings. Reviewing vendor, customer and employee communication documents and various correspondence. |
| 10/6/12 | Tony Reyes | Review of numerous documents and emails. Offering comments and revising same. Several conversations with Mitch Vininsky, Jennifer Stam and Evan Cobb. Further discussions and emails in preparation for filing tomorrow. |
| 10/6/12 | Evan Cobb | Commenting on revised court documents. |
| 11/6/12 | Tony Reyes | Attendance before Justice Morawetz. Reviewing revisions to publication notice. Reviewing further changes to draft report of information officer. Reviewing U.S. order regarding wages. Discussion regarding same with Bobby Kofman and Mitch Vininsky. Discussion of file with Evan Cobb. Review of draft factum and providing comments on same. Further conversations and emails. Exchange of emails regarding mailings and communications plan. Discussion with Evan Cobb regarding service. Telephone conversation with Jennifer Stam regarding same. Reviewing materials to prepare for hearing tomorrow. Additional emails regarding communications. Telephone conversation with Bobby Kofman. Review of press release. |
| 11/6/12 | Evan Cobb | Commenting on Factum of Foreign Representative. Attending to matters in respect of finalizing report. Attending to service of report and various correspondence. |
| 12/6/12 | Tony Reyes | Exchanging emails regarding further amendments to Canadian orders. Exchanging emails regarding status in U.S. Reviewing factum and brief of the foreign representatives. Reviewing supplemental affidavit and DIP loan agreement. Exchanging various emails. Attending before Justice Morawetz. Reviewing press release. Reviewing the additional motion material for tomorrow morning. |
| 12/6/12 | Evan Cobb | Various correspondence. Attending at court for recognition motion. |

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

| Date | Timekeeper | Description | |
|---|---|---|---|
| 13/6/12 | Evan Cobb | Reviewing third supplemental affidavit of Christopher Eustace. Attending at court for recognition hearing. | |
| 13/6/12 | Tony Reyes | Attendance before Justice Morawetz. Review of endorsements from yesterday and today. Organizing file. | |
| 14/6/12 | Tony Reyes | Telephone conversation with Jennifer Stam regarding potential directors and officers liabilities and possibility of directors and officers charge. Locating and forwarding research memos regarding same. | |
| | | **TOTAL FEES** | **$41,256.00** |

NORTON ROSE

**INVOICE**

Invoice Number: 1179066
Date: June 30, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC. FORMERLY RSM RICHTER
RE: Allied Systems Holdings, Inc.
Matter No.: 02004267-0059

Barristers & Solicitors / Patent & Trade-mark Agents

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

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toronto@nortonrose.com
**nortonrose.com**

On January 1, 2012, Macleod Dixon joined Norton Rose OR to create Norton Rose Canada.

GST: R111340006

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending June 30, 2012. | |
|---|---|
| FEES | $3,931.00 |
| DISBURSEMENTS (Taxable) | 0.00 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | $3,931.00 |
| HST | 511.03 |
| TOTAL FOR THIS INVOICE | $4,442.03 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 15/6/12 | Tony Reyes | Exchanging emails regarding directors and officers issues. Sending emails regarding accounts. |
| 19/6/12 | Tony Reyes | Search for opinion regarding security. Telephone conversation with Jeffrey Canto-Thaler regarding claim by WSIB claims management firm (Allen & Huras). Review of draft motion material from the Canadian Auto Workers. Emails regarding same. |
| 20/6/12 | Tony Reyes | Emails regarding conversations with Canadian Auto Workers and proposed response to draft motion. Emails and draft order regarding carve-out for unionized employees. Update on status of director-related issues and possible charge. |
| 21/6/12 | Evan Cobb | Reviewing and commenting on order for directors and officers charge. Meeting with Tony Reyes on same. |
| 21/6/12 | Tony Reyes | Providing comments on draft come-back order. Discussing same with Evan Cobb. Further emails regarding amounts of termination and severance pay that might become owing. |
| 22/6/12 | Tony Reyes | Emails regarding correction order. |
| 25/6/12 | Tony Reyes | Emails regarding proposed directors and officers charge and regarding other issues. |
| 28/6/12 | Tony Reyes | Review of revised order (come-back) and providing additional comments regarding same. |
| 29/6/12 | Tony Reyes | Emails regarding cash management issues. Discussions with Evan Cobb. Reviewing additional emails. |
| | | **TOTAL FEES** **$3,931.00** |

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Barristers & Solicitors / Patent & Trade-mark Agents

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200 Bay Street, P.O. Box 84
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**nortonrose.com**

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**INVOICE**

Invoice Number: 1181800
Date: July 18, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC. FORMERLY RSM RICHTER
RE: Allied Systems Holdings, Inc.
Matter No.: 02004267-0059

GST: R111340006

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending July 13, 2012. | |
|---|---|
| FEES | $12,422.00 |
| DISBURSEMENTS (Taxable) | 0.00 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | $12,422.00 |
| HST | 1,614.86 |
| TOTAL FOR THIS INVOICE | $14,036.86 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 3/7/12 | Tony Reyes | Review of revised come-back order. Review of proposed letter agreement with Canadian unions. Emails regarding director and officer charge proposed. |
| 4/7/12 | Tony Reyes | Review of draft affidavit of Scott Macaulay regarding come-back motion. Review of revised Canadian Auto Workers letter. |
| 5/7/12 | Tony Reyes | Review of comments on draft Macauley affidavit and on Canadian Auto Workers letter. |
| 6/7/12 | Tony Reyes | Various comments regarding July 16th come-back hearing, and removal of relief regarding directors and officers charge. Emails regarding report of Information Officer. |
| 7/7/12 | Evan Cobb | Review of Information Officer's Report and provide comments thereon. |
| 7/7/12 | Tony Reyes | Emails regarding Information Officer's Report. Review of same. |
| 9/7/12 | Evan Cobb | Review of blacklines of final orders. Telephone call with Mitch Vininsky regarding same. |
| 9/7/12 | Tony Reyes | Emails regarding draft Information Officer's Report. Discussion with Evan Cobb regarding same. Revise and send same to Duff & Phelps. Telephone conversation with Mitch Vininsky. Review of revised affidavit of Macaulay. Review of revised Canadian come-back orders. Telephone conversation with Mitch Vininsky. Email to Jennifer Stam regarding resignation of Canadian directors. Additional emails regarding priority provisions in Canadian order. Emails regarding revised U.S. order. |
| 10/7/12 | Tony Reyes | Discussion with Jennifer Stam. Exchange of several emails regarding charging language. Exchange of further emails. Discussion with Evan Cobb regarding timing. |
| 11/7/12 | Evan Cobb | Review of draft First Report and providing comments thereon. Review draft affidavit. Various correspondence. Attend to service of First Report. |
| 11/7/12 | Tony Reyes | Review of revised come-back order and revised supporting affidavit. Review of revised Duff & Phelps report. Discussion with Evan Cobb regarding same. Review of motion record of foreign representative, as served. Review of revised draft Information Officer report. Review of Gowlings' comments. Discussion with Evan Cobb. |
| 12/7/12 | Tony Reyes | Review of materials as served, to prepare for motion. |

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

| Date | Timekeeper | Description | |
|---|---|---|---|
| 13/7/12 | Tony Reyes | Review of Canadian Auto Workers letter as finalized. Review of Factum to be filed by Foreign Representative. Exchange of emails regarding potential priority for pension contributions. Exchange of additional emails. Discussion regarding filing with Evan Cobb. Review of supplemental affidavit. | |
| | | **TOTAL FEES** | **$12,422.00** |

NORTON ROSE

Barristers & Solicitors / Patent & Trade-mark Agents

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Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
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F: +1 416.216.3930
toronto@nortonrose.com
nortonrose.com

On January 1, 2012, Macleod Dixon joined Norton Rose OR to create Norton Rose Canada.

**INVOICE**

Invoice Number: 1185720
Date: July 31, 2012

Client: DUFF & PHELPS CANADA RESTRUCTURING INC. FORMERLY RSM RICHTER
RE: Allied Systems Holdings, Inc.
Matter No.: 02004267-0059

GST: R111340006

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending July 30, 2012. | |
|---|---|
| FEES | $21,096.00 |
| DISBURSEMENTS (Taxable) | 242.80 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | $21,338.80 |
| HST | 2,774.04 |
| TOTAL FOR THIS INVOICE | $24,112.84 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 16/7/12 | Evan Cobb | Attending at court on Foreign Representative's motion for recognition of certain US final orders. |
| 16/7/12 | Tony Reyes | Discussion with Evan Cobb regarding materials. Attendance before Justice Morawetz. Emails regarding file. |
| 18/7/12 | Tony Reyes | Exchange of emails regarding director and officer motion. |
| 19/7/12 | Evan Cobb | Reviewing and commenting on draft affidavit and order for Directors' and Officers' charge motion, various correspondence on same. |
| 19/7/12 | Tony Reyes | Emails regarding materials for director and officer order. Telephone conversation with Jennifer Stam. Additional emails. Telephone conversation with Mitch Vininsky. Reviewing and commenting on draft affidavit and draft order. Several additional emails. |
| 20/7/12 | Tony Reyes | Review revisions to draft Macauley affidavit. Review additional comments from Evan Cobb. Discuss file with Evan Cobb. Exchange emails regarding date. Communicating with Mitch Vininsky regarding July 31st motion. Conference call with Jennifer Stam regarding same. Review of revised affidavit regarding director and officer issues. |
| 21/7/12 | Evan Cobb | Reviewing Canada Labour Code issues. Meeting with Rick Charney on Canada Labour Standards Regulations. Various emails and telephone calls with Information Officer on same. |
| 23/7/12 | Tony Reyes | Various emails regarding directors and officers relief, quantums, etc. |
| 24/7/12 | Tony Reyes | Review of revised Blount affidavit. Discuss same with Evan Cobb. Send comments to Gowlings. Review of revised order and providing comments on same. Review of draft Second Report of Information Officer. Discuss same with Evan Cobb. Making major revisions to Second Report of Information Officer. Provide comments to Mitch Vininsky. |
| 24/7/12 | Evan Cobb | Reviewing Affidavit, Order and Information Officer's report for motion to approve Directors' Charge and commenting on same. Reviewing law on directors' liability under the Canada Labour Code. |
| 25/7/12 | Evan Cobb | Discussion with Tony Reyes and Mitch Vininsky. Reviewing comments from Foreign Representative on Information Officer's report. |

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

| Date | Timekeeper | Description |
|---|---|---|
| 25/7/12 | Tony Reyes | Telephone conversation with Mitch Vininsky. Discussion with Evan Cobb regarding second report. Review of revised Order. Discussion with Evan Cobb. Review of revised Second Report. Emails regarding insurance claim. Discussion with Evan Cobb regarding service and notice. Review of Gowlings' comments on Second Report. Further emails regarding same. Review of motion record as served. |
| 26/7/12 | Evan Cobb | Reviewing factum of the Foreign Representative. Finalizing and attending to service of Information Officer's Second Report. Coordinating research on scope of Directors and officers charge. |
| 26/7/12 | Tony Reyes | Review of comments on second report. Various emails. Review of report as finalized. Discussion with Evan Cobb regarding service and filing of same. Additional emails. Discussion with Jennifer Stam regarding directors and officers charge for pre-filing amounts. Discussion with Evan Cobb regarding same. |
| 27/7/12 | Evan Cobb | Reviewing case law and academic commentary on Directors and Officers Charges. Correspondence regarding same. Attending to matters in connection with filing of the Second Report of the Information Officer. |
| 27/7/12 | Tony Reyes | Review of draft factum. Review of cases and commentary regarding charge for pre-filing amounts. Discussion with Evan Cobb. Discussion with Jennifer Stam. Discussion with Evan Cobb regarding possible adjournment. Other emails. |
| 30/7/12 | Tony Reyes | Emails regarding 9:30 appointment tomorrow morning. Additional emails in this regard. Discussion with Evan Cobb. |
| | | **TOTAL FEES** **$21,096.00** |

**DISBURSEMENTS - TAXABLE**

| | |
|---|---|
| Overtime - Secretarial | 227.50 |
| External DB Search/Quicklaw | 15.30 |
| | $242.80 |

INVOICE: 1185720

NORTON ROSE

**INVOICE**

Invoice Number: 1188806
Date: August 17, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC. FORMERLY RSM RICHTER
RE: Allied Systems Holdings, Inc.
Matter No.: 02004267-0059

Barristers & Solicitors / Patent & Trade-mark Agents

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

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toronto@nortonrose.com
**nortonrose.com**

On January 1, 2012, Macleod Dixon joined Norton Rose OR to create Norton Rose Canada.

GST: R111340006

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending August 15, 2012. | |
|---|---|
| FEES | $2,761.50 |
| DISBURSEMENTS (Taxable) | 8.93 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | $2,770.43 |
| HST | 360.16 |
| TOTAL FOR THIS INVOICE | $3,130.59 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.
FORMERLY RSM RICHTER

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 26/7/12 | Benjamin Reingold | Research pertaining to Directors' and Officers' charges for E. Cobb. |
| 27/7/12 | Benjamin Reingold | Research pertaining to Directors' and Officers' charges for E. Cobb. |
| 27/7/12 | Leo Wang | File affidavit of service with Commercial List Office for E. Cobb. |
| 31/7/12 | Evan Cobb | Attend at chambers appointment before Justice Morawetz. |
| 31/7/12 | Tony Reyes | Review of emails regarding adjournment. |
| 8/8/12 | Evan Cobb | Telephone call with A. Rose. Voicemails and emails to M. Vininsky and T. Reyes regarding UCC inquiry. |
| 8/8/12 | Tony Reyes | Emails regarding assets and security. |
| 10/8/12 | Tony Reyes | Emails regarding directors' and officers' charge. Review term sheet and draft order. Several additional emails regarding same. Review revised term sheet and revised order. |
| 14/8/12 | Tony Reyes | Review revised drafts of order and term sheet regarding severance. Emails regarding same. |
| | | **TOTAL FEES** **$2,761.50** |

**DISBURSEMENTS - TAXABLE**

| | |
|---|---|
| Taxis | 8.93 |
| | $8.93 |

INVOICE: 1188806

NORTON ROSE

**INVOICE**

Invoice Number: 1194903
Date: September 18, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC.
RE: Allied Systems Holdings, Inc.
Matter No.: 02004267-0059

Barristers & Solicitors / Patent & Trade-mark Agents

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

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toronto@nortonrose.com
**nortonrose.com**

On January 1, 2012, Macleod Dixon joined Norton Rose OR to create Norton Rose Canada.

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

GST: R111340006

Attention: Robert Kofman
Managing Director

For professional services rendered and disbursements incurred for the period ending August 31, 2012.

| | |
|---|---|
| FEES | $1,918.00 |
| DISBURSEMENTS (Taxable) | 0.00 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | $1,918.00 |
| HST | 249.34 |
| TOTAL FOR THIS INVOICE | $2,167.34 |

COPY

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC. 02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 16/8/12 | Evan Cobb | Reviewing revised Union/directors' and officers' charge order and term sheet. |
| 16/8/12 | Tony Reyes | Various emails regarding proposed order and directors' and officers' issues. Discussion with Evan Cobb. |
| 17/8/12 | Tony Reyes | Review of amended order. Discussion with Evan Cobb. |
| 20/8/12 | Tony Reyes | Email regarding report regarding status of U.S. proceedings. |
| 21/8/12 | Tony Reyes | Review of order and term sheet as sent to Canadian Auto Workers. |
| 24/8/12 | Tony Reyes | Emails regarding Canadian Auto Workers term sheet and order. Email regarding status. |
| 28/8/12 | Tony Reyes | Exchange of emails regarding status. Exchange of emails regarding Rothschild retainer and U.S. motions. Review of prior Canadian Orders regarding obligation to provide status reports. |
| | | **TOTAL FEES** **$1,918.00** |

NORTON ROSE

**INVOICE**

Invoice Number: 1214228
Date: November 29, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC.
RE: Allied Systems Holdings, Inc.
Matter No: 02004267-0059

Barristers & Solicitors / Patent & Trade-mark Agents

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

T : +1 416.216.4000
F : +1 416.216.3930
toronto@nortonrose.com
nortonrose.com

On January 1, 2012, Macleod Dixon joined Norton Rose OR to create Norton Rose Canada.

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

GST: R111340006

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending October 31, 2012. | |
|---|---|
| FEES | 3,788.00 |
| DISBURSEMENTS (Taxable) | 0.00 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | 3,788.00 |
| HST | 492.44 |
| TOTAL FOR THIS INVOICE IN CANADIAN DOLLARS | $4,280.44 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA
RESTRUCTURING INC.

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 7/9/12 | Tony Reyes | Email regarding status. |
| 21/9/12 | Tony Reyes | Receiving status email from M. Vininsky. |
| 1/10/12 | Tony Reyes | Exchanging emails regarding status of director issues. |
| 5/10/12 | Evan Cobb | Commenting on draft Third Report of the Information Officer. |
| 9/10/12 | Tony Reyes | Reviewing the draft Third Report of Duff & Phelps. Providing comments on same. |
| 11/10/12 | Tony Reyes | Reviewing revised Third Report of Information Officer. Discussing same with Evan Cobb. |
| 11/10/12 | Evan Cobb | Telephone calls with Information Officer. Email correspondence. Reviewing US orders and stipulations. Final comments on Third Report. Attending to service matters. |
| 12/10/12 | Evan Cobb | Various correspondence regarding Third Report. |
| 12/10/12 | Todd Melchior | Filing Third Report with the Commercial List at the Superior Court. |
| 15/10/12 | Tony Reyes | Various e-mails and discussions regarding 9:30 am appointment tomorrow, and further adjournment. |
| 15/10/12 | Evan Cobb | Emails regarding scheduling issues. |
| 16/10/12 | Evan Cobb | Attending at court and email correspondence. |
| 18/10/12 | Tony Reyes | Reviewing e-mail and materials regarding lifting stay of proceedings for an insurance claim. |
| 25/10/12 | Tony Reyes | Reviewing e-mail from counsel to personal injury claimant. Responding to same. |
| 26/10/12 | Evan Cobb | Reviewing email correspondence regarding lift stay motion. |
| 26/10/12 | Tony Reyes | Receiving various e-mails regarding documents requested by personal injury claimant, and potential motion for leave. |
| 31/10/12 | Tony Reyes | Reviewing revised term sheet and order regarding severance issues and director/officer charge. |
| | | **TOTAL FEES** **CAD $3,788.00** |

INVOICE: 1214228

NORTON ROSE

**INVOICE**

Invoice Number: 1229592
Date: December 31, 2012
Client: DUFF & PHELPS CANADA RESTRUCTURING INC.
RE: Allied Systems Holdings, Inc.
Matter No: 02004267-0059

Barristers & Solicitors / Patent & Trade-mark Agents

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

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nortonrose.com

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

GST: R111340006

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending December 31, 2012. | |
|---|---|
| FEES | 273.00 |
| DISBURSEMENTS (Taxable) | 20.43 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | 293.43 |
| HST | 38.15 |
| TOTAL FOR THIS INVOICE IN CANADIAN DOLLARS | $331.58 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA
RESTRUCTURING INC.

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description | |
|---|---|---|---|
| 3/12/12 | Tony Reyes | Reviewing revised settlement agreement. Exchanging e-mails regarding scheduling of motion to approve settlement. | |
| | | **TOTAL FEES** | **CAD $273.00** |

**DISBURSEMENTS - TAXABLE**

| | | |
|---|---|---|
| Courier service | | 20.43 |
| | **TOTAL** | **CAD $20.43** |

INVOICE: 1229592

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NORTON ROSE

**INVOICE**

Invoice Number: 1248121
Date: March 25, 2013
Client: DUFF & PHELPS CANADA RESTRUCTURING INC.
RE: Allied Systems Holdings, Inc.
Matter No: 02004267-0059

Barristers & Solicitors / Patent & Trade-mark Agents

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

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toronto@nortonrose.com
nortonrose.com

DUFF & PHELPS CANADA RESTRUCTURING INC.
Suite 1002, P.O. Box 84
200 King Street West
Toronto, Ontario M5H 3T4

GST: R111340006

Attention: Robert Kofman
Managing Director

| For professional services rendered and disbursements incurred for the period ending March 25, 2013. | |
|---|---|
| FEES | 5,213.50 |
| DISBURSEMENTS (Taxable) | 466.92 |
| DISBURSEMENTS (Non Taxable) | 0.00 |
| NET | 5,680.42 |
| HST | 738.45 |
| TOTAL FOR THIS INVOICE IN CANADIAN DOLLARS | $6,418.87 |

**Payable upon receipt**

**Banking information for wire transfer**
RBC Financial Group, Main Branch, Royal Bank Plaza
Toronto, Ontario, CANADA
Bank 003, Transit 00002, Acc. No. 106-030-0
Swift Code # ROYCCAT2
**Include invoice number on transfer order**

NORTON ROSE

DUFF & PHELPS CANADA RESTRUCTURING INC.

02004267-0059

**RE: Allied Systems Holdings, Inc.**

**FEE DETAIL**

| Date | Timekeeper | Description |
|---|---|---|
| 4/1/13 | Tony Reyes | Exchanging e-mails regarding next court date and report due. |
| 9/1/13 | Tony Reyes | Exchanging e-mails regarding report of the Information Officer. |
| 10/1/13 | Evan Cobb | Reviewing and commenting on Fourth Report. |
| 10/1/13 | Tony Reyes | Reviewing draft Fourth Report and providing comments on same. Exchanging e-mails regarding same. Reviewing additional comments and e-mails and e-mails regarding attendance before Mr. Justice Morawetz. |
| 11/1/13 | Tony Reyes | Reviewing Endorsement of Mr. Justice Morawetz. Exchanging e-mails regarding filing of report from Information Officer. Attending to same. Exchanging e-mails regarding service. Discussing matters with E. Cobb. |
| 14/1/13 | Steven Zuccarelli | Filing the Fourth Report of Duff & Phelps Canada Restructuring Inc. and an affidavit of service with the Commercial List. |
| 5/2/13 | Tony Reyes | Reviewing report regarding US proceedings. |
| 15/2/13 | Tony Reyes | Reviewing e-mail regarding further adjournment. |
| 27/2/13 | Tony Reyes | Exchanging e-mails regarding upcoming motion. Discussing same with E. Cobb. |
| 14/3/13 | Evan Cobb | Reviewing Directors and Officers motion materials for Canadian and US proceedings. Reviewing relevant Canada Labour Code provisions. |
| 15/3/13 | Evan Cobb | Commenting on Directors and Officers motion materials for Canadian and US proceedings. Exchanging e-mails on same. |
| 18/3/13 | Evan Cobb | Meeting with T. Reyes. Exchanging e-mails regarding Directors and Officers charge motion materials. |
| 18/3/13 | Tony Reyes | Reviewing draft materials regarding indemnity and charge for severance and termination amounts. Discussing same with E. Cobb. |
| 19/3/13 | Evan Cobb | Reviewing responses from Allied counsel on Directors and Officers motion materials. |

**TOTAL FEES** **CAD $5,213.50**

NORTON ROSE

DUFF & PHELPS CANADA
RESTRUCTURING INC.

02004267-0059

**RE:** **Allied Systems Holdings, Inc.**

**DISBURSEMENTS - TAXABLE**

| | | |
|---|---|---|
| Copies | | 262.00 |
| Courier service | | 193.66 |
| Stamps/Postage | | 11.26 |
| | **TOTAL** | **CAD $466.92** |

INVOICE: 1248121

**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: CV10-8640-00CL

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

Proceeding commenced at Toronto

**AFFIDAVIT OF JUAN ANTONIO REYES**
**(sworn April 9, 2013)**

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

**Tony Reyes** LSUC#: 28218V
Tel: 416-216-4825

**Evan Cobb** LSUC#: 55787N
Tel: 416.216.1929
Fax: 416.216.3930

Lawyers for the Information Officer,
Duff & Phelps Canada Restructuring Inc.

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