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JUDICIAL CENTRE OF

CALGARY

APPLICANTS:

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

**AND IN THE MATTER OF A PLAN OF
COMPROMISE OR ARRANGEMENT OF
ALPHABOW ENERGY LTD.**

DOCUMENT

BENCH BRIEF OF THE APPLICANT

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I. INTRODUCTION

1. AlphaBow Energy Ltd. ("**AlphaBow**" or the "**Applicant**") brings applications pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"), seeking an initial order (the "**Initial Order**") and an amended and restated initial order (the "**ARIO**"). The relief sought is required to provide stability in order to address the short and long-term liquidity needs of the AlphaBow, and to explore potential restructuring options. Immediately following the Court's approval of the Initial Order, AlphaBow also intends to bring a comeback application pursuant to the CCAA seeking an amended and restated initial order (the "**ARIO**").

2. AlphaBow believes that this CCAA proceeding is in the best interest of its stakeholders and presents the best opportunity to implement a sale and investment solicitation process, with a view of maximizing value, ensuring long term care over AlphaBow's assets, and a return to employment for AlphaBow's former employees.

II. FACTS

3. The facts supporting this proceeding are set out in the affidavit of Ben Li sworn April 15, 2024 ("**Li Affidavit**"). Any defined terms not defined herein have the definition ascribed to them in the Li Affidavit.

III. ISSUES

4. The issues to be considered on this application are whether:

- (a) the Applicant is a company to which the CCAA applies;
- (b) the Stay of Proceedings should be granted;
- (c) the Administration Charge should be granted;
- (d) the Applicant should be authorized to maintain their present cash management system and, with the consent of the Monitor, make certain pre-filing payments;
- (e) the SISP should be granted;

- (f) the vesting order for the sale of a 15% non-operating working interest in the CO₂ Facilities should be granted; and
- (g) sealing order should be granted.

IV. LAW AND ARGUMENT

A. The Applicant is a "debtor company"

5. The CCAA applies in respect of a "debtor company or affiliated debtor companies" whose liabilities exceed \$5 million.¹ The term "debtor company" is defined as "any company that: (a) is bankrupt or insolvent...". The term "company" is defined as "any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province...".²

6. The Applicant is a "company" within the meaning of the CCAA as it is incorporated under the Alberta *Business Corporations Act*.³

7. The Applicant is a "debtor company" as defined in the CCAA because it is a company that is insolvent. The insolvency of a debtor company is assessed as of the time of filing the CCAA application.⁴ While the CCAA does not define insolvency, courts have taken guidance from the definition of "insolvent person" in subsection 2(1) of the *Bankruptcy and Insolvency Act*, which, in relevant part, provides that an "insolvent person" is a person:

- (a) who is for any reason unable to meet his obligations as they generally become due;
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

¹ *Companies' Creditors Arrangement Act*, [RSC 1985, c. C-36](#), s 3(1) [CCAA].

² *Ibid*, s 2(1).

³ Li Affidavit at para 5.

⁴ *Stelco Inc (Re)*, [2004] OJ No 1257, 48 CBR (4th) 299, [2004 CanLII 24933](#) (Commercial List) at para 4.

8. The Applicant is clearly insolvent. It has faced ongoing liquidity challenges and is unable to satisfy obligations as they become due. The total claims against the Applicant greatly exceed the \$5 million threshold amount under the CCAA.⁵

B. CCAA is the preferable procedure

9. In *Re Northland Properties Ltd*, the Court commented that "... [i]f there is an opportunity to reorganize, then that should be given fully to the companies to achieve that purpose."⁶ As such, the CCAA provides "breathing space" for companies to reorganize their affairs.⁷

10. Pursuant to s. 11.7(1) of the CCAA, upon an initial application in respect of a debtor company, the Court shall, at the same time, appoint a person to monitor the business and financial affairs of the company. AlphaBow has retained KSV Restructuring Inc. ("KSV") to act as monitor in these proceedings. KSV is qualified and competent to act as the Proposed Monitor, has consented to act as Proposed Monitor under the CCAA, subject to the approval of the Court, and is supportive of the relief sought within the CCAA proceedings.

11. While AlphaBow's operations are currently in the care and custody of the Orphan Well Association ("OWA") and its staff have been laid off, it is a goal of AlphaBow through its process to ensure that all of its assets are removed from the OWA and that its employees will be able to resume employment. To this end, AlphaBow has been working with its advisors to develop a process that would provide for the solicitation of offers for both investment and sale.

12. The CCAA proceedings will enable AlphaBow to utilize its knowledge of the assets and potential bidders to run a process focused on ensuring that all of its environmental liabilities are addressed, which will in turn increase the likelihood of creditors receiving some recovery and employees being able to resume their employment.

⁵ CCAA, s 3(1).

⁶ *Re Northland Properties Ltd*, [1988 CanLII 2924](#) at para 7.

⁷ *Bondfield Construction Co (Re)*, [2019] OJ No 1847, [2019 ONSC 2310](#) (Commercial List) at para 14.

13. AlphaBow anticipates that the process will be completed within six months; however, given the complexity of the proceeding, the CCAA proceedings will give AlphaBow the flexibility to ensure that the process is conducted properly and in the best interests of all parties.

C. A stay of proceedings should be granted

14. Pursuant to section 11.02 of the CCAA, this Court has the authority to order a stay of proceedings "on any terms that it may impose" and "effective for the period that the court considers necessary", provided the initial stay period is no longer than 10 days.⁸

15. The stated purpose of the recent amendments to the CCAA which limits the initial stay to no longer than 10 days is for "enhancing retirement security by making the insolvency process fairer, more transparent and more accessible" by, among other things, limiting "the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players".⁹

16. One of the key considerations for the limitation of relief sought in the initial order, is often such orders are sought on no or limited notice which impacts stakeholder participation. In the case of AlphaBow, as a result of its NOI Proceedings, its stakeholders have been aware of its insolvency and intention to commence proceedings under the CCAA since in or around April 1, 2024 when the Proposal Trustee provided Notice to Creditors.

17. Similar to what was done in the CCAA conversion proceedings in the matter of a plan of compromise or arrangement of Glenogle Energy Inc., 1651558 Alberta Ltd. and Glenogle Energy LP,¹⁰ AlphaBow is seeking to have the comeback application on the same day, which also happens to be the only time that the Court had available.¹¹

⁸ CCAA, s 11.02.

⁹ Canada, Innovation, Science and Economic Development Canada, [Insolvency reforms to come into force](#), News Release, (Ottawa: Media Relations) 2019 at 2; Canada, Marketplace Framework Policy Branch, [Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90, Canada](#) Gazette, Part II, Volume 153, Number 18 [Order Fixing]. See also *Re Lydian International Limited*, 2019 ONSC 7473 at para 31.

¹⁰ [Initial Order](#) granted in in the matter of a plan of compromise or arrangement of Glenogle Energy Inc., 1651558 Alberta Ltd. and Glenogle Energy LP.

¹¹ Li Affidavit at para 3.

18. The CCAA stay of proceedings has been described as "the engine that drives the broad and flexible statutory scheme" of the CCAA.¹² The courts construe the power to grant a stay of proceedings broadly in order to permit the CCAA to accomplish its legislative purpose and to enable continuance of the company seeking CCAA protection.¹³ A stay of proceedings is appropriate to provide the debtor with breathing room while it seeks to restore solvency and emerge from the CCAA on a going concern basis.¹⁴

19. AlphaBow requires a stay of proceedings, while it explores potential restructuring options.

20. In the absence of a stay of proceedings, there is the risk that AlphaBow will continue to be faced with multiple creditors proceeding with uncoordinated collection efforts for their own benefit as opposed to a single proceeding. As noted in the Affidavit of Mr. Li, there are currently 13 legal proceedings ongoing and multiple garnishments.¹⁵

21. AlphaBow believes that the granting of the Stay of Proceedings is in the best interests of AlphaBow and its stakeholders and is appropriate in the circumstances.

D. Administration Charge

22. The Applicant is seeking an Administration Charge in the amount of \$100,000 within the Initial Order with an increased to not exceed an aggregate amount of \$400,000 in the ARIO to secure the professional fees and disbursements of the Proposed Monitor, counsel to the Proposed Monitor and counsel to the Applicants, incurred at their standard rates and charges whether incurred before or after the date of the Initial Order.¹⁶

23. Section 11.52 of the CCAA expressly provides the court with the jurisdiction to grant the Administration Charge. The following list of non-exhaustive factors are to be considered when granting an administration charge:

- (a) the size and complexity of the business being restructured;

¹² *Nortel Networks Corp.*, [2010 ONSC 1304](#) at para 55.

¹³ *Ibid* at para 34; *Lehndorff*, *supra* note 7 at para 10.

¹⁴ *Century Services Inc v Attorney General (Canada)*, [2010 SCC 60](#) at para 14; *Target Canada Co*, [2015 ONSC 303](#) at para 8.

¹⁵ Li Affidavit at para 37.

¹⁶ Li Affidavit at paras 61-64.

- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.¹⁷

24. In consideration of the above factors, AlphaBow submits it is appropriate for this Court to exercise its jurisdiction and grant the Administration Charge, given that:

- (a) AlphaBow has a significant number of assets and any sales or restructuring will be complex given the outstanding orders, regulatory considerations and number of stakeholders;
- (b) the amount of the Administration Charge was reached in consultation with the Proposed Monitor, and the Proposed Monitor is supportive of the nature and quantum of the Administration Charge;
- (c) all of the beneficiaries of the proposed Administration Charge have contributed, and will continue to contribute, to the restructuring efforts of AlphaBow; and
- (d) there will be no unwarranted duplication of roles between the beneficiaries of the Administration Charge as each proposed beneficiary will be performing distinction functions.¹⁸

E. Cash Management System and Payments During the CCAA Proceedings

1. Cash Management System

25. The Applicant seeks authority under the Initial Order to continue to use their existing Cash Management System to fund the Applicant's obligations and maintain existing banking

¹⁷ *Canwest Publishing Inc / Publications Canwest Inc Re*, [2010 ONSC 222](#) at para 54.

¹⁸ Li Affidavit at paras 60-64.

arrangements. The continued operation of the Cash Management System will minimize disruption to the Applicant's operations caused by the CCAA Proceedings and avoid the need to negotiate and implement alternative banking arrangements.¹⁹

2. Pre-Filing Payments

26. To avoid any disruption, the AlphaBow is seeking authorization under the Initial Order to pay all reasonable expenses incurred prior to the commencement of these proceedings in respect of fees and disbursements of professionals and advisors retained by AlphaBow.

27. The Court has the jurisdiction to permit payment of pre-filing obligations in a CCAA proceeding.²⁰ In granting debtors the authority to pay certain pre-filing obligations, courts have considered a number of factors, including:

- (a) whether the goods and services were integral to the business of the applicants;
- (b) the applicant's need for the uninterrupted supply of the goods or services;
- (c) the fact that no payments would be made without the consent of the Monitor;
- (d) the Monitor's support and willingness to work with the applicant to ensure that payments in respect of pre-filing liabilities were appropriate;
- (e) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
- (f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments.²¹

¹⁹ Li Affidavit at paras 50-52.

²⁰ *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114](#) at paras 31, 41; *Performance Sports Group Ltd Re*, [2016 ONSC 6800](#) at paras 24-25; *Cinram International Re*, [2012 ONSC 3767](#) at para 67 [*Cinram*]; *Eddie Bauer of Canada Inc, Re*, [2009 CanLII 32699](#) at para 22.

²¹ *JTI-Macdonald Corp*, [2019 ONSC 1625](#) at para 24; *Cinram*, *supra* note 21 at para 68.

28. AlphaBow believes that the payments contemplated to be paid pursuant to the Initial Order are reasonable and necessary to allow the Applicant to advance restructuring efforts for the benefit of its stakeholders.²²

F. AlphaBow's sales processes should be granted

29. AlphaBow is seeking the Court's approval for two sales process: a sales process to continue to market and sell carbon credits; and a sales and investment process ("SISP").

30. First, AlphaBow is seeking the Court's approval of a sales process to market and sell its 6,124 carbon credits from 2023. AlphaBow has engaged Strom Futures, a company with 20 years of experience and expertise in buying and selling carbon offsets.

31. Second, AlphaBow is seeking the Court's approval of a SISP that has been developed and will be led by the Monitor and Sayer Energy Advisors ("Sayer").

32. The use of Strom Futures, the Monitor and Sayer, will ensure the integrity of the process through providing an independent party that can understand and weigh various bids.²³

33. The Court has the authority to grant the SISP. In considering whether to do so, Courts have had regard to section 36 of the CCAA and the factors to consider when approving a sale outside of the ordinary course of business articulated at s. 36(3) of the CCAA; namely:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

²² Li Affidavit at paras 50-52.

²³ *Re Ivaco Inc.*, [2004 CanLII 34434](#) at para 17.

- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.²⁴

34. The Courts have drawn a distinction between the approval of a sales process and the approval of an actual sale itself. Therefore, while these factors may be considered on an application to approve a sales process, they are not determinative.²⁵

35. In approving a SISP, Courts have also referred to the well-known *Soundair* principles, which have been expressed in the following terms²⁶:

Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

36. In considering each of the *Soundair* factors, the Applicants submit that approval of the proposed SISP are appropriate in the circumstances. The process has been specifically designed to enhance participation through the selection of bid deadlines. The enhanced role for the Monitor

²⁴ CCAA, s. 36(3); *Re Brainhunter Inc.*, [2009 CanLii 72333](#) (Commercial List) [*Brainhunter*].

²⁵ *Brainhunter*, *supra* note 24 at para 13; *Re Danier Leather Inc.*, [2016 ONSC 1044](#) at para 22.

²⁶ *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#) at para 6.

and the involvement of Sayer, a company experienced in the marketing of energy assets, will insist on ensuring an independent and fair process.

G. A vesting order for the sale of a 15% non-operating working interest in the facilities constructed pursuant to and are governed by the Agreement for the Construction Ownership and Operation of the Glencoe CO₂ Production Facility (the "CO₂ Facilities") should be granted

37. AlphaBow is seeking the Court's approval for a sale of a 15% non-operating interest in Functional Units II and III of the CO₂ Facilities to an arm length producer, Cascade Capture Ltd. ("**Cascade**").

38. Sections 36(1) and (2) of the CCAA expressly allow the Court to authorize the sale or disposition of assets outside the ordinary course of business, after the company provides notice to its secured creditors. AlphaBow does not have any secured creditors.

39. The Court must consider all of the circumstances to determine whether the proposed asset sale is fair and reasonable. In deciding whether to grant the authorization, the Court is to consider the factors set out at s. 36(3) of the CCAA, and outlined above.

40. Section 36(4) provides further considerations for the Court, after considering the factors referred to in subsection (3), if the proposed sale or disposition is to a person who is related to the company. Cascade is not a person related to the company, so this does not apply.

41. The *Soundair* factors set out the following factors to consider when reviewing a proposed sales transaction:

- (a) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;
- (b) It should consider the interests of all parties;
- (c) It should consider the efficacy and integrity of the process by which offers have been obtained; and

(d) It should consider whether there has been unfairness in the working out of the process.²⁷

42. AlphaBow submits that the proposed asset sale of the minority non-operating working interest is fair and reasonable, considering all of the circumstances. While a sales process has yet to be conducted through these proceedings, prior marketing efforts occurred, further, AlphaBow sought input from its independent sales advisor to ensure that the purchase price is appropriate.²⁸

43. In pursuing the transaction, AlphaBow had consideration for the fact that the sale will result in a reduction in environmental liabilities and an assumption of certain go forward obligations, while providing AlphaBow with the funds desperately required to advance its restructuring efforts, where interim financing is not available.²⁹

44. As set out at paragraphs 73-82 of the Li Affidavit, given the extended period of time that AlphaBow's operations have been suspended, it does not have cash flow necessary to support these restructuring efforts independently. AlphaBow made sufficient efforts to obtain interim financing; however, these efforts were unsuccessful.

45. In the circumstances, AlphaBow determined that the only way to fund the process was to sell a minority non-operating working interest in the CO₂ Facilities, and that, through its inquiries over the last few years, the only party prepared to work jointly with AlphaBow and to proceed with an offer only conditional on court approval was Cascade.

H. SEALING ORDER

46. Pursuant to Part 6, Division 4, of the Alberta Rules of Court, AR 124/2010, this Court has the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.³⁰

²⁷ *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#)

²⁸ Li Affidavit at para 82.

²⁹ Li Affidavit at paras 49, 74, 79.

³⁰ *Alberta Rules of Court*, Part 6, Division 4, [AR 124/2010](#).

47. The test to determine whether a sealing order is appropriate is set out by the Supreme Court of Canada in *Sherman Estate v Donovan* as follows:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.³¹

48. In its Comeback application, AlphaBow asks this Honourable Court to seal on the court file three confidential appendices, which include commercially sensitive information:

- (a) The Sales Advisor's engagement letter; and
- (b) The purchase price in the Cascade Purchase and Sale Agreement and the Sales Advisor's assessment of the transaction.

49. AlphaBow submits that the materials they seek to have sealed fit squarely within the *Sherman Estate* test. The materials are of a commercially sensitive nature and include information that could harm the competitive advantage of the Sales Advisor if released and be prejudicial to the SISF.

50. No reasonably alternative measures exist, and sealing the Confidential Appendices is the least restrictive method available. The benefits of the sealing order, which are to protect the general commercial interest of maintaining confidentiality and commercially sensitive information, far outweigh the negative effects of restricting the accessibility of court proceedings.

³¹ *Sherman Estate v Donovan*, [2021 SCC 25](#) at para 38.

V. CONCLUSION

51. AlphaBow believes it satisfies all requirements for the relief sought and requests that this Court grant the Initial Order and Amended Initial and Restated Order in the form requested. All relief sought is necessary and for the benefit of all stakeholders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15TH DAY OF APRIL 2024.

BENNETT JONES LLP

Per:



Keely Cameron/Sarah Aaron
Counsel for the Applicant

Table of Authorities

1. *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.
2. Affidavit of Ben Li, sworn on April 15, 2024.
3. *Stelco Inc (Re)*, [2004] OJ No 1257, 48 CBR (4th) 299, [2004 CanLII 24933](#).
4. *Re Northland Properties Ltd*, [1988 CanLII 2924](#).
5. *Lehndorff General Partner Ltd (Re)*, [1993] OJ No 14, 17 CBR (3d) 24.
6. *Bondfield Construction Co (Re)*, [2019] OJ No 1847, [2019 ONSC 2310](#).
7. Canada, Innovation, Science and Economic Development Canada, [Insolvency reforms to come into force](#), News Release, (Ottawa: Media Relations) 2019
8. Canada, Marketplace Framework Policy Branch, [Order Fixing November 1, 2019 as the Day on Which Certain Provisions of the two Acts Come into Force: SI/2019-90, Canada](#) Gazette, Part II, Volume 153, Number 18
9. *Re Lydian International Limited*, [2019 ONSC 7473](#).
10. [Initial Order](#) granted in in the matter of a plan of compromise or arrangement of Glenogle Energy Inc., 1651558 Alberta Ltd. and Glenogle Energy LP.
11. *Nortel Networks Corp.*, [2010 ONSC 1304](#).
12. *Century Services Inc v Attorney General (Canada)*, [2010 SCC 60](#).
13. *Target Canada Co*, [2015 ONSC 303](#).
14. *Canwest Publishing Inc / Publications Canwest Inc Re*, [2010 ONSC 222](#).
15. *Canwest Global Communications Corp. (Re)*, [2009 CanLII 55114](#) .
16. *Performance Sports Group Ltd Re*, [2016 ONSC 6800](#).
17. *Cinram International Re*, [2012 ONSC 3767](#).
18. *Eddie Bauer of Canada Inc, Re*, [2009 CanLII 32699](#).
19. *JTI-Macdonald Corp*, [2019 ONSC 1625](#).
20. *Re Ivaco Inc.*, [2004 CanLII 34434](#).
21. *Re Brainhunter Inc*, [2009 CanLii 72333](#).
22. *Re Danier Leather Inc*, [2016 ONSC 1044](#).

23. *CCM Master Qualified Fund v blutip Power Technologies*, [2012 ONSC 1750](#).
24. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727](#).
25. *Alberta Rules of Court*, Part 6, Division 4, [AR 124/2010](#).
26. *Estate v Donovan*, [2021 SCC 25](#).