

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

BETWEEN:

**COMERICA BANK**

Applicant

- and -

**ARXX BUILDING PRODUCTS INC., ARXX CORPORATION, ARXX BUILDING  
PRODUCTS U.S.A. INC., ECB HOLDINGS, LLC, APS HOLDINGS, LLC, UNISAS  
HOLDINGS, LLC, AND ECO-BLOCK INTERNATIONAL, LLC**

Respondents

APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101  
OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED

**FACTUM OF THE RECEIVER  
(MOTION RETURNABLE DECEMBER 27, 2013)**

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Restructuring, Inc., in its capacity as  
the receiver for ARXX Building  
Products Inc., ARXX Corporation,  
ARXX Building Products U.S.A. Inc.,  
ECB Holdings, LLC, APS Holdings,  
LLC, UNISAS Holdings, LLC and  
Eco-Block International, LLC

## PART I - OVERVIEW

1. Pursuant to an order of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) made on December 9, 2013 (the “**Appointment Order**”), Duff & Phelps Canada Restructuring Inc. (“**D&P**”) was appointed receiver (in such capacity, the “**Receiver**”) of the assets, property and undertaking of each of ARXX Building Products Inc. (“**ARXX Canada**”), ARXX Building Products U.S.A. Inc. (“**ARXX USA**” and, together with ARXX Canada, “**ARXX**”), ARXX Corporation, ECB Holdings, LLC, APS Holdings, LLC, UNISAS Holdings, LLC and Eco-Block International, LLC (collectively, the “**ARXX Group**”).
2. D&P seeks an order of this Honourable Court (the “**Order**”), substantially in the form of the draft order included with the Motion Record, approving a stalking horse asset purchase agreement (the “**Stalking Horse Agreement**” or the “**APA**”), including approving certain protections granted to the stalking horse bidder pursuant to the Stalking Horse Agreement, and related bidding procedures (the “**Bidding Procedures**”) and sales process (the “**Sales Process**”).
3. The Receiver recommends issuance of the Order for the factual and legal bases set forth herein and in its motion record.

## PART II - THE FACTS

### (i) General Background

4. A detailed description of the facts relating to the ARXX Group’s corporate and capital structure, is set forth in the first report of D&P, dated December 19, 2013 (the “**First Report**”).
5. The ARXX Group is in the business of designing and marketing building products known as insulating concrete forms (“**ICF**”), which are a green, energy-efficient technology used in residential and commercial construction. The business is operated through ARXX Canada, an Ontario Corporation, and ARXX USA, a Delaware company that is a wholly-owned subsidiary of ARXX Canada. ARXX USA is entirely dependent on ARXX Canada and cannot operate on a standalone basis.

First Report, Receiver's Motion Record, Tab 2, 2.0, paras. 1, 4, 5.

6. As described in detail in the First Report, the ARXX Group's principal line of business is selling ICF. The ARXX Group purchases ICF on a "just-in-time" basis from various suppliers, and immediately sells the product to customers. The ARXX Group's business is seasonal; sales are slower in the winter when residential and commercial business slows, and increased funding is required during this time.

First Report, 2.0, paras. 2, 3.

7. ARXX currently has nine (9) Canadian employees and seven (7) U.S. employees. The ARXX Group's assets are comprised of inventory and equipment, accounts receivable, Canadian and U.S. patents for concrete form walls, Canadian, U.S. and international trademarks for "ARXX", and U.S. copyrights for "Blue Maxx-stronger, safer, superior: a product of AAB Building Systems, Inc."

First Report, 2.0, para. 6.

#### **(ii) The ARXX Group's Indebtedness**

8. The application to appoint the Receiver was brought by Comerica Bank (the "**Bank**"), the ARXX Group's principal secured creditor. The ARXX Group is indebted to the Bank in the amount of approximately US\$3.6 million, as at December 9, 2013 (excluding fees, costs and expenses), pursuant to a loan agreement dated September 24, 2010, as amended (the "**Loan Agreement**").

First Report, 3.0, para. 1.

9. The Bank has committed to fund the Company's operations until the closing of this transaction provided the Sale Process and Bidding Procedures Order are approved by this Court. To the extent required, the Receivership Order authorizes the Receiver to borrow up to \$500,000 pursuant to Receiver's Certificates. Any such advances are secured by a charge on the assets of the ARXX Group subject only to the Receiver's Charge. As at the date of this Report, the Receiver has not required any such borrowings.

First Report, 3.1, para. 3.

10. According to the ARXX Group's accounts payable listings, unsecured obligations totaled approximately \$2 million as at December 9, 2013. Trade creditors are principally comprised of inventory suppliers and freight companies.

First Report, 3.2, para. 1.

**(iii) The ARXX Group's Sale and Marketing Process**

11. The Management of ARXX began a process of identifying and soliciting potential investors in and/or purchasers of the business in September of 2013. Certain strategic parties were approached in this process, including Airlite Plastics Co. ("**Airlite**" or the "**Stalking Horse Bidder**").

First Report, 4.0, para. 1.

12. Airlite was identified in September of 2013, at which point the ARXX Group's management began to discuss the terms of a potential sale. On September 19, 2013, Airlite executed a confidentiality agreement and commenced its diligence efforts. On November 12, 2013, Airlite delivered a letter of intent, setting out the proposed terms of a purchase of the business.

First Report, 4.0, para. 2.

13. Negotiations with Airlite were ongoing at the time of the commencement of the receivership proceedings and were significantly advanced. These negotiations were continued by the Receiver immediately following the Receiver's appointment. The Receiver's objective from the outset was to negotiate an Asset Purchase Agreement with Airlite that could be used as a "stalking horse" in the Sales Process.

First Report, 4.0, paras. 3, 5.

14. At the time of its appointment, the Receiver believed there were a number of reasons to pursue completion of negotiations with Airlite and to proceed by way of a stalking horse sale process, including:

- i) negotiations with Airlite were significantly advanced;
- ii) significant value of the ARXX Group consists of its customer relationships; announcing a sale agreement at the outset of the receivership proceedings best preserves the value of the ARXX Group in the circumstances;
- iii) a stalking horse process preserves the opportunity to seek a superior bid to the Airlite APA while simultaneously avoiding the risk of expending time and resources to conduct a sale process that might prove unsuccessful; and
- iv) the Bank was supportive of proceeding in this manner.

First Report, 4.0, para. 4.

**(iv) The Stalking Horse Agreement and Sale Process**

15. A detailed summary of the material terms and conditions of the Stalking Horse Agreement and Sale Process is set forth in the First Report.

First Report, 4.0, para. 6.

16. In consideration for the Stalking Horse Bidder's expenditure of time and money, and agreement to act as the initial bidder through the Stalking Horse Agreement, the Stalking Horse Bidder will be entitled to a break fee of \$150,000 (the "**Break Fee**"), payable to Airlite on the closing of a transaction should Airlite not be the Successful Bidder. The Stalking Horse Bidder will also be entitled to an expense reimbursement for its legal and other costs incurred in connection with the Stalking Horse Bid in an amount of up to \$150,000 (the "**Expense Reimbursement**"), payable by the Receiver to the Stalking Horse Bidder only in the event that a

Successful Bid other than the Stalking Horse Bid is accepted and the transaction contemplated thereby is completed. The Break Fee and Expense Reimbursement will be payable to the Stalking Horse Bidder from the sale proceeds derived from and upon completion of a sale transaction.

Bidding Procedures.

First Report, 5.1, paras. 1, 2, 3.

17. The Bidding Procedures provide for a timeline with bids to be submitted by January 22, 2014; the Auction being on January 24, 2014; Canadian approval being sought on January 29, 2014; U.S. recognition of the Canadian sale approval order sought on January 31, 2014; and closing of a sale transaction on February 3, 2014 (with a fallback to February 10, 2014, if need be in accordance with the Stalking Horse Agreement).

Bidding Procedures, Receiver's Motion Record, Tab 3A.

18. The Receiver is of the view that the Stalking Horse Agreement with the Stalking Horse Bidder is the best available option to maximize the value to be obtained for the Purchased Assets.

First Report, 1.0, para. 3; 5.1, para. 3.

19. The Break Fee and Expense Reimbursement amount are not inconsistent with the market for transactions in this value range, and the aggregate quantum of the Break Fee and the Expense Reimbursement is unlikely to be viewed as being so large as to discourage a third party from submitting an offer that is higher than the Stalking Horse Offer.

First Report, 1.0, para. 3; 5.1, para. 3.

20. It is the Receiver's experience that Break Fees in transactions of this nature typically range from 2.5% and 4%. Based on the estimated value of the transaction contemplated by the Stalking Horse Offer, the Break Fee represents less than 4% of the value, which is consistent with market for transactions in this value range. Such a Break Fee would likely be requested by any stalking horse purchaser since, without it, a purchaser would have little incentive to act as the Stalking Horse.

First Report, 1.0, para. 3; 5.1, para. 3.

21. In respect of the Expense Reimbursement, Airlite has been performing diligence and negotiating this transaction since September, 2013. While the Expense Reimbursement as a percentage of the transaction value is at the high end of the normal range, the Receiver believes this is reasonable in the circumstances given that: (i) the transaction value is relatively low; and (ii) the amount of work to be done by a prospective stalking horse purchaser is largely unchanged irrespective of a relatively small transaction size as compared to a larger size transaction.

First Report, 1.0, para. 3; 5.1, para. 3.

22. The Sales Process will allow the business to continue to operate in the normal course while the sale of ARXX's business and assets is carried out in a stabilized environment.

First Report, 1.0, para. 3; 5.1, para. 3.

### **PART III - THE ISSUES**

23. The Receiver's request for approval of the Order raises the following issue for this Honourable Court:

- A. Should the Court approve the Sales Process, , the Bidding Procedures and the Stalking Horse Agreement, including the Break Fee and the Expense Reimbursement?

#### PART IV - LAW AND ARGUMENT

A. Approval of the Sales Process

24. Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to market the property of a debtor, which is the case under the Appointment Order.

Appointment Order, First Report, Appendix A, Subsections 4(k), 4(l).

25. Stalking horse sale transactions have been routinely approved in Canada (although many of such cases involve proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") rather than receiverships).

26. In a receivership – more so than a CCAA proceeding – it is clearly understood at the outset of the proceedings that the sale of the assets for the benefit of creditors is the principal objective of the proceedings.

27. The test when approving a receivership sale process has been considered in recent cases:

"The Ontario Superior Court of Justice approved a sales/auction process ... Justice Brown held that the reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.), specifically, when reviewing a sales and marketing process proposed by a receiver, a court should assess: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the



receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. The court approved the stalking horse agreement for the purposes requested by the receiver."

Houlden, Lloyd W. et al, *The 2013-2014 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2013), L20, citing *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), Receiver's Brief of Authorities, Tab 1.

28. As set out herein, each of the elements of this test have been met in the present case.
29. In approving the "stalking horse" agreement in *Re Nortel Networks Corp.*, for the purpose of conducting the "stalking horse" bidding process, including a break fee and expense reimbursement in favour of the "stalking horse" bidder, Justice Morawetz also took into account the fact that the proposed sales process provided for an auction to be conducted prior to the motion for approval of the sale.

*Re Nortel Networks Corp.*, (2009), O.J. No. 4286 (Ont. S.C.J. [Comm. List]), Receiver's Brief of Authorities, Tab 2, paras. 51, 58.

30. In the case of *Re Timminco and Bécancour Silicon Inc.*, Justice Morawetz approved a stalking horse agreement and related bidding procedures. In his Endorsement, Justice Morawetz held that, “I am satisfied that it is appropriate to approve the Stalking Horse agreement and the bidding procedures. Although the time lines are short, the Applicant is of the view that it will lead to a reasonable outcome. The Monitor is of the view that the bidding procedures are reasonable and appropriate in the circumstances. I am also satisfied that the payment and priority of the Expense Reimbursement in the amount of \$500,000 is reasonable in the circumstances and is approved.”

*Re Timminco and Bécancour Silicon Inc.*, Endorsement dated March 12, 2013, Court File No. CV-12-9539-00CL, Receiver’s Brief of Authorities, Tab 3.

31. Similarly, in the case of *Re Tiger Brand Knitting Co.*, Justice Campbell approved a sales process involving a stalking horse bid, holding that, “a sale rather than a restructuring of the Company was the more likely result of the ongoing effort.” In that case, a substantial portion of the CCAA debtor’s business was being sold.

*Re Tiger Brand Knitting Co.* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), Receiver’s Brief of Authorities, Tab 4, para. 10.

32. It is the Receiver’s position that the Sales Process should be approved. In the present case, the Receiver believes that it would be in the best interests of the ARXX Group and the relevant stakeholders to begin a marketing process for a potential asset sale, and to capitalize upon a prospective sale transaction with Airlite that had already been significantly advanced and negotiated at the outset of the receivership proceedings.

First Report, 6.3, para. 1.

33. The Receiver is of the view that the Stalking Horse Agreement presents the best option in the circumstances. In the Receiver's view, the Sale Process is commercially reasonable and the Bidding Procedures and Auction, if required, provide an opportunity for a result superior to the transaction contemplated by the Stalking Horse Agreement to maximize the purchase price to be obtained for the Purchased Assets.

First Report, 6.3, para. 1.

34. The Receiver is also of the view that the aggregate quantum of the Break Fee and the Expense Reimbursement Amount is reasonable in light of the amount of the proposed purchase price under the Stalking Horse Agreement and the Stalking Horse Bidder's expenditure of time and money in the preparation of the Stalking Horse Agreement and Bidding Procedures. As well, the Expense Reimbursement will only be paid from sale proceeds in circumstances where a Successful Bid (other than the Stalking Horse Bid) is accepted, and the transaction closes.

First Report, 5.1, para. 3.

35. In their article entitled, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings," Ashley Taylor and Yannick Katirai reviewed current market practices relating to stalking horse bidders. As part of this analysis, they determined the average break fees and expense reimbursements as a percentage of the size of the transaction. Taylor and Katirai found that, "[t]his data suggests that, allowing for the particular circumstances of a *CCAA* proceeding and the individual stalking horse bidder, the market will support a break fee of approximately 3.2 percent, together with a separate expense reimbursement linked to the actual out-of-pocket expenditures of the stalking horse bidder incurred in connection with the sale process of about 1.7 percent." The aggregate Break Fee and Expense Reimbursement Amount of approximately 3.75% is within the accepted range seen in Canadian proceedings to date.

Taylor, Ashley and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings," in *Journal of the Insolvency Institute of Canada*, Volume 2 (Toronto: Thomson Reuters Canada Limited, 2013), pp. 95-129, p. 111.

36. The Bidding Procedures were designed to provide a fair and efficient process to maximize the value of the Stalking Horse Assets, for the benefit of all of the ARXX Group's stakeholders.

First Report, 6.3, para. 1.

37. The Company operates in a highly competitive industry in which customers can easily transition to alternative suppliers. There is urgency to complete a transaction in order to preserve the Company's customer base, being the principal asset that Airlite is acquiring. In this regard, Airlite has advised that it is not prepared to act as a stalking horse bidder should the Sales Process be prolonged.

First Report, 6.3, para. 1.

38. Moreover, given that the winter is the slower season, the ARXX Group is projected to generate operating losses during the receivership period. The Bank has agreed to fund these losses for a limited period of time provided the proposed Order is granted. The losses and erosion to the Bank's collateral are projected to continue into February, 2014, and, accordingly, it is critical for the transaction to close expeditiously in order for the Receiver to maximize value.

First Report, 6.3, para. 1.

39. The existence of a "stalking horse" offer will assist to create certainty for all stakeholders (employees, customers and vendors) to understand that the Company's business will continue to operate as a going concern. Absent the completion of the transaction contemplated by the

Stalking Horse Offer or a superior transaction that may result from the Sale Process, the Receiver will not have access to funding, in which case the Company's operations would be discontinued.

First Report, 6.3, para. 1.

40. The Receiver will return to Court to seek approval of the highest and/or best bid to emerge from the auction process, and will aim to establish the requirements established by the Court for such approval. The ARXX Group's creditors are not prejudiced by the sales process, and retain their rights to raise any concerns over, or objections to, a proposed sale, during the course of any motion to approve an asset sale. The Bank is the principal economic stakeholder in these proceedings and has consented to the Sales Process, Stalking Horse Offer and Bidding Procedures.

First Report, 6.3, para. 1.

41. In the view of the Receiver, the Bidding Procedures and the Stalking Horse Agreement represent the best option in the circumstances to maximize the benefit to stakeholders of ARXX Canada.

#### **PART V - ORDER REQUESTED**

42. For the reasons set forth herein and in the Report, the Receiver respectfully requests the granting of the Order in the form contained in the Receiver's motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of December, 2013.



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**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]).
2. *Nortel Networks Corp., Re*, (2009), 56 C.B.R. (5th) 224, 2009 CarswellOnt 4338 (Ont.Sup. Ct. J.) [Commercial List].
3. *Re Tiger Brand Knitting Co.* (2005), 9 C.B.R. (5th) 315 (Ont. Sup. Ct. J.).
4. *Re Timminco and Bécancour Silicon Inc.*, Endorsement dated March 12, 2013, (Ont. Sup. Ct. J.) [Commercial List], Court File No. CV-12-9539-00CL.
5. Taylor, Ashley and Yannick Katirai, "An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings," in *Journal of the Insolvency Institute of Canada*, Volume 2 (Toronto: Thomson Reuters Canada Limited, 2013), pp. 95-129.

**SCHEDULE "B"**  
**RELEVANT STATUTES**

1. *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3), s. 243

**Court may appoint receiver**

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

**Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

**Definition of "receiver"**

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.



**Definition of “receiver” — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of “disbursements”**

(7) In subsection (6), “disbursements” does not include payments made in the operation of a business of the insolvent person or bankrupt.

2. *Courts of Justice Act*, R.S.O. 1990, c. C-43, ss. 100, 101.

**Vesting orders**

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**Injunctions and receivers**

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

COMERICA BANK

and

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BLOCK INTERNATIONAL, LLC  
RESPONDENTS

Court File No. CV-13-10353-00CL

APPLICANT

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

Proceedings commenced in Toronto

**FACTUM  
(STALKING HORSE SALES PROCESS)**

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