Clerk's stamp:

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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF CANADIAN OVERSEAS PETROLEUM LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A"
DOCUMENT	**BENCH BRIEF OF BP ENERGY COMPANY**
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I. INTRODUCTION

1. This Bench Brief is submitted by BP Energy Company ("**BP**"), in response to the application of Canadian Overseas Petroleum Limited ("**COPL**", and entities joined in the within proceedings, collectively hereafter the "**Debtors**") seeking an Approval and Vesting Order (the "**Proposed AVO**") with respect to the Stalking Horse Purchase Agreement (as defined below).

2. The relief sought by the Debtors is unsupportable at law. It is specifically prejudicial to BP and seeks to sanction a preference of one creditor over another of equivalent seniority. The Proposed AVO fails to meet the requirements of the *Companies' Creditors Arrangement Act* (the "**CCAA**"), and further fails to meet the criteria for the extinguishment of third party interests.

II. FACTS

3. The material facts are not in dispute.

4. The first lien lender group (referred to herein as the "**Summit Parties**") are parties with BP to an Intercreditor Agreement.

5. The Summit Parties are owed approximately $44 MM (USD) under their loan facility (the "**Summit Loan Indebtedness**").

6. BP is owed approximately $11 MM (USD) as a result of terminated swap agreements (the "**BP Indebtedness**").

7. By virtue of an Intercreditor Agreement, BP and the Summit Parties (together, the "**Senior Creditors**") are *pari passu*, senior secured creditors of COPL with shared collateral.

8. The Summit Parties have additionally advanced $11 MM (USD) to COPL for interim financing under a DIP facility (the "**Summit DIP**").

9. The Summit DIP is secured by a super-priority charge, ahead of the Senior Creditors.

10. The Summit Parties (or some combination of them) have entered a stalking horse purchase and sale agreement with COPL (the "**Stalking Horse Purchase Agreement**").

11. The Summit Parties can credit bid the Summit DIP amount, as it sits in first priority. The Summit Parties cannot credit bid the Summit Loan Indebtedness, as it is not a priority debt ahead of BP. The Summit Parties propose to have the stalking horse assume the Summit Loan Indebtedness, rather than pay it out, as this would allow it to avoid its *pari passu* obligation and effectively reorder the priorities among creditors.

12. The effect is the same, however it is structured: the full amount of the Summit Loan Indebtedness is preserved, while the BP Indebtedness is extinguished.

13. This follows a sale process ("**SISP**"), in which the stalking horse offer made by the Summit Parties was marketed. The baseline price for the stalking horse was the full amount of the Summit Loan Indebtedness, plus the Summit DIP. Accordingly, a qualified bid would only be achieved if better than approximately $55 MM (USD), plus the necessary bid increment to cover bid protections.

14. If a qualified bid had been received, the proceeds would have to be shared among the Summit Parties and BP on a *pari passu* basis. By contrast, if no qualified bids are received, the Summit Parties would receive 100% recovery, by virtue of the assumption of its debt under the Proposed AVO. The Summit Parties accordingly benefit from reduced competition in the SISP, as any competing offer, unless sufficient to fully repay both Senior Creditors, would actually worsen the Summit Parties' position.

15. As no qualified submissions were received by the first deadline in the SISP, COPL has applied for approval of the Proposed AVO.

16. If approved, this will result in 100% recoveries to the Summit Parties, and nil recoveries to BP, despite the Senior Creditors ranking equally as the fulcrum creditors.

17. This outcome is specifically contrary to the Senior Creditors' existing priority rights, reorders the priorities (accelerating the Summit Loan Indebtedness ahead of BP), sanctions a preference, and is contrary to the legislated (and conventional) requirement that proceeds of sale, under a vesting order, must be applied in priority fashion against the debts under the security that is discharged.

III. ISSUES

18. Should the Proposed AVO be approved?

19. It is submitted the Proposed AVO fails to meet the applicable statutory and common law requirements for a vesting order, particularly in view of the attempted extinguishment of BP's senior creditor position.

20. The requested relief must be refused, and COPL may pursue various reasonable alternatives in its restructuring path.

IV. LAW AND ARGUMENT

A. Statutory Requirements

21. The authority for the applicants to seek a vesting order is found under section 36 of the CCAA.

22. Section 36(1) allows the Court to authorize sale or disposition of assets outside of ordinary course.

***Companies Creditors Arrangement Act*, RSC, 1985, c C-36, subsection 36(1) [CCAA]; [TAB 1].**

23. Section 36(3) provides a list of non-exhaustive factors for consideration in approving an extraordinary disposition, including:

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

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

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

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

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

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

CCAA, subsection 36(3), with emphasis.

24. The Court accordingly must consider: was the process reasonable? What is its effect?

25. Section 36(6) provides the authority for this Court to vest the assets. There is a very clear proviso:

> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

CCAA, subsection 36(6), with emphasis.

26. The legislation is clear – to obtain a vesting order, upon sale of all of the assets of the company, the proceeds must stand in place and stead of the assets. The security that is vested off the assets must attach to the proceeds *with equivalent priority*. This paradigm is absolutely standard in sale approval and vesting orders.

27. What the Debtors propose is for the assets to be vested, but the proceeds to be directed to a singular creditor. This is a cashless offer, but a no cash offer only works if it is a true credit bid. This is because there is no abuse of section 36(6), if the priority creditor is paying down its own debt by way of the credit bid. For that to work, the credit-bidder must have first priority. If it does not, it must assume or payout those liabilities that rank at or above the credit-bidder's position.

28. Put more simply, the security of both BP and the Summit Lenders will be vested off the assets, but only the Summit Lenders will receive any portion of the $55MM (USD) consideration. This is specifically contrary to the legislation.

B. Common Law Requirements

29. Any sale process must be assessed with retrospective view to the *Soundair* factors:

(a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;

(b) whether the interests of all parties have been considered;

(c) the efficacy and integrity of the process by which offers have been obtained; and

(d) whether there has been unfairness in the working out of the process.

***Royal Bank v. Soundair Corp.*, (1991), 4 OR (3d) 1 (CA), at para 16 [*Soundair*]; [TAB 2].**

30. Additional factors, when seeking to extinguish third party interests, were set out in *Third Eye Capital Corporation v Dianor Resources Inc.* The Ontario Court of Appeal described the "rigorous cascade analysis":

(a) first, the nature and strength of the interest that is proposed to be extinguished;

(b) second, whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency; and

(c) third, if the first two steps proved to be ambiguous or inconclusive, a consideration of the equities to determine if a vesting order is appropriate in the circumstances.

***Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 at para 102-110 [*Third Eye*]; [TAB 3].**

31. The factors set out in *Soundair* and *Third Eye* are applicable in any CCAA sale process where the applicant seeks a vesting order. This was confirmed and the factors were recently applied in the CCAA proceedings of CannaPiece Group, wherein the Court refused to grant a vesting order, on facts similar to the case at bar.

***In the Matter of CannaPiece Group Inc*, 2023 ONSC 841 [*CannaPiece*]; [TAB 4].**

32. In *CannaPiece*, between two senior secured creditors, one party would have acquired the assets and assumed its own debt, and the other would have had its rights extinguished. The Court refused the order.

33. The *Soundair* factors are applied to the application of COPL, as follows:

Sufficient effort and a provident process

(a) The efforts to market the COPL assets were focused on a defined pool of recipients. A press release was issued, but not a solicitation. No general solicitation was made through relevant industry publications, so the entirety of the marketing pool was limited to the targeted recipients.

(b) The solicitation period was very short. This is not uncommon in CCAA proceedings, due to prevailing constraints, but the fact it's common, to run shorter processes, does not reduce the importance of ensuring effectiveness. In this case, interested parties were afforded very little time to discover and assess a complex operational package, with a notional floor value exceeding $55MM.

(c) BP was advised by at least one potential purchaser that he made inquiries within the solicitation period and received no response.

(d) As discussed below, the stalking horse bid created a high bar to entry for other potential bidders, to the sole advantage of the Summit Parties. This created singular advantage to one creditor (rather than any advantage to the estate and stakeholders), while simultaneously quelling potential bid activity.

Whether the interests of all parties were considered

(e) It is evident the interests of BP have not been considered. BP's legal interests are equivalent to the Summit Parties, but its treatment is opposite. It is assumed by the applicants that BP's rights under the Intercreditor Agreement can simply be disregarded, though no legal premise has been provided to support this.

Efficacy and integrity of the process

(f) If the stalking horse bid were a true credit bid, it would have to be limited to the amount of the Summit DIP; that is the extent of the priority amount. The bid floor would be $11MM (USD) and any proceeds in excess of that amount would be pro-rated among BP and the Summit Parties.

(g) Setting the bid floor higher reduces competition from other prospective buyers. This is fine, if it means more proceeds for the debtor's estate, for distribution to stakeholders.

(h) In this case, the high bid threshold has been disconnected from the consideration actually flowing to the debtors' estate. This disconnect undermines the integrity of the sale process – bidders are dissuaded from participating in the process, and at the same time there are no proceeds to mitigate the suppressed purchaser participation.

Unfairness in the working out of the process

(i) There is an inherent conflict highlighted above, where the stalking horse bidder has had the advantage of reduced competition against its bid, which bid provides for 100% recoveries contrary to its *pari passu* obligations. This conflict is contrary to the spirit and purpose of a stalking horse.

(j) In other words, the process has not worked to maximum benefit of creditors that comprise the. Instead, it has depressed bid activity and split the fulcrum claims, creating a preference.

(k) The Court cannot reorder legal priorities. To allow the Summit Parties to lift their pre-filing debt to a priority position ahead of other existing claims is akin to a rollup, which is prohibited by section 11.2 of the CCAA. The parties have structured this arrangement to try to avoid a rollup, but the practical effect of this transaction is the same.

(l) In *Re Medipure Pharmaceuticals Inc.,* the Court reviewed recent Canadian jurisprudence with respect to full and partial rollups:

> It is clear that take-out or roll-up DIP, even facilitated new money advanced under the DIP, in contrast to creeping DIP, is prohibited by s. 11.2(1) of the CCAA.

***Medipure Pharmaceuticals Inc. (Re*), 2022 BCSC 177, at para 60 [*Medipure*]; [TAB 6].**

(m) The purpose behind the prohibition is that the rollup is to the prejudice of other creditors, and does not benefit the debtor:

> An important protection under subsection 11.2(1) is the prevention of the interim financing charge from securing pre-filing obligations because partial "roll up" provisions prejudice other creditors and do not benefit the debtor.

***Medipure,* at para 49.**

(n) The reordering of priorities in insolvency proceedings has long been repugnant. This is not just the reordering of priorities under the *Bankruptcy and Insolvency Act*. As stated by Honourable Justice Morawetz, in *Re Windsor Machine & Stamping Limited*:

> There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors.

***Windsor Machine & Stamping Limited (Re),* 2009 CanLII 3977, at para 43; [TAB 7].**

(o) The stalking horse process has accordingly resulted in an unfairness that cannot now be sanctioned.

34. Turning to the *Third Eye* factors:

The nature and strength of the interest that is proposed to be extinguished

35. A security interest, particularly a first position security interest, is significant. This was stated in *CannaPiece*, and bears no exception. There is essentially no greater interest at stake in a CCAA restructuring, when the secured creditor constitutes the fulcrum.

36. The Court in *CannaPiece* also confirmed the *Third Eye* factors are not limited only to extinguishment of interests in land.

Does the interest holder consent to being extinguished, in past or present terms

37. BP does not and would not consent to an arrangement that will see the Summit Parties fully repaid, yet BP receive nothing for its security.

If the matter remains inconclusive, consideration of the equities, to determine if a vesting order is appropriate in the circumstances

38. It is submitted the first two factors of the *Third Eye* test are conclusive.

39. In any case, the considerations to be made, with respect to this third factor, were summarized in *CannaPiece* as follows:

> A consideration of the equities contemplated in the third step includes consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition are sale [*sic*]; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith.

***CannaPiece,* at para 56.**

40. The equities lie with BP in this case. It is being specifically prejudiced. There are no proceeds of sale or disposition, which would normally stand in place and stead of the property to mitigate the secured creditor's loss. It bears repeating, this is the prescribed requirement in section 36(6) of the CCAA, and it is absent in this application.

41. In consideration of the equities, it will be argued that the stalking horse agreement must be approved, for the benefit of all stakeholders. It will be argued that the worse alternative is a bankruptcy or receivership.

42. It is submitted that the Court must be very cautious in weighing projections and hypotheticals as against actual, quantifiable prejudice.

43. In *CannaPiece*, the Court rejected the applicant's submission that the only other alternative would be a bankruptcy.

***CannaPiece*, at para 99.**

44. In the present case, if the Proposed AVO is rejected:

(a) the SISP could be extended;

(b) that could be with or without a stalking horse credit bid, limited to the Summit DIP;

(c) the Senior Creditors could negotiate an arrangement – in *CannaPiece*, after the first rejection, the parties returned to the Court within a week for approval of a negotiated transaction, with the consent of both senior secured creditors;

***CannaPiece Group Inc v Marzilli,* 2023 ONSC 3291 [TAB 5]**

(d) the Debtors may be petitioned into receivership;

(e) therein the Debtors may be continued as a going concern and/or the subject of a sale process;

(f) the Debtors may go into bankruptcy.

V. CONCLUSION

45. The Proposed AVO fails to meet statutory requirements for approval. It must be rejected. It is specifically contrary to the express terms of section 36(6) of the CCAA, and in practical effect creates a rollup (and acceleration of priority) contrary to section 11.2 of the CCAA.

46. In addition, the Proposed AVO fails the common law tests. Review of the *Soundair* factors confirms the sale process was flawed. The entry point for bidders exceeded $55MM (USD), but there was no corresponding benefit to the affected stakeholders. The process stifled participation, but failed to deliver any consideration back to BP. This is specifically prejudicial.

47. There is no basis at law for the applicants to extinguish BP's rights. By contrast, should the Proposed AVO be rejected, there are various reasonable alternatives that can and should be pursued. This includes extending the going concern, preserving employment and enterprise.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd DAY OF APRIL, 2024.

DENTONS CANADA LLP, counsel for BP Energy Company

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Per: _____
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Derek Pontin

SCHEDULE "A"

1. Canadian Overseas Petroleum Limited
2. COPL America Holding Inc.
3. COPL America Inc.
4. Canadian Overseas Petroleum (UK) Limited
5. Canadian Overseas Petroleum (Ontario) Limited
6. COPL Technical Services Limited
7. Canadian Overseas Petroleum (Bermuda Holdings) Limited
8. Canadian Overseas Petroleum (Bermuda) Limited
9. Southwestern Production Corporation
10. Atomic Oil and Gas LLC
11. Pipeco LLC

TABLE OF AUTHORITIES