Court File No. CV-18-594380-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THE 24th DAY
	)	OF JULY, 2018
JUSTICE HAINEY	)	

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 OR COMPROMISE OR ARRANGEMENT OF DISCOVERY AIR INC.

Applicant

ORDER

THIS MOTION, made by the Ad Hoc Committee (the "**Ad Hoc Committee**") of Holders of 8.375% Unsecured Debentures issued by the Applicant, Discovery Air Inc. ("**Discovery**"), pursuant to the Convertible Debenture Indenture dated May 12, 2011, amended November 27, 2014 (the "**Debentures**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), for an order granting them leave to issue an Application for a Bankruptcy Order pursuant to the *Bankruptcy and Insolvency Act,* R.S.C. 1985, C-B3, as amended ("**BIA**"), and to issue and serve a Statement of Claim, both as against Discovery, together with related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Ad Hoc Committee, the Affidavit of Stephen Campbell, sworn April 3, 2018, including the exhibits thereto, and on hearing

the submissions of counsel for the Ad Hoc Committee, counsel to the Monitor, counsel to Discovery, and the other parties,

1. THIS COURT ORDERS that the time for and manner of service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. THIS COURT ORDERS that the stay of proceedings imposed by the Initial Order in these proceedings, dated March 21, 2018, as it may be extended from time to time, shall not apply with respect to the following:

(a) the issuance and service of an Application for a Bankruptcy Order, and any supporting affidavit or other documents, as against Discovery pursuant to the BIA, substantially in the form attached as **Appendix "A"** ("**Bankruptcy Application**"); and

(b) the issuance of a Statement of Claim by the Ad Hoc Committee, or by their counsel or other lawful representatives, as against Discovery, substantially in the form attached as **Appendix "B"**, subject to revisions and/or amendments as necessary or advisable ("**Oppression Action**").

3. THIS COURT ORDERS AND DECLARES that for the purpose of service of the Bankruptcy Application, counsel of record for Discovery in these proceedings ("**Discovery Counsel**") is an agent of Discovery, and valid and effective personal service of the Bankruptcy Application may be made by leaving a copy of the document with said counsel, and nothing herein shall constitute Discovery Counsel as solicitors of

record for Discovery in respect of the proceedings commenced by the Bankruptcy Application.

4. THIS COURT ORDERS that the Bankruptcy Application shall be returnable to a judge of this Court on the day of the filing of the Monitor's certificate confirming the termination of these proceedings, at 9:30 a.m. or at such later time that day as the Bankruptcy Application may be heard, and no further step shall be taken with respect to the Bankruptcy Application in the interim without leave of the Court.

5. THIS COURT ORDERS that prior to filing of the Monitor's certificate confirming the termination of these proceedings, the Statement of Claim in the Oppression Action shall not be served on the defendants, except with leave of the Court.

Hainey J.

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APPENDIX "A"

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

IN THE MATTER OF THE BANKRUPTCY OF
DISCOVERY AIR INC.
of the City of Toronto, in the Province of Ontario

APPLICATION FOR BANKRUPTCY ORDER

Stephen Campbell (the "Petitioner"), hereby makes an application to the Court that Discovery Air Inc. (the "Respondent") be adjudged bankrupt and that a bankruptcy order be made in respect of the property of the Respondent of the City of Toronto in the Province of Ontario, carrying on business at 170 Attwell Drive, Suite 370, Etobicoke, Ontario, and says:

1. That the Respondent is an insolvent person within the meaning of the *Bankruptcy and Insolvency Act* (Canada) and has at some time during the six months next preceding the filing of this application carried on business in the City of Toronto in the Province of Ontario within the jurisdiction of this Court.

2. That the Respondent is justly and truly indebted to the Petitioner in respect of 8.375% subordinated unsecured convertible debentures issued by the Respondent having a face value of $242,000, and interest and costs continuing to accrue.

3. That the Petitioner does not, nor does any person on his behalf, hold any security on the said Respondent's property, or on any part thereof, for the payment of the said sum.

4. That the Respondent did, within the six months next preceding the date of the filing of this application, commit the following act of bankruptcy, namely it has:

   a. given notice to its creditors that it has suspended, or that it is about to suspend, payment of its debts; and
   b. ceased to meet its liabilities generally as they have become due in that it has failed to meet its obligations to the Petitioner and to other creditors.

5. That A. Farber & Partners Inc., of the City of Toronto, is qualified to act as trustee of the property of the said debtor, and has agreed to act as such. and is acceptable to the undermentioned creditors:

Creditor	Address	Amount of Debt
Stephen Campbell	5544 Whitewood Avenue, Manotick, Ontario K4M1C7	$242,000
Pamela Campbell	5544 Whitewood Avenue, Manotick, Ontario K4M1C7	$131,000
Lindsay Campbell	5544 Whitewood Avenue, Manotick, Ontario K4M1C7	$46,000
Gail Pepler	1125 Currier Street, Manotick, Ontario K4M 1A3	$165,000

Dated at the City of Toronto this 18th day of June, 2018.

SIGNED by the Petitioner in my presence

STEPHEN CAMPBELL

(*Signature of witness*)

Issued at the City of Toronto, in the Province of Ontario, this ..... day of June, 2018.

_____

Registrar in Bankruptcy

Appendix "B"

Court File No.: »

ONTARIO
SUPERIOR COURT OF JUSTICE

[Commercial List]

B E T W E E N :

STEPHEN CAMPBELL

Plaintiff

- and -

CLAIRVEST GROUP INC., DISCOVERY AIR INC., TOP ACES INC., TOP ACES HOLDINGS INC., KENNETH ROTMAN, ADRIAN PASRICHA, ROD PHILLIPS, MICHAEL M. GRASTY, G. JOHN KREDIET, MICHAEL MULLEN, ALAIN BENEDETTI, THOMAS HICKEY, PAUL BERNARDS, ALAN TORRIE, and JACOB SHAVIT.

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This

will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: [•] , 2018 Issued by

Local registrar

Address of court office: Superior Court of Justice
361 University Avenue
Toronto, Ontario M5G 1T3

TO: **Clairvest Group Inc.**
22 St. Clair Avenue East, Suite 1700
Toronto, ON, M4T 2S3

AND TO: **Discovery Air Inc.**
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

AND TO: **Top Aces Inc.**
1675 Trans Canada, Suite 201
Dorval, Quebec, Canada
H9P 1J1

AND TO: **Top Aces Holdings Inc.**
c/o Clairvest Group Inc.
22 St. Clair Avenue East, Suite 1700
Toronto, ON, M4T 2S3

AND TO: **Kenneth Rotman**
c/o Clairvest Group Inc.
22 St. Clair Avenue East, Suite 1700
Toronto, ON, M4T 2S3

AND TO: **Adrian Pasricha**
c/o Clairvest Group Inc.

22 St. Clair Avenue East, Suite 1700
Toronto, ON, M4T 2S3

AND TO: **G. John Krediet**
c/o Clairvest Group Inc.
22 St. Clair Avenue East, Suite 1700
Toronto, ON, M4T 2S3

AND TO: **Rod Phillips**
c/o Top Aces Inc.
1675 Trans Canada, Suite 201
Dorval, Quebec, Canada
H9P 1J1

AND TO: **Michael Grasty**
c/o Discovery Air Inc.
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

AND TO: **Michael Mullen**
c/o Top Aces Inc.
1675 Trans Canada, Suite 201
Dorval, Quebec, Canada
H9P 1J1

AND TO: **Alain Benedetti**
c/o Discovery Air Inc.
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

AND TO: **Thomas Hickey**
c/o Discovery Air Inc.
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

AND TO: **Alan Torrie**
c/o Discovery Air Inc.
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

AND TO: **Jacob Shavit**
c/o Discovery Air Inc.
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

AND TO: **Paul Bernards**

c/o Discovery Air Inc.
170 Attwell Drive, Suite 370
Etobicoke, ON, M9W 5Z5

I. DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

(a) **"*CBCA*"** means the *Canada Business Corporations Act*, RSC, 1985, c C-44, as amended;

(b) **"*CCAA*"** means the *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, as amended;

(c) **"Clairvest"** means Clairvest Group Inc. and/or its affiliates, including certain funds managed by Clairvest Group Inc.;

(d) **"Conversion Agreements"** means the December 2016 Credit Agreement, the June 2017 Credit Agreement, and the June 2017 Swap Agreement;

(e) **"Debentures"** means the 8.375% convertible unsecured subordinated debentures of Discovery, issued pursuant to the Indenture;

(f) **"Debentureholder"** means a person or entity that holds Debentures;

(g) **"December 2016 Credit Agreement"** means the December 20, 2016 Credit Agreement between Clairvest, G. John Krediet, and Top Aces;

(h) **"Defendants"** means, collectively, Clairvest, Discovery, Top Aces, the Individual Defendants, and, when referring to time periods following December 14, 2017, includes Top Aces Holdco;

(i) **"Discovery"** means Discovery Air Inc.;

(j) **"Indenture"** means the Convertible Debenture Indenture dated May 12, 2011, together with the First Supplemental Convertible Indenture dated November 27, 2014, between Discovery and Computershare Trust Company of Canada;

(k) "**Individual Defendants**" means, collectively Kenneth Rotman, Adrian Pasricha, Rod Phillips, Michael Grasty, G. John Krediet, Michael Mullen, Alain Benedetti, Thomas Hickey, Alan Torrie, Jacob Shavit, and Paul Bernards;

(l) **"June 2017 Credit Agreement"** means the June 5, 2017 Subordinated Credit Agreement between Clairvest and Top Aces;

(m) **"June 2017 Swap Agreement"** means the June 5, 2017 letter agreement between Clairvest, G. John Krediet, and Discovery;

(n) **"MI 61-101"** means Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*;

(o) **"Top Aces"** means the company known as

(i) Top Aces Inc. (before February 1, 2013 and after January 31, 2018); and

(ii) Discovery Air Defense Services Inc. (between February 1, 2013 and January 31, 2018);

(p) **"Top Aces Holdco"** means Top Aces Holdings, Inc.; and

(q) **"TSX"** means the Toronto Stock Exchange.

2. Unless otherwise stated, all dollar amounts stated herein are in Canadian dollars.

II. CLAIM

3. The plaintiff, on his own behalf and on behalf of the Debentureholders, claims

(a) a declaration that:

(i) the acts or omissions of Clairvest, Discovery, and Top Aces have effected a result;

(ii) the business and affairs of Clairvest, Discovery, and Top Aces have been carried on or conducted in a manner; and,

(iii) the powers of the Individual Defendants have been exercised in a manner;

that is or has been oppressive or unfairly prejudicial to or that unfairly disregards or disregarded the interests of the plaintiff and Debentureholders, as contemplated by s. 241 of the *CBCA*;

(b) an order directing that the Defendants or any of them pay to the plaintiff and Debentureholders the amount of $35.9 million, or such other amount as the Court may determine;

(c) punitive damages in the amount of $20 million or such other amount as the Court may order;

(d) costs of this action on a full or substantial indemnity basis;

(e) pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*, RSO 1990 c C. 43;

(f) such further and other relief as this Honourable Court may deem just.

III. THE PARTIES

Plaintiff

4. Stephen Campbell is an individual Debentureholder residing in Ontario.

Defendants

5. Discovery is a *CBCA* corporation that provided aviation services through its wholly owned subsidiaries. Prior to being delisted pursuant to a going-private transaction on May 29, 2017, Discovery's shares were listed for trading on the TSX. Following the privatization, Discovery's shares were owned 95.5% by Clairvest

(including shares held by the defendant G. John Krediet) and 4.5% by current and former management of Discovery.

6. Clairvest is a private equity management firm in Toronto, Ontario, with approximately $1.7 billion equity capital under management. It has significant investments in the gaming and waste industries. At all material times, representatives of Clairvest were members of and exercised control over Discovery's board of directors.

7. Top Aces is a *CBCA* corporation that provides military airborne training services. Between August 27, 2007 and December 14, 2017, it was a wholly owned subsidiary of Discovery. Following that date, it became a wholly-owned subsidiary of Top Aces Holdco.

8. Top Aces Holdco was incorporated pursuant to the *CBCA* in December 2017 as a holding company for 100% of Top Aces shares. The shares of Top Aces Holdco are currently held by a small group of investors, the majority of which are owned by Clairvest.

9. Discovery, Clairvest, Top Aces, and Top Aces Holdco are affiliates as defined in the *CBCA*.

10. Kenneth Rotman has been a director of Discovery since October 14, 2011, and Chairman of Discovery's board of directors since July 3, 2014. Mr. Rotman resides in Ontario.

11. Mr. Rotman has been a director of Clairvest since 2000 and its Chief Executive Officer (**"CEO"**) since January 1, 2018. Prior to becoming the CEO, he held the position of Clairvest's Co-CEO since 2000. Mr. Rotman controls approximately 50% or more of Clairvest's voting shares.

12. Adrian Pasricha has been a director of Discovery since June 26, 2014, and a principal of Clairvest since 2010. Mr. Pasricha resides in Ontario.

13. G. John Krediet has been a director of Discovery since October 14, 2011, and a director of Clairvest since 2004. Mr. Krediet resides in the Netherlands.

14. Paul Bernards has been the Chief Financial Officer of Discovery since April 1, 2014. Mr. Bernards resides in Ontario.

15. Thomas Andrew Hickey has been a director of Discovery since January 25, 2017. Mr. Hickey resides in Ontario.

16. Michael Mullen was a director of Discovery from May 9, 2014 to December 29, 2017. He is currently serving as a director of Top Aces. Mr. Mullen resides in Maryland, in the United States of America.

17. Michael Grasty has been a director of Discovery since July 8, 2013. Mr. Grasty resides in Chile.

18. Alain Benedetti was a director of Discovery from June 26, 2014 to May 1, 2017. Mr. Benedetti resides in Quebec.

19. Rod Phillips was a director of Discovery from June 26, 2014 to December 29, 2017. He is currently serving as a director of Top Aces. Mr. Phillips resides in Ontario.

20. Alan Torrie has been Chief Executive Officer of Discovery since August 29, 2017. Mr. Torrie resides in Ontario.

21. Jacob Shavit was President and Chief Executive Officer of Discovery from November 28, 2012 to August 29, 2017. Mr. Shavit resides in New York, in the United States of America.

IV. THE DEFENDANTS' OPPRESSIVE CONDUCT

A. Overview

22. The plaintiff and other Debentureholders seek a remedy for the oppressive conduct of the Defendants, which resulted in the loss of the $34.5 million plus accrued interest owing to them under the Debentures.

23. Discovery's common shares were listed for trading on the TSX until May 2017, when an investor group led by Clairvest, Discovery's long-time controlling shareholder,

took the company private. The Debentures continued to be listed on the TSX and became the only publicly-traded securities of Discovery.

24. Discovery conducted operations through a number of wholly-owned subsidiaries, the crown jewel of which was Top Aces. Top Aces has long been Discovery's most valuable subsidiary with the greatest growth potential. Its principal business is providing airborne training services to militaries. It is the primary supplier of contracted airborne training services to the Canadian Department of National Defence, the German Armed Forces, and the Australian Defense Force.

25. Since 2005, Top Aces has derived its revenue from interim contracts and "standing offers" to provide services at pre-arranged prices when and if required. In 2005, Top Aces received its first Interim Contracted Airborne Training Services contract with the Canadian government.

26. In August 2015, the Canadian Department of National Defence requested proposals for the long-term Contracted Airborne Training Services ("**CATS**") contract, valued at $1.5 billion over ten years. Top Aces had a significant advantage over its competitors and was widely expected to win the bid process. Indeed, the Defendants knew that Top Aces was the leading bidder for the contract, and, subject to formal inspection and certain other requirements, that Top Aces would be formally awarded the CATS contract at some time in 2017.

27. In addition, in the fall of 2016, demand for military air training services was growing rapidly. As a leader in providing contract aggressor training, Top Aces was positioned to win a large and profitable portion of international government contracts worth billions of dollars that were set to be announced in the coming few years.

28. Top Aces' positioning in this booming industry should have been a positive development for Discovery. Top Aces' excellent prospects could be monetized in any number of ways to ensure Discovery's financial stability and enable Discovery to meet its obligations to its creditors. Among those obligations was the $34.5 million plus

interest owing on the Debentures, which would mature in June 2018. Top Aces' success ensured that Discovery would be able to make those payments.

29. Clairvest and the Individual Defendants, however, were motivated to enrich Clairvest rather than act in Discovery's best interest. As Discovery's majority owner, Clairvest's own profits would be maximized if Discovery could avoid paying back the debt owed to the Debentureholders. Simply failing to make those payments, however, could allow the Debentureholders to exercise their rights in a way that could jeopardize Clairvest's ownership interests in Discovery and its assets, including Top Aces.

30. Therefore, sometime during the last quarter of 2016, Clairvest and the Individual Defendants developed a scheme for Discovery to avoid its $34.5 million obligation to the Debentureholders, while protecting Clairvest's own interests in Top Aces and Discovery's other assets. To do this, Clairvest had to ensure that Discovery's assets would not be available to the Debentureholders through an eventual insolvency or bankruptcy.

31. Clairvest accomplished this through a series of transactions which transferred the majority of Top Aces' shares from Discovery to Clairvest at a drastic discount, leaving Discovery in a cash-poor position. These transactions set the stage for Discovery's carefully planned and structured insolvency proceedings, during which Clairvest was able to use its position as Discovery's largest secured creditor to acquire Discovery's remaining assets, leaving the Debentureholders with nothing.

32. Clairvest could not have effected a direct transfer of Top Aces from Discovery to Clairvest for pennies on the dollar without running afoul of Ontario's rules and regulations. These rules and regulations required, among other things, a formal valuation of Top Aces to ensure the fairness of the transaction.

33. The Defendants therefore went to great lengths to design a series of transactions that would avoid regulatory scrutiny, including the provisions of MI 61-101, which are designed to protect the interests of minority stakeholders in related-party transactions.

34. First, the Defendants disguised the transfer of Top Aces shares as "conversion options" pursuant to a series of three agreements (the Conversion Agreements, described below). The mechanics of the conversion price were not disclosed; however, they were based on an undisclosed and flawed valuation of Top Aces, which would allow Clairvest to later acquire Top Aces' shares for a fraction of their true value.

35. Second, between the signing of these agreements, Clairvest and the Individual Defendants caused Discovery to go private in order to qualify for an exemption from obtaining a formal valuation of Top Aces under MI 61-101.

36. Third, in December 2017, after announcing that Top Aces had been formally awarded the CATS contract, Clairvest exercised the conversion options to acquire 74% of Top Aces shares at a substantial discount.

37. Fourth, the Defendants caused additional Top Aces shares to be sold to a third party investor group led by JP Morgan Asset Management ("**JP Morgan Group**") at a significantly higher price than the price at which Clairvest acquired those shares.

38. Lastly, Clairvest and the Individual Defendants caused Discovery to enter insolvency proceedings, but not before using the money from the JP Morgan Group to cause Discovery to make an approximately $25 million payment to Clairvest on debt that had not yet matured.

39. As a result of the Defendants' oppressive conduct, the Debentureholders lost the entirety of the funds owing under the Debentures. Had Discovery maintained ownership of Top Aces, received a fair price for any transfer of Top Aces shares, and/or refrained from pre-paying debt owing to Clairvest, the Debentureholders would have received the payment of the principal and interest on the Debentures.

40. The Defendants' conduct has oppressed, unfairly prejudiced, and unfairly disregarded the interests of the plaintiff and Debentureholders, who have been damaged thereby.

B. The Debentures

41. The Debentures were issued by Discovery in May 2011 in the aggregate principal amount of $34.5 million. They accrue interest at a rate of 8.375% per annum, payable on a semi-annual basis, and matured on June 30, 2018.

42. The Indenture contains the following covenants, among others, which apply to both Discovery and its subsidiaries:

> **7.3 To Give Notice of Default**
>
> The Corporation shall notify the Trustee immediately upon obtaining knowledge of any Event of Default hereunder.
>
> **7.4 Preservation of Existence, Etc.**
>
> Subject to the express provisions hereof, the Corporation will carry on and conduct its activities, and cause its Subsidiaries to carry on and conduct their businesses, in a proper, efficient and business-like manner and in accordance with good business practices; and, subject to the express provisions hereof, it will do or cause to be done all things necessary to preserve and keep in full force and effect its and its Subsidiaries' respective existences and rights.
>
> **7.9 Maintain Listing**
>
> The Corporation will use reasonable commercial efforts to maintain the listing of the Class A Shares and the Debentures on the Toronto Stock Exchange, and to maintain the Corporation's status as a "reporting issuer" not in default of the requirements of the Applicable Securities Legislation; provided that the foregoing covenant shall not prevent or restrict the Corporation from carrying out a transaction to which Article 11 would apply if carried out in compliance with Article 11 even if as a result of such transaction the Corporation ceases to be a "reporting issuer" in all or any of the provinces of Canada or the Class A Shares or Debentures cease to be listed on the Toronto Stock Exchange or any other stock exchange.

43. Article 11 of the Indenture prohibits Discovery from consolidating, amalgamating, or merging with another entity except on specific terms, including that the ultimate consolidated entity assume the obligations under the Indenture.

44. Failure to observe or perform these covenants constitutes an Event of Default under the Indenture. Events of Default generally result in the principal, interest, and premium, if any, on all Debentures then outstanding being due and payable.

45. In November 2014, Discovery sought to amend the Indenture to, among other things, extend the maturity date from June 30, 2016 to June 30, 2018. In soliciting support for this amendment, Shavit and Rotman addressed the need to extend the maturity of the debentures to ensure the financial stability of Discovery while several key strategies involving Top Aces could be successfully completed for the benefit of all stakeholders including the Debentureholders. The voting holders of the Debentures approved the amendments.

C. The Conversion Agreements

46. Clairvest's undervalue acquisition of Top Aces shares was effected through options it acquired in December 2016 and June 2017, pursuant to the December 2016 Credit Agreement, the June 2017 Credit Agreement, and the June 2017 Swap Agreement (i.e. the Conversion Agreements).

47. The December 2016 Credit Agreement provided for a revolving credit facility of up to $25 million. Borrowings under the credit facility were secured and bore interest at a rate of 12%. The agreement included a conversion feature allowing the amounts outstanding under the credit facility to be converted to common shares of Top Aces at an undisclosed conversion price, which was based on an undisclosed valuation of Top Aces (**"Undisclosed Valuation"**). The Undisclosed Valuation was flawed and ascribed a value to Top Aces that was substantially lower than its actual value.

48. The June 2017 Credit Agreement provided for a revolving credit facility of up to $13 million. Borrowings under the credit facility were secured and bore interest at a rate of 12%. The agreement included a conversion feature that allowed the amounts outstanding under the credit facility to be converted to common shares of Top Aces at the same undisclosed conversion price (based on the Undisclosed Valuation) as the December 2016 Credit Agreement.

49. The June 2017 Swap Agreement granted Clairvest the option to convert up to $18.4 million of secured debentures of Discovery (which Clairvest acquired in 2011) into the equivalent of $14.7 million of Top Aces common shares held by Discovery at the same undisclosed conversion price, (based on the Undisclosed Valuation) as the December 2016 and June 2017 Credit Agreements.

50. The purpose of the Conversion Agreements was to allow Clairvest to later exercise the conversion options to acquire the Top Aces shares at a drastic discount. There was no commercial justification for providing these conversion rights to Clairvest.

51. The press releases issued in connection with the December 2016 and June 2017 Credit Agreements indicated that, among other things,

(a) the Credit Agreements were "related party transactions" pursuant to MI 61-101;

(b) Discovery was not required to obtain a formal valuation and was relying on an exemption from the minority approval requirements under MI 61-101 because, among other things, the credit facilities were provided on reasonable commercial terms that were not less advantageous to Discovery than if the credit facilities were obtained from an arm's length party; and,

(c) if required under applicable securities laws, certain conditions would be satisfied prior to exercising the conversion features, including Discovery retaining a valuator to prepare a formal valuation in accordance with MI 61-101.

52. These press releases were false and misleading because, among other things, the December 2016 and June 2017 Credit Agreements were not provided on reasonable commercial terms. Indeed, none of the Conversion Agreements were commercially reasonable as they allowed Clairvest to acquire Top Aces shares at a fraction of their true value to the enrichment of Clairvest and to the detriment of Discovery and its stakeholders, including the Debentureholders. Rather, the Conversion Agreements were

unfair, oppressive and were made on terms that would never have been offered by Discovery or Top Aces to an arm's length party.

53. Further, as described below, the Defendants never intended to comply with the formal valuation requirements of MI 61-101. Indeed, they constructed the agreements and transactions with the specific intention of obtaining an exemption to avoid such valuation and other securities laws, rules, and regulations.

D. Going Private Transaction and August 2017 Exemption

54. On March 24, 2017, between the signing of the December 2016 and June 2017 Credit Agreements, Discovery agreed to enter into a definitive agreement with Clairvest to effect a plan of arrangement under the *CBCA*. Pursuant to the definitive agreement Clairvest and certain Individual Defendants would acquire all of the issued and outstanding shares in the capital of Discovery for total consideration of approximately $1.5 million ("**Going-Private Transaction**"). As described below, this transaction was a key step in the Defendants' scheme to avoid the formal valuation requirements of MI 61-101 and other requirements.

55. In connection with the Going Private Transaction, Discovery obtained a valuation conducted by Capital Canada Limited (**"Discovery Valuation"**). The Discovery Valuation states that "the financial statements and other information provided by the management of Discovery Air and their representatives have been accepted, without further verification, as correctly reflecting the business conditions and operating results of Discovery Air for the respective periods." Furthermore, Capital Canada did not independently verify the accuracy of the financial forecast prepared by Management, which was "its primary basis for assessing the cash flows to be generated by Discovery Air for the years ending January 31, 2018 through January 31, 2020."

56. The Discovery Valuation was based on certain assumptions, one of which was that "Discovery Air will be awarded the Contracted Airborne Training Services (CATS) contract."

57. The Discovery Valuation did not include a formal valuation of Top Aces, but ascribed a value to Top Aces which was flawed and reflected a fraction of Top Aces' true value.

58. The Going-Private Transaction, which was approved by the Ontario Superior Court of Justice on May 24, 2017, was a key step in Clairvest's plan to acquire Top Aces while avoiding the formal valuation requirements of MI 61-101 and other securities laws and regulations. In obtaining court approval for the Going Private Transaction, Discovery did not disclose to the Court that the Discovery Valuation substantially undervalued Top Aces.

59. Following the Going Private Transaction, the Debentures were still listed publicly. However, with its shares now delisted from the TSX and its equity privately held, Discovery could fit into an exemption from the formal valuation requirements of MI 61-101 before exercising the conversion options in the Conversion Agreements. Discovery applied for and obtained such an exemption from the Ontario Securities Commission ("**OSC**") on August 1, 2017.

60. The decision granting the exemption relied on certain facts as represented by Discovery, including that the Undisclosed Valuation was consistent with the valuation attributed to Top Aces later in the formal Discovery Valuation.

61. In obtaining the exemption, Discovery did not disclose to the OSC that the valuation attributed to Top Aces in both the Undisclosed Valuation and the Discovery Valuation were flawed and represented only a fraction of Top Aces' true value, or that the exercise of the conversion options would result in Clairvest's acquisition of Top Aces shares from Discovery at a fraction of their true value.

E. Conversion Transactions

62. Having avoided complying with MI 61-101, Clairvest exercised the options under the Conversion Agreements on December 14, 2017 ("**Conversion Transactions**"), resulting in Clairvest acquiring 74% of Top Aces common shares. The balance was held by Discovery. A Discovery news release issued that day stated that

"following the completion of the Conversion Transaction, [Discovery] will have approximately $60 million less of secured debt."

63. In fact, Discovery had only obtained an $18.4 million reduction in secured debt as a result of the exercise of the conversion options pursuant to the June 2017 Swap Agreement.

64. Clairvest's acquisition of 74% of Top Aces pursuant to the Conversion Transactions implied a valuation of Top Aces of between approximately $24 million and $81 million. The result of the Conversion Transactions was that Clairvest acquired the shares of Top Aces at a price that was significantly lower than the true value of those shares.

65. Following the Conversion Transactions, shares of Top Aces held by each of Discovery and Clairvest were exchanged (on a proportionate basis to their previous ownership interest in Top Aces) for shares in Top Aces Holdco, with Top Aces becoming a wholly-owned subsidiary of Top Aces Holdco.

F. JP Morgan Transaction

66. On December 22, 2017, less than a week after Clairvest obtained its 74% interest in Top Aces, Discovery announced a transaction whereby: (i) Discovery sold the majority of its remaining shares in Top Aces Holdco to the JP Morgan Group for $25 million; and (ii) Top Aces Holdco issued an additional $25 million treasury shares to those investors; resulting in a net $50 million investment by the JP Morgan Group to acquire approximately 25% of Top Aces Holdco. This transaction valued Top Aces at $195.3 million.

67. Following the completion of the Conversion Transactions and the transaction with the JP Morgan Group, the ownership of the equity of Top Aces Holdco was (i) Clairvest – 64.7%; (ii) JP Morgan Group – 25.6%; and (iii) Discovery – 9.7%.

68. Furthermore, following the transactions, Clairvest and the Individual Defendants caused Discovery to use approximately $25 million of the funds from the transaction

with the JP Morgan Group to pre-pay amounts owed to Clairvest although the debt was not due at that time.

69. There was no information that would explain or justify the difference between the valuations ascribed to Top Aces in the Conversion Agreements and the JP Morgan Transactions.

H. Insolvency

70. On or about March 21, 2018, just over three months after the completion of the transactions described above, having pre-paid $25 million to Clairvest for a debt which was not yet due, Discovery applied for and obtained protection under the *CCAA* (the **"*CCAA* Proceedings"**). KSV Kofman Inc. (**"KSV"**), which had been advising Clairvest since November 2016, was appointed as Monitor for the purpose of the *CCAA* Proceedings.

71. From the outset, the representations made by both Discovery and the Monitor emphasized the need to progress the *CCAA* Proceedings at a fast pace, in order to stabilize the business. Among other things, the court was advised that:

(a) Discovery had an urgent need for a $12.6 million debtor-in-possession loan facility with interest at a rate of 10% per annum, to be provided by an affiliate of Clairvest; and,

(b) the principal purpose of the *CCAA* Proceedings was to conduct, in very short order, a sale solicitation process for Discovery's wholly-owned operating subsidiaries, Great Slave Helicopters Ltd., Air Tindi Ltd, and Discovery Mining Services Ltd., as well as Discovery's 9.7% residual interest in Top Aces Holdco (collectively, the **"Equity Interests"**). Discovery and Clairvest had already negotiated four stalking horse agreements, all dated as of March 21, 2018, pursuant to which Clairvest agreed to act as a "stalking horse purchaser" in connection with Discovery's sale of the Equity Interests in the *CCAA* Proceedings.

72. In the face of the urgency described above, the court supervising the *CCAA* Proceedings approved a sale solicitation process on April 4, 2018 (the **"Sale Process"**), only two weeks after the start of the *CCAA* Proceedings. The Sale Process was subject to material temporal and other constraints limiting the value that could be realized for the assets being sold.

73. On or about June 15, 2018, the Monitor filed a report in the *CCAA* Proceedings in support of a motion for approval of the sale of the Equity Interests to Clairvest (the **"Sale Approval Motion"**), recommending that, based on the results of the Sales Process, the Equity Interests be sold to Clairvest on the terms set out in the stalking horse agreements.

74. On June 22, 2018, the Sale Approval Motion was approved and, as a result of the conduct of the Defendants preceding the *CCAA* Proceedings described herein, Clairvest acquired Discovery's remaining assets, including the Equity Interests, for a fraction of what they would have realized but for the actions taken by the Defendants prior to the start of the *CCAA* Proceedings.

75. Clairvest acquired Discovery's 9.7% stake in Top Aces Holdco at a purchase price of approximately $20,825,000 plus certain other amounts, implying a valuation of Top Aces of at least $214 million. There was no information that would explain or justify the difference between the valuations ascribed to Top Aces in this sale and the Conversion Agreements.

76. As a result of the conduct of the Defendants described herein, the Debentureholders have lost the entirety of the amounts owing under the Debentures.

G. The Individual Defendants

77. Each of the Individual Defendants owed a fiduciary duty to Discovery to act honestly and in good faith with a view to the best interests of Discovery, and to treat individual stakeholders equitably and fairly. Each of the Individual Defendants also owed a duty to Discovery and its other stakeholders, including the Debentureholders, to

exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

78. The Individual Defendants breached both of those duties by the conduct described herein. The oppressive conduct described herein was attributable to the Individual Defendants' exercise of power over Discovery, Top Aces, and Top Aces Holdco.

79. As directors, officers, and/or principals of Clairvest, each of Messrs. Rotman, Pasricha, and Krediet owed duties to Clairvest that conflicted with the duties that they owed to Discovery in respect of dealings between Discovery and Clairvest, including the negotiation and execution of the Conversion Agreements.

80. Mr. Grasty is a senior partner at the law firm of Grasty Quintana Majlis, which represents Clairvest and its affiliates in gaming endeavours, among other matters. Due to this relationship with Clairvest, Mr. Grasty's personal, business, and professional interests conflicted with the duty he owed to Discovery in respect of dealings between Discovery and Clairvest, including the negotiation and execution of the Conversion Agreements.

81. Mr. Phillips has had a long-standing business relationship with Mr. Rotman, Clairvest, and its affiliates. By virtue of these relationships, Mr. Phillips' personal and business interests conflicted with the duty he owed to Discovery in respect of dealings between Discovery and Clairvest, including the negotiation and execution of the Conversion Agreements.

82. By causing, allowing, or permitting Discovery to enter into the Conversion Agreements, Messrs. Rotman, Pasricha, Krediet, Grasty, and Phillips acted in their own personal interests to enrich Clairvest to the detriment of Discovery and the Debentureholders, in breach of the duties owed to Discovery and its stakeholders.

83. Messrs. Rotman, Pasricha, Krediet, and the other Individual Defendants that owned shares of Clairvest were personally enriched by causing Discovery and Top Aces to enter into the Conversion Agreements.

V. OPPRESSION REMEDY AND DAMAGES

84. The plaintiff and Debentureholders seek relief pursuant to the oppression remedy provisions of the *CBCA*.

85. The plaintiff and Debentureholders are complainants within the meaning of section 241 of the *CBCA*.

86. The plaintiff and Debentureholders had reasonable expectations about the manner in which the business and affairs of Discovery would be conducted. Those reasonable expectations arose from, among other things, the Individual Defendants' duties to Discovery and its stakeholders, representations made by some or all of the Defendants, the terms of the Indenture, the nature and size of Discovery, past practice, and commercially reasonable business practice.

87. The reasonable expectations of the plaintiff and Debentureholders included the following:

(a) that Discovery would not transfer its ownership interests in Top Aces for a fraction of its true value;

(b) that Discovery's business and affairs would not be intentionally conducted in a manner that would leave the Debentureholders unable to realize on any of Discovery's assets in satisfaction of amounts owing under the Debentures;

(c) that the Debentures would have priority over Clairvest's equity interests in Discovery;

(d) that Discovery's business and affairs would be conducted in a manner that complied with the terms of the Indenture;

(e) that Discovery's business and affairs would be conducted in a proper, efficient, and business-like manner and in accordance with good business practices;

(f) that Discovery would do all things necessary to preserve and keep in full force and effect its and its subsidiaries' respective existences and rights;

(g) that Discovery would be candid and forthcoming with regulators and the courts;

(h) that every director and officer of Discovery would

(i) act honestly and in good faith with a view to the best interests of the Discovery while treating the individual stakeholders equitably and fairly; and

(ii) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances; and

(i) that the Individual Defendants would avoid conflicts between their personal interests and the interests of Discovery.

88. The Defendants acted in a manner contrary to those reasonable expectations by committing the acts and omissions described herein, including, without limitation:

(a) causing Discovery and Top Aces to enter the Conversion Agreements, which resulted in the transfer of Top Aces shares to Clairvest at a fraction of their true value;

(b) planning Discovery's insolvency and bankruptcy proceedings in a manner intended to ensure that the Debentureholders were unable to realize on any of Discovery's assets in satisfaction of the amounts owing under the Debentures;

(c) failing to comply with the terms of the Indenture;

(d) failing to conduct Discovery's business and affairs in an proper, efficient, business-like manner in accordance with good business practices, including,

(i) entering into the Conversion Agreements;

(ii) paying approximately $25 million to Clairvest on debt that had not yet matured; and

(iii) taking steps to avoid obtaining a formal valuation of Top Aces and other requirements of securities laws and regulations;

(e) intentionally conducting Discovery's business and affairs in a manner that caused Discovery's insolvency and the sale of its assets for a fraction of their market value;

(f) failing to disclose to the Court and the OSC that the Discovery Valuation and Undisclosed Valuation were inaccurate;

(g) with respect to the Individual Defendants, acting to enrich Clairvest at the expense of Discovery and its stakeholders, in a manner that was contrary to Discovery's best interests and unfair to the Debentureholders; and

(h) With respect to Messrs. Rotman, Pasricha, Krediet, Grasty and Phillips, preferring their own interests and the interests of Clairvest over Discovery's interests.

89. The conduct of the Defendants described herein was oppressive, unfairly prejudicial, and unfairly disregarded the interests of the plaintiff and Debentureholders. The plaintiffs and Debentureholders are entitled to a remedy pursuant to section 241 of the *CBCA*.

90. The Defendants' acts and omissions caused the plaintiff and Debentureholders to lose the entirety of the amounts owed to them pursuant to the Debentures. But-for the Defendants' conduct, the Debentureholders would have recovered the $34.5 million plus accrued interest owing to them under the Debentures.

91. The Defendants' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in contemptuous disregard

of the rights of the Plaintiff and other Debentureholders, and as such renders the Defendant liable to pay punitive damages.

VI. LEGISLATION

92. The plaintiff pleads and relies upon the *Courts of Justice Act*, RSO 1990, c C43 and the *CBCA*, both as amended.

VII. SERVICE OUTSIDE ONTARIO AND PLACE OF TRIAL

93. This statement of claim may be served outside Ontario without leave in accordance with rule 17.02 of the *Rules of Civil Procedure* because it is:

(a) a claim in respect of personal property in Ontario (Rule 17.02 (a)); and

(b) against a person ordinarily resident or carrying on business in Ontario (Rule 17.02 (p)).

94. The plaintiff proposes that this action be tried in the City of Toronto, in the Province of Ontario.

[•], 2018

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Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
[Commercial List]

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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 DISCOVERY AIR INC.

Court File No. CV-18-594380-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
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