

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF DISCOVERY AIR INC.

APPLICANT

**FACTUM OF THE APPLICANT
(Approval and Vesting Orders)
(Motion Returnable June 22, 2018)**

June 20, 2018

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(APPROVAL AND VESTING ORDERS)**

PART I – NATURE OF THIS MOTION

1. This factum is filed in support of a motion made by Discovery Air Inc. (“**Discovery**” or the “**Company**”) for, among other things, approval of the Asset Purchase Agreements (defined below) and vesting the Purchased Assets (defined below) in the Purchasers (defined below).

PART II – FACTS

2. The facts supporting this motion are set out in full detail in the affidavit of Paul Bernards sworn June 15, 2018 (the “**June 15 Affidavit**”). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Bernards Affidavit.
3. On March 21, 2018, Discovery obtained an initial order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the

“CCAA”). Pursuant to the terms of the Initial Order, KSV Kofman Inc. was appointed as monitor (the “**Monitor**”) in these proceedings.¹

4. The main purpose of Discovery’s CCAA proceedings has been to allow for the sale of Discovery’s assets, which are comprised of its equity interests in Great Slave Helicopters Ltd. (“**GSH**”), Air Tindi Ltd. (“**ATL**”) and Discovery Mining Services Ltd. (“**DMS**”), its minority interest in Top Aces Holdings Inc. (“**TA Holdings**”), and other miscellaneous assets including various contracts, intercompany claims owed to Discovery by its subsidiaries and all claims and causes of action of Discovery against other persons (collectively, the “**Purchased Assets**”).²
5. In furtherance of that process, on April 4, 2018, Discovery brought a motion (the “**SSP Motion**”) seeking approval of a sale solicitation process (the “**SSP**”) as well as approval of the following four (4) asset purchase agreements for the purposes of constituting stalking horse bids in the SSP process³:
 - (a) asset purchase agreement dated as of March 21, 2018 (the “**Top Aces APA**”) among Discovery, as seller and CEP IV Co-Investment Limited Partnership, Clairvest Equity Partners IV Limited Partnership, Clairvest Equity Partnership IV-A Limited Partnership, DA Holdings Limited Partnership and G. John Krediet (collectively, the “**Top Aces Buyer**”) for the sale of the Discovery’s remaining 9.7% interest in TA Holdings and certain other claims, interests and assets owned by Discovery (collectively, the “**Top Aces Property**”);⁴
 - (b) asset purchase agreements dated as of March 21, 2018 between 10671541 Canada Inc. (the “**Northern Business Buyer**”) and together with the Top Aces Buyer, the

¹ Affidavit of Paul Bernards, sworn June 15, 2018 (“**June 15 Affidavit**”), para. 3, Motion Record of the Applicant returnable June 22, 2018 (“**Applicant’s MR**”), Tab 2.

² June 15 Affidavit, para. 5, Applicant’s MR, Tab 2.

³ June 15 Affidavit, para. 6, Applicant’s MR, Tab 2.

⁴ Fourth Report of KSV Kofman Inc., in its capacity as Monitor, dated June 15, 2018 (“**Fourth Report**”), para 1(c), Motion Record of the Monitor (“**Monitor’s MR**”), Tab 1.

“**Purchasers**”), an entity incorporated by Clairvest⁵, pursuant to which the Northern Business Buyer has agreed to purchase:

- (i) the Company’s issued and outstanding shares in GSH (the “**GSH Shares**”), the intercompany debt owing from GSH to the Company and certain assets owned by the Company but used solely in connection with the GSH business (together with the GSH Shares, the “**GSH Property**”) and to assume certain liabilities related to the GSH business (such Asset Purchase Agreement being the “**GSH APA**”)⁶;
- (ii) the Company’s issued and outstanding shares in the capital of ATL (the “**ATL Shares**”), the intercompany debt owing from ATL to the Company and certain assets owned by the Company but used solely in connection with the ATL business (together with the ATL Shares, the “**ATL Property**”) and to assume certain liabilities related to the ATL business (such Asset Purchase Agreement being the “**ATL APA**”)⁷; and
- (iii) the Company’s issued and outstanding shares in the capital of DMS (the “**DMS Shares**”) and certain assets owned by the Company but used solely in connection with the DMS business (together with the DMS Shares, the “**DMS Property**”) and together with the GSH Property and ATL Property, the “**Northern Property**” or the “**Northern Businesses**”) and to assume certain liabilities related to the DMS business (such Asset Purchase Agreement being the “**DMS APA**” and together with the GSH APA and ATL APA, the “**Northern APAs**”)⁸;

6. The executed Top Aces APA and Northern APAs (collectively, the “**Asset Purchase Agreements**”) were attached to the affidavit of Paul Bernards sworn March 28, 2018 in

⁵ As applicable, the term “Clairvest” may also include Mr. G. John Krediet, an individual investor within the Clairvest group.

⁶ Fourth Report, para. 1(c)(ii), Monitor’s MR, Tab 1.

⁷ Fourth Report, para. 1(c)(ii), Monitor’s MR, Tab 1.

⁸ Fourth Report, para. 1(c)(ii), Monitor’s MR, Tab 1.

support of the SSP Motion (the “**March 28 Affidavit**”) and are also attached to the June 15 Affidavit in support of this motion. The Asset Purchase Agreements (which have not been amended since they were executed on March 21, 2018) also each attached the agreed upon form of approval and vesting order to be sought in the event that those agreements were the successful bids.⁹

7. On April 4, 2018, this Court granted an order (the “**SSP Order**”) approving the SSP and the Asset Purchase Agreements for the purposes of acting as stalking horse agreements. Given the relationship between Discovery and Clairvest, including Clairvest’s role as stalking horse bidder and DIP Lender, and the fact that certain principals and employees of Clairvest are directors of Discovery, the terms of the SSP provided that it would be overseen, conducted and run by the Monitor. Further, the terms of the SSP provide that Clairvest was not entitled to any information regarding the SSP that was not also provided to other Qualified Bidders.¹⁰
8. In accordance with the SSP Order, the Monitor carried out the sale processes to solicit interest and bids in the Top Aces Property, GSH Property, ATL Property and/or DMS Property. Briefly:
 - (a) *Top Aces Property.*
 - (i) The Monitor contacted 29 potential financial parties in respect of the Top Aces Property. One party signed a confidentiality agreement and performed due diligence.¹¹
 - (ii) On May 21, 2018, the bid deadline in respect of the TA Holdings sale process expired. No bids were received and the bid submitted by Clairvest

⁹ June 15 Affidavit, para. 6, Applicant’s MR, Tab 2.

¹⁰ June 15 Affidavit, para. 7, Applicant’s MR, Tab 2.

¹¹ Fourth Report, s. 3.2, para 1(a), Monitor’s MR, Tab 2

as set out in the Top Aces Asset Purchase Agreement was accepted as the successful bid.¹²

(b) *Northern Businesses*

- (i) The Monitor contacted 144 potential strategic and financial parties who might have had interest in purchasing one or more of the Northern Businesses.¹³
- (ii) 36 parties signed confidentiality agreements and performed due diligence.¹⁴
- (iii) On June 4, 2018, the bid deadline in respect of the Northern Sale Process expired. One offer was submitted in the SSP for the Northern Businesses. The offer was not a qualifying offer and, accordingly, no auction was conducted. Accordingly, the bids submitted by Clairvest as set out in the Northern Asset Purchase Agreements were accepted as the successful bids.¹⁵

PART III – ISSUE AND THE LAW

9. The issue on this motion is whether the Asset Purchase Agreements be approved by this Court and the Purchased Assets be vested in the Purchasers.

A. The Asset Purchase Agreements Should be approved by this Court

10. Section 36 of the CCAA specifically provides that a Court may approve a sale of assets outside of the ordinary course of business. Section 36(3) of the CCAA sets out factors that should be considered by the Court in determining whether to approve a sale.¹⁶ Those factors include:

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

¹² Fourth Report, s. 3.2, para. 1(b), Monitor's MR, Tab 1.

¹³ Fourth Report, s. 3.3, para. 1(a), Monitor's MR, Tab 1.

¹⁴ Fourth Report, s. 3.3, para. 1(a), Monitor's MR, Tab 1.

¹⁵ Fourth Report, s. 3.3, para. 1(b) and (d), Monitor's MR, Tab 1.

¹⁶ CCAA, s. 36

- (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.¹⁷
11. The factors set out in Section 36(3) of the CCAA are not intended to be exhaustive and overlap with the factors that were set out in the *Royal Bank v. Soundair Corp* (“*Soundair*”) which state that the Court should consider: (a) whether sufficient efforts have been made to obtain the best price and the debtor has not acted improvidently; (b) whether the interests of all parties have been considered; (c) the integrity and efficacy of the process for obtaining officers; and (d) whether there was any unfairness in working out the process.¹⁸ Although *Soundair* was determined in the context of a receivership, the “*Soundair* test” is also applicable in the context of a sale in the CCAA.
12. The criteria set out in Section 36(3) of the CCAA and *Soundair* have been met for the following reasons:
- (a) The SSP process for both the TA Holdings Assets and each of the Northern Businesses was fair and reasonable in the circumstances.

¹⁷ CCAA, s. 36(3).

¹⁸ *Royal Bank v. Soundair Corp.*, (1991) 4 O.R. (3d) 1 (C.A.)

- (b) The SSP, including the deadlines contemplated by the process, was supported by the Monitor and approved by this Court.
- (c) The sale process was conducted by the Monitor in order to ensure an objective process.
- (d) The value of the Northern Business APAs materially exceeds the liquidation value of the respective Northern Businesses given that, *inter alia*, they are structured as share deals that provide for the assumption of all liabilities of the Northern Businesses, including secured, unsecured, contingent or otherwise¹⁹;
- (e) The Monitor has filed a report in support of this motion recommending the approval of the Asset Purchase Agreements and related relief including for the following reasons²⁰:
 - (i) the SSP was commercially reasonable, including timelines, breadth of marketing process and information made available to interested parties, including information in the data rooms;
 - (ii) the duration of the SSP (roughly two months) was sufficient to allow interested parties to perform diligence and submit offers. In addition, none of the parties the Monitor contacted expressed any concern or made any requests to extend the SSP timelines;
 - (iii) no other qualifying offers were received for the TA Interest or for the Northern Businesses and, accordingly, the stalking horse Asset Purchase Agreements were the best offers received in the process;
 - (iv) the Transactions were extensively negotiated prior to these proceedings with a view to maximizing the value of the Company's business and assets;

¹⁹ Fourth report, s. 4.3, para. 1(f), Monitor's MR, Tab 1.


²⁰ Fourth Report, s. 4.3, para. 1(a) through (l), Monitor's MR, Tab 1.

- (v) the SSP provided all prospective bidders with the opportunity to submit offers for the shares of the Northern Businesses (as contemplated by the Northern APAs) or their assets;
- (vi) all interested parties were permitted to submit offers for any or all of the Northern Businesses;
- (vii) employment in Northern Canada will be preserved;
- (viii) Clairvest, as DIP lender and principal secured creditor, has consented to the Transactions;
- (ix) CIBC has advised that it is not opposed to the requested relief and the other secured creditors have been served with the Company's motion record; and
- (x) the Monitor does not believe that further time spent marketing the Company's business and assets will result in superior transactions.

PART IV – NATURE OF THE ORDER SOUGHT

13. The Company therefore requests Orders substantially in the form filed with its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of June 2018.



SCHEDULE A – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.*, (1991) 4 O.R. (3d) 1 (C.A.)

SCHEDULE B – RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

Restriction on disposition of business assets

- **36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Factors to be considered

- (3)** In deciding whether to grant the authorization, the court is to consider, among other things,
- **(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.

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Proceeding commenced **TORONTO**

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