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

*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 OR COMPROMISE OR ARRANGEMENT OF DISCOVERY AIR INC.

Applicant

# RESPONDING MOTION RECORD OF THE AD HOC COMMITTEE OF HOLDERS OF DEBENTURES

**(Returnable June 22, 2018)**

June 19, 2018

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**Lawyers for the Ad Hoc Committee of Holders of the Debentures**

# INDEX

TAB 1

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

***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 OR COMPROMISE OR ARRANGEMENT OF DISCOVERY AIR INC.

Applicant

## NOTICE OF RESPONDING CROSS-MOTION

**TAKE NOTICE** that the Ad Hoc Committee of holders of $34.5 million principal amount of unsecured debentures (the "Ad Hoc Committee") of Discovery Air Inc. ("Discovery") will make a cross-motion to the Honourable Justice Hainey of the Commercial List on June 22, 2018 at 10:00 a.m., or as soon as after that time that the motion can be heard, at 330 University Avenue, 8th Floor, Toronto, Ontario, or at such other time and place as the Court may direct.

**THE PROPOSED METHOD OF HEARING**: The motion is to be heard:

- [ ] in writing under subrule 37.12.1(1)
- [ ] in writing as an opposed motion under subrule 37.12.1(4);
- [X] orally.

**THE MOTION IS FOR**:

1. An Order, if necessary, validating the manner of and abridging the time for service and filing of this Notice of Motion and Motion Record, and dispensing with any further service thereof;

2

2. An Order, substantially in the form appended as Schedule "A" to this Notice of Motion (the "Draft Order"):

(a) declaring that the vesting orders made in respect of the sale of the assets of Discovery are without prejudice to and do not impact such claims as may be made in respect of conduct taken prior to the commencement of the CCAA Proceedings, or any remedies that may be granted by the court in respect of such pre-filing conduct, whether it be damages or otherwise, including, without limitation, the claim marked as Appendix "A" to the Draft Order (the "Oppression Claim"); and,

(b) directing the Monitor to preserve access to all documents within the possession, control, or power of Discovery and that may need to be produced in response to the Oppression Claim, in the ordinary course, pursuant to the *Rules of Civil Procedure,* including, without limitation the documents referenced at Appendix "B" to the Draft Order;

3. Such other relief as counsel may request and as this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE**:

4. Discovery is a holding company that earns revenue through its subsidiaries. Prior to December 2017, Discovery was the 100% owner of Discovery Air Defence Services ("DADS," now known as "Top Aces") a provider of military air training services. DADS was the most valuable of Discovery's operating subsidiaries;

5. Discovery's shares were previously publicly traded and listed on the Toronto Stock Exchange ("TSX"). Following a going private transaction on May 26, 2017, the Clairvest Group Inc. and its affiliates ("Clairvest") acquired 100% of Discovery's equity and its shares were de-listed from the TSX;

6. The Debentures were issued by Discovery pursuant to an indenture dated May 12, 2011, and remain outstanding. Until they were cease traded on April 27, 2018, the

Debentures were listed on the TSX and, following the going private transaction, were the only publicly traded security of Discovery;

7. As of December 2016, Clairvest owned 87.5% of Discovery's listed outstanding common shares and controlled its board of directors. Five of the seven board members had material relationships with Clairvest;

8. In December 2016 and June 2017, Discovery's board caused DADS to enter into a series of related party transactions with Clairvest (the "Impugned Transactions") which appear to have granted Clairvest options to acquire equity of DADS at a fraction of its true value, to the benefit of Clairvest and to the detriment of Discovery and its Debenture holders;

9. In December 2017, following the announcement that DADS had won a coveted long-term contract with the Canadian military, Clairvest exercised its options. It appears that the effect of the options was to allow Clairvest to acquire shares that may have had a fair market value of approximately $100 million in exchange for the retirement of $18.4 million in secured liabilities;

10. Following the completion of these transactions, Discovery became insolvent and, on March 21, 2018, filed for and was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "CCAA proceedings");

11. From the outset, Discovery has taken the position that the principal purpose of the CCAA proceedings is to conduct a sale solicitation process for Discovery's remaining shares in DADS and in Discovery's other wholly-owned subsidiaries and for other related assets;

12. Discovery and Clairvest negotiated four stalking horse agreements, all dated as of March 21, 2018, pursuant to which Clairvest or its nominee would act as a "stalking horse purchaser" in connection with Discovery's sale of its equity interests;

13. A sale solicitation process was approved by the Court on April 4, 2018 (the "Sale Process") on short notice and on an urgent basis. The Sale Process set out the terms

on which Discovery's equity interests would be marketed for sale, including the bidding procedures to be used in connection with the Sale Process;

14. The Sale Process is concluding, and the Monitor has moved for Court approval of orders vesting those equity interests in an entity incorporated by Clairvest;

15. The Ad Hoc Committee is concerned that the Impugned Transactions described above were contrary to the best interests of Discovery, and were oppressive, prejudicial, and unfairly disregarded the reasonable expectations of the holders of the Debentures, and members of the Ad Hoc Committee expect to commence litigation to address those concerns (i.e., the Claim");

16. In these circumstances, it is fair and reasonable that the court exercise its discretion to ensure that:

(a) the orders issued in these CCAA proceedings do not directly or indirectly relieve Clairvest or others from liability that they may have in respect of their pre-filing conduct or fetter the court's remedial discretion;

(b) Discovery's access to information that may be relevant to the impugned transactions be preserved for the purposes of the litigation of the Claim, as well as for any investigation that may be undertaken by a trustee in bankruptcy or other court officer;

17. Such other grounds as counsel may advise and this Honourable Court may consider.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

18. The Affidavit of Lauren Pearce, affirmed on June 18, 2018, and the exhibits attached thereto;

19. The pleadings and proceedings herein; and,

20. Such further and other materials as counsel may advise and this Honourable Court may permit.

June 19, 2018

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**Lawyers for the Ad Hoc Committee of Holders of the Debentures**

**TO: THE SERVICE LIST**

# SCHEDULE "A"
## Draft Order

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

*ONTARIO*
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

| | | |
|---|---|---|
| THE HONOURABLE MR. | ) | THE DAY |
| | ) | OF JUNE, 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 Discovery Air Inc. ("**Discovery**", and the "**Notes**"), 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 Lauren Pearce, affirmed on June 18, 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 Cross-Motion and the Responding Motion Record herein is hereby abridged and validated, and the court hereby dispenses with any further service thereof, so that this Motion is properly returnable today.

2. THIS COURT ORDERS AND DECLARES that the vesting orders made this day in respect of the sale of the assets of Discovery are without prejudice to and do not impact such claims as may be made in respect of conduct taken prior to the commencement of the CCAA Proceedings, or any remedies that may be granted by the court in respect of such pre-filing conduct, whether it be damages or otherwise, including, without limitation, in respect of the claim marked as **Appendix "A"** to the Draft Order (the "Oppression Claim").

3. THIS COURT ORDERS AND DIRECTS the Monitor to preserve access to all documents within the possession, control or power of Discovery and that, in the ordinary course, may need to be produced in response to the Oppression Claim, pursuant to the *Rules of Civil Procedure*, including, without limitation, the documents referenced at **Appendix "B"** to the Draft Order.

Hainey J.

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**
Proceeding commenced at TORONTO

**ORDER**

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**Lawyers for the Ad Hoc Committee of Holders of the Debentures**

# APPENDIX "A"
to draft Order

# APPENDIX "A"

Court File No.:

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**

**[Commercial List]**

B E T W E E N :

STEPHEN CAMPBELL

Plaintiff

- and -

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

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:** **Kenneth Rotman**
[•]

**AND TO:** **Adrian Pasricha**
[•]

**AND TO:** **Rod Phillips**
[•]

**AND TO:** **Michael Grasty**
[•]

**AND TO:** **G. John Krediet**
[•]

**AND TO:** **Michael Mullen**
[•]

**AND TO:** **Alain Benedetti**
[•]

**AND TO:** **Thomas Hickey**
**[•]**

**AND TO:** **Alan Torrie**
**[•]**

**AND TO:** **Jacob Shavit**
**[•]**

**AND TO:** **Paul Bernards**
**[•]**

## 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 *Canadian 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., and may include, as applicable, G. John Krediet;

(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 and the Individual Defendants;

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

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

(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 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 Top Aces Inc.;

(p) **"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 the Defendants have effected a result;

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

(iii) the powers of the directors of Discovery 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 plaintiffs and Debentureholders, as contemplated by s. 241 of the 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;

(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 Manotick, Ontario.

### Defendants

5. Discovery is a CBCA corporation that provided aviation services through its wholly owned subsidiaries. Discovery is owned 95.5% by Clairvest and G. John Krediet, and 4.5% by current and former management of Discovery.

6. Discovery obtained creditor protection under the *CCAA* pursuant to the order of Justice Hainey dated March 21, 2018.

7. 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 Discovery's board of directors and exercised control over it.

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

9. Mr. Rotman has been Chief Executive Officer of Clairvest since January 1, 2018 and was previously the Co-Chief Executive Officer since 2000. He has been a director of Clairvest since June 2000. Mr. Rotman controls over 50% of the shares of Clairvest.

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

11. 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.

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

13. Thomas Andrew Hickey has been a director of Discovery since January 25, 2017.

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

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

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

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

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

19. 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

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

21. Discovery was a public company that conducted operations through a number of wholly-owned subsidiaries, the crown jewel of which was Top Aces, a military airborne training service provider. 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.

22. Top Aces has long been Discovery's most valuable subsidiary with the greatest growth potential. Its principal business is providing airborne training service to militaries. It is the primary supplier of training services to Canadian, German and Australian air forces.

23. 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.

24. 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 billions worth of international government contracts set to be announced in the coming few years.

25. In addition, 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, Clairvest

and the Individual 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.

26. These should have been positive developments for Discovery. Top Aces' excellent prospects could be monetized in any number of ways to ensure Discovery's financial stability and that it could meet its obligations to its creditors.

27. Clairvest and its co-investors were required to share Top Aces' success with Discovery's other stakeholders including the Debentureholders. In particular, Discovery had an obligation to pay back the $34.5 million principal plus interest owing on the Debentures. Top Aces' success ensured that Discovery would be able to make that payment.

28. Accordingly, sometime during the last quarter of 2016, Clairvest developed a scheme to avoid paying the Debentureholders, while protecting its interest in Top Aces and Discovery's other assets through an eventual insolvency or bankruptcy. Clairvest accomplished this through a series of transactions that stripped the majority of Top Aces shares out from under Discovery at a drastic discount and left Discovery in a cash-poor position. These transactions set the stage for carefully planned and structured insolvency proceedings by Discovery, in 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.

29. 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 requiring, among other things, a formal valuation of Top Aces to ensure the fairness of the transaction.

30. So, as described below, the Defendants went to great lengths to design a series of transactions that would avoid regulatory scrutiny, and, in particular, the provisions of MI 61-101 that were designed to protect the interests of minority stakeholders in related-party transactions.

31. First, the Defendants disguised the Top Aces share transfer as "conversion options" pursuant to a series of three agreements (the Conversion Agreements, described below). Between these series of agreements, Clairvest and the Individual Defendants took steps to take the company private in order to qualify for an exemption under MI 61-101 from obtaining a formal valuation of Top Aces.

32. Second, 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 massive discount.

33. Third, Clairvest and the Individual Defendants caused Discovery to sell additional Top Aces shares to a third party investor group led by JP Morgan Asset Management ("**JP Morgan Group**") at a significantly higher price.

34. Finally, 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.

35. The result of the Defendants' oppressive conduct was that 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 its 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.

36. 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**

37. 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 mature on June 30, 2018.

38. 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.

39. Article 11 of the Indenture requires that Discovery ensure that any consolidation occur on specific terms, including that the ultimate consolidated entity assumes the obligations under the Indenture, including the conversion rights.

40. 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 to be due and payable.

41. 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**

42. 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, June 2017 Credit Agreement, and the June 2017 Swap Agreement (the Conversion Agreements).

43. 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 equity of Top Aces at an undisclosed conversion price, and based on an undisclosed valuation of Top Aces.

44. 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 allowing the amounts outstanding under the credit facility to be converted to equity of Top Aces at the same undisclosed conversion price as the December 2016 Credit Agreement.

45. The June 2017 Swap Agreement granted Clairvest the option to convert up to $18.4 million of secured debentures already held by Clairvest into the equivalent of $14.7 million of Top Aces common shares held by Discovery, at the same undisclosed conversion price as the December 2016 and June 2017 Credit Agreements.

46. 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 Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions ("**MI 61-101**");

(b) that 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, Discovery would satisfy certain conditions prior to exercising the conversion features, including retaining a valuator to prepare a formal valuation in accordance with MI 61-101.

47. 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. Rather, they were unfair and oppressive agreements, the terms of which would never have been offered by Discovery to an arm's length party.

48. Further, as described below, Clairvest and the Individual 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**

49. Between the signing of the December 2016 and June 2017 Credit Agreements, on March 24, 2017, Discovery agreed to enter into a definitive agreement with Clairvest to effect a plan of arrangement under the CBCA, pursuant to which 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**").

50. The Going-Private Transaction was inconsistent with the spirit of the obligations contained in the Indenture to, including the obligation to maintain Discovery's listing on the TSX.

51. 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.

52. 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 OSC on August 1, 2017..

**E. Conversion Transactions**

53. Having avoided complying with MI 61-101, Clairvest exercised the options under the Conversion Agreements on December 14, 2017 ("**Conversion Transactions**"), pursuant to which it acquired 74% of Top Aces equity. 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."

54. 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.

55. Accordingly, Discovery obtained a 74% stake in Top Aces in return for $18.4 million, implying a valuation of Top Aces of approximately $24.8 million.

**F. JP Morgan Transaction**

56. On December 22, 2017, less than a week after Clairvest obtained its 74% interest in Top Aces, Discovery announced a new equity subscription for shares of Top Aces whereby: (i) Discovery sold the majority of its remaining shares in Top Aces to the JP Morgan Group for $25 million; and (ii) Top Aces 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. This transaction valued Top Aces at $195.3 million.

57. Following the completion of the Conversion Transactions and the new share issuance, 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%.

58. Furthermore, following the sale, Clairvest and the Individual Defendants caused Discovery to use approximately $25 million of the funds from the transaction with the JP Morgan Group pre-pay amounts owed to Clairvest under its secured debenture, even though the debt was not due at that time.

## G. Insolvency

59. On or about March 21, 2018, just over 3 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.

60. 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 (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.

61. 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.

62. 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 Sale Process, the Equity Interests be sold to Clairvest on the terms set out in the stalking horse agreements.

63. In the event that the relief sought in respect of the Sale Approval Motion is granted, then, as a result of the conduct of the Defendants preceding the CCAA Proceedings, as described herein, Clairvest will have 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, and the Debentureholders will have lost the entirety of the amounts owing under the Debentures.

## V. OPPRESSION REMEDY AND DAMAGES

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

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

66. 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 statutory obligations owed by the Defendants to Discovery and its stakeholders, statements made by some or all of the Individual Defendants, the terms of the Indenture, and commercially reasonable business practice.

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

(a) that Discovery would not divest itself of Top Aces equity except on terms that were commercially fair and reasonable, and that reflected the true market value of Top Aces;

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

(c) that Discovery would only enter into commercially reasonable financing agreements;

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

(e) that every director and officer of Discovery would act honestly and in good faith with a view to the best interests of the Discovery, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, as required by section 122 of the *CBCA*;

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

68. 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 to enter the Conversion Agreements, which resulted in the transfer of Top Aces equity to Clairvest at a significant undervalue;

(b) failing to obtain an independent and/or accurate valuation of Top Aces in connection with the Conversion Agreements; and

(c) actively taking steps to avoid the requirements of securities laws, rules, and regulations that would have prohibited such an undervalue transfer.

69. 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*.

70. 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.

## VI. LEGISLATION

71. The plaintiff pleads and relies upon the *CBCA*, as amended.

## V. SERVICE AND PLACE OF TRIAL

72. For service outside Ontario, the plaintiff relies on rules 17.02(a), (c), (f), (n) and (p).

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

[●], 2018

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Lawyers for the Plaintiff

| | | |
|---|---|---|
| STEPHEN CAMPBELL<br>Plaintiff | and | DISCOVERY AIR et al<br>Defendant |

Court File No.:

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**[Commercial List]**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**


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Lawyers for the Plaintiff


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# APPENDIX "B"
# to draft Order

# APPENDIX "B"

## DOCUMENT/INFORMATION PRODUCTION LIST

1. All quarterly and annual non-consolidated financial statements for each of the following:

    a. Discovery Air Inc ("**Discovery**");

    b. Discovery Air Defense Services Inc. ("**DADS**"), aka Top Aces Inc. ("**Top Aces**");

    c. Discovery Air Innovations Inc. ("**Innovations**");

    d. Advanced Training System International, Inc. ("**ATSI**");

    e. Great Slave Helicopters Ltd. ("**GSH**");

    f. Air Tindi Ltd. ("**ATL**");

    g. Discovery Mining Services Ltd. ("**DMS**");

    h. Discovery Air Technical Services Inc. ("**DATS**");

    i. Discovery Air Fire Services Inc. ("**DAFS**"); and

    j. any and all other past or present subsidiaries of Discovery or entities beneficially owned or controlled by it.

    (the entities listed in subparagraphs (b) through (j) are collectively referred to as the **"Subsidiaries"**).

2. The following information in respect of DADS/Top Aces for each quarter since it was acquired by Discovery:

    a. sources of revenue and funding;

    b. itemized list of all aircraft owned at the end of each quarter, including the amount depreciated or written off;

    c. which (if any) aircraft are leased;

    d. amounts paid for options to acquire aircraft or related technology (e.g. sensor technology)

    e. parts or services requisitioned, purchased, and/or acquired;

    f. components or parts used, added, deleted or otherwise adjusted to inventories;

    g. amount of components and parts lost, stolen, transferred to other subsidiaries, or otherwise removed.

3. All documents in respect of the purchase or lease of aircraft, including options to purchase such aircraft, including:

    a. the amounts paid towards purchases, leases or options; and

    b. the accounting treatment of such payments;

4. All documents in respect of inter-company debt, including, without limitation, the amounts owing to DADS/Top Aces by Discovery or the Subsidiaries;

5. All documents and communications related to Discovery's acquisition of ATSI, including a list of all items acquired (whether or not disclosed on the balance sheets);

6. All documents in respect of the Top Aces brand, including

    a. the book value attributed to it;

    b. portion of the purchase price allocated to it by Discovery upon acquisition; and

    c. portion of the sale price allocated to it in any sale by Discovery;

7. All tax filings and schedules for each of the entities listed in paragraph 1;

8. All documents and communications in respect of the following agreements (collectively, the **"Conversion Agreements"**):

    a. December 20, 2016 Credit Agreement between DADS as Borrower, Clairvest GP Manageco Inc., as Administrative Agent, and various Lenders ("**December 2016 Credit Agreement**");

    b. June 5, 2017 Credit Agreement between DADS as Borrower, Clairvest GP Manageco Inc., as Administrative Agent, and various Lenders ("**June 2017 Credit Agreement**"); and

    c. June 5, 2017 letter from Discovery Air Inc. and Discovery Air Defense Services to Clairvest Equity Partners IV Limited Partnership, Clairvest Equity Partners IV – A Limited Partnership, CEP IV Co-Investment Limited Partnership, DA Holdings Limited Partnership, and G. John Krediet ("**June 2017 Swap Agreement**");

9. All documents and communications relating to the determination that the December 2016 and June 2017 Credit Agreements were "provided on reasonable commercial terms that are not less advantageous to the Corporation than if [they were] obtained from an arm's length party" as stated in the Discovery press releases dated December 20, 2016 and June 5, 2017.

10. All documents and communications in respect of the exercise of the options pursuant to the Conversion Agreements (**"Conversion Transactions"**);

11. All documents and communications in respect of the impact or effect of the Conversion Agreements or Conversion Transactions on Discovery's other debt or stakeholders, including

the 8.375% unsecured subordinated convertible debentures issued by Discovery pursuant to the indenture dated May 12, 2011, as amended in November 2014 ("**Debentures**") or the holders of the Debentures;

12. All documents and communications in respect of the going private transaction in May 2017 ("**Going Private Transaction**");

13. All documents and communications in respect of the Voting and Support Agreements between Discovery, Clairvest GP Manageco Inc. and certain shareholders in January 2017 ("**Voting and Support Agreements**");

14. All documents and communications in respect of any special committees of Discovery's board of directors, including

    a. purpose of the special committee;

    b. composition of the special committee; and

    c. documents and communications to, from, or between members of the special committee and/or its advisors;

15. All documents and communications in respect of funding, loans, or financing (including all efforts to seek funding, loans, or financing) for Discovery or the Subsidiaries, including, without limitation, in connection with

    a. DADS and/or Top Aces;

    b. the Contracted Airborne Training Services ("**CATS**") contract;

    c. the Conversion Agreements;

    d. Efforts to seek alternative financing to the Conversion Agreements;

16. All documents and communications in respect of Paul Bernards' conversations with representatives of Durig Capital Inc. (**"Durig Capital"**) in September and October 2017, including, without limitation, in respect of

    a. Durig Capital's request to convert (or obtain options to convert) some or all of the Debentures into shares of DADS;

    b. Durig Capital's offer to provide financing to Discovery or DADS at a rate similar to the 12% rate given to Clairvest;

    c. The offer communicated by Mr. Bernards to purchase the Debentures for 8.375% of their face value;

17. All documents referred to or incorporated in the Conversion Agreements, including, without limitation,

    a. Aircraft Security Agreement;

b. Disclosure Letter;

c. Initial Valuation;

including all documents referred to or incorporated therein;

18. All documents and communications in respect of the valuation of DADS/Top Aces, including, without limitation:

a. formal or informal valuations;

b. internal and external valuations;

c. documents and information upon which the valuations are based;

d. projections or forecasts; and

e. potential contracts and the likelihood of winning them;

19. All documents and communications in respect of the sale of DADS/Top Aces equity to the investor group led by JP Morgan ("**Investor Group**") in December 2017, including, without limitation:

a. communications with the Investor Group;

b. all documents and materials provided to the Investor Group including, without limitation, all financial statements and documents relating to the valuation of DADS/Top Aces;

20. All documents and communications in respect of prospective investors other than the Investor Group in respect of the sale of DADS/Top Aces equity including without limitation,

a. communications with such prospective investors;

b. all documents and materials provided to such prospective investors; and

21. All documents and communications in respect of the decision to use the proceeds of the sale to the Investor Group to make an early payment in respect of the secured debentures held by Clairvest Group Inc. or its affiliates.

TAB 2

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

***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

**AFFIDAVIT OF LAUREN PEARCE**
**(Affirmed on June 18, 2018)**

I, Lauren Pearce, barrister and solicitor, of the City of Toronto, in the Province of Ontario, SOLEMNLY AFFIRM AS FOLLOWS:

1. I am an associate at the law firm of Paliare Roland Rosenberg Rothstein LLP ("PRRR"). PRRR and Siskinds LLP represent the Ad Hoc Committee of Holders of Unsecured Debentures ("Ad Hoc Committee") in connection with these proceedings.

2. On June 18, 2018, PRRR sent a letter to the lawyers and the Monitor describing contingent relief sought by the Ad Hoc Committee in respect of a motion brought by the Monitor seeking approval of the sale of certain of the Applicant's assets. The letter attaches a draft of a claim that members of the Ad Hoc Committee intend to commence against the Applicant and others (the "Oppression Claim"), and a draft list of documents that they will seek to have produced by the Applicant, in due course, in connection with the Oppression Claim. A copy of PRRR's letter dated June 18, 2018, with enclosures, is attached as **Exhibit "A"**.

3. I am affirming this affidavit in connection with the Ad Hoc Committee's cross-motion, returnable June 22, 2018, seeking certain relief in connection with the sale of the assets the Applicant, and for no other or improper purpose.

**AFFIRMED BEFORE ME** at the City of Toronto, in the Province of Ontario on June 18, 2018

Commissioner for Taking Affidavits

**Lauren Pearce**

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**
Proceeding commenced at TORONTO

# AFFIDAVIT OF LAUREN PEARCE (AFFIRMED ON JUNE 18, 2018)


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**Lawyers for the Ad Hoc Committee of Holders of the Debentures**

This is Exhibit "A" referred to in the Affidavit of Lauren Pearce, affirmed June 18, 2018

*Commissioner for Taking Affidavits (or as may be)*

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June 18, 2018

File 94830

**VIA EMAIL**

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Dear Sirs/Mesdames:

**Re: Discovery Air Inc.—CCAA (the "CCAA Proceedings")**

We are in receipt of the motion seeking orders approving the sale of certain of Discovery Air's assets. As per usual, our clients are concerned with ensuring that, in the event that the court grants the relief being sought, their claims against Discovery Air and certain of its directors, officers, shareholders and related parties are not prejudiced by the sale.

In keeping with the foregoing, we propose to bring a cross-motion for an order:

1. Declaring that the relief granted in the various vesting orders being sought is without prejudice to claims in respect of conduct taken prior to the commencement of the CCAA Proceedings, and the remedies that may be granted by the court in respect of such pre-filing conduct, whether it be damages or otherwise. For convenience, we attach a draft of the claim which our clients will be seeking leave to issue, which remains subject to revision and amendment (the "Claim").

2. Directing the Monitor to take steps to preserve access to all documents that are currently within the power, possession or control of DAI and that will need to be produced in response to the Claim, in the ordinary course, pursuant to the *Rules of Civil Procedure*. To assist in this regard, we attach a draft list of the documents that our clients would expect to be produced, and we would be pleased to work with you to develop a protocol to ensure that access to those documents is preserved.

We would be pleased to discuss these matters with you in advance of the hearing on Friday.

Regards,

Yours very truly,
**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**

Massimo (Max) Starnino
MS:m

c. Service List

Doc 2541986 v1

Court File No.:

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**

**[Commercial List]**

B E T W E E N :

STEPHEN CAMPBELL

Plaintiff

- and -

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

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:** **Kenneth Rotman**
[•]

**AND TO:** **Adrian Pasricha**
[•]

**AND TO:** **Rod Phillips**
[•]

**AND TO:** **Michael Grasty**
[•]

**AND TO:** **G. John Krediet**
[•]

**AND TO:** **Michael Mullen**
[•]

**AND TO:** **Alain Benedetti**
[•]

**AND TO:** **Thomas Hickey**
[•]

**AND TO:** **Alan Torrie**
[•]

**AND TO:** **Jacob Shavit**
[•]

**AND TO:** **Paul Bernards**
[•]

## 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 *Canadian 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., and may include, as applicable, G. John Krediet;

(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 and the Individual Defendants;

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

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

(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 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 Top Aces Inc.;

(p) **"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 the Defendants have effected a result;

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

(iii) the powers of the directors of Discovery 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 plaintiffs and Debentureholders, as contemplated by s. 241 of the 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;

(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 Manotick, Ontario.

### Defendants

5. Discovery is a CBCA corporation that provided aviation services through its wholly owned subsidiaries. Discovery is owned 95.5% by Clairvest and G. John Krediet, and 4.5% by current and former management of Discovery.

6. Discovery obtained creditor protection under the *CCAA* pursuant to the order of Justice Hainey dated March 21, 2018.

7. 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 Discovery's board of directors and exercised control over it.

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

9. Mr. Rotman has been Chief Executive Officer of Clairvest since January 1, 2018 and was previously the Co-Chief Executive Officer since 2000. He has been a director of Clairvest since June 2000. Mr. Rotman controls over 50% of the shares of Clairvest.

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

11. 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.

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

13. Thomas Andrew Hickey has been a director of Discovery since January 25, 2017.

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

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

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

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

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

19. 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

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

21. Discovery was a public company that conducted operations through a number of wholly-owned subsidiaries, the crown jewel of which was Top Aces, a military airborne training service provider. 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.

22. Top Aces has long been Discovery's most valuable subsidiary with the greatest growth potential. Its principal business is providing airborne training service to militaries. It is the primary supplier of training services to Canadian, German and Australian air forces.

23. 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.

24. 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 billions worth of international government contracts set to be announced in the coming few years.

25. In addition, 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, Clairvest

and the Individual 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.

26. These should have been positive developments for Discovery. Top Aces' excellent prospects could be monetized in any number of ways to ensure Discovery's financial stability and that it could meet its obligations to its creditors.

27. Clairvest and its co-investors were required to share Top Aces' success with Discovery's other stakeholders including the Debentureholders. In particular, Discovery had an obligation to pay back the $34.5 million principal plus interest owing on the Debentures. Top Aces' success ensured that Discovery would be able to make that payment.

28. Accordingly, sometime during the last quarter of 2016, Clairvest developed a scheme to avoid paying the Debentureholders, while protecting its interest in Top Aces and Discovery's other assets through an eventual insolvency or bankruptcy. Clairvest accomplished this through a series of transactions that stripped the majority of Top Aces shares out from under Discovery at a drastic discount and left Discovery in a cash-poor position. These transactions set the stage for carefully planned and structured insolvency proceedings by Discovery, in 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.

29. 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 requiring, among other things, a formal valuation of Top Aces to ensure the fairness of the transaction.

30. So, as described below, the Defendants went to great lengths to design a series of transactions that would avoid regulatory scrutiny, and, in particular, the provisions of MI 61-101 that were designed to protect the interests of minority stakeholders in related-party transactions.

31. First, the Defendants disguised the Top Aces share transfer as "conversion options" pursuant to a series of three agreements (the Conversion Agreements, described below). Between these series of agreements, Clairvest and the Individual Defendants took steps to take the company private in order to qualify for an exemption under MI 61-101 from obtaining a formal valuation of Top Aces.

32. Second, 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 massive discount.

33. Third, Clairvest and the Individual Defendants caused Discovery to sell additional Top Aces shares to a third party investor group led by JP Morgan Asset Management ("**JP Morgan Group**") at a significantly higher price.

34. Finally, 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.

35. The result of the Defendants' oppressive conduct was that 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 its 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.

36. 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**

37. 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 mature on June 30, 2018.

38. 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.

39. Article 11 of the Indenture requires that Discovery ensure that any consolidation occur on specific terms, including that the ultimate consolidated entity assumes the obligations under the Indenture, including the conversion rights.

40. 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 to be due and payable.

41. 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

42. 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, June 2017 Credit Agreement, and the June 2017 Swap Agreement (the Conversion Agreements).

43. 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 equity of Top Aces at an undisclosed conversion price, and based on an undisclosed valuation of Top Aces.

44. 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 allowing the amounts outstanding under the credit facility to be converted to equity of Top Aces at the same undisclosed conversion price as the December 2016 Credit Agreement.

45. The June 2017 Swap Agreement granted Clairvest the option to convert up to $18.4 million of secured debentures already held by Clairvest into the equivalent of $14.7 million of Top Aces common shares held by Discovery, at the same undisclosed conversion price as the December 2016 and June 2017 Credit Agreements.

46. 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 Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions ("**MI 61-101**");

(b) that 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, Discovery would satisfy certain conditions prior to exercising the conversion features, including retaining a valuator to prepare a formal valuation in accordance with MI 61-101.

47. 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. Rather, they were unfair and oppressive agreements, the terms of which would never have been offered by Discovery to an arm's length party.

48. Further, as described below, Clairvest and the Individual 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**

49. Between the signing of the December 2016 and June 2017 Credit Agreements, on March 24, 2017, Discovery agreed to enter into a definitive agreement with Clairvest to effect a plan of arrangement under the CBCA, pursuant to which 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**").

55

50. The Going-Private Transaction was inconsistent with the spirit of the obligations contained in the Indenture to, including the obligation to maintain Discovery's listing on the TSX.

51. 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.

52. 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 OSC on August 1, 2017..

**E. Conversion Transactions**

53. Having avoided complying with MI 61-101, Clairvest exercised the options under the Conversion Agreements on December 14, 2017 ("**Conversion Transactions**"), pursuant to which it acquired 74% of Top Aces equity. 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."

54. 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.

55. Accordingly, Discovery obtained a 74% stake in Top Aces in return for $18.4 million, implying a valuation of Top Aces of approximately $24.8 million.

**F. JP Morgan Transaction**

56. On December 22, 2017, less than a week after Clairvest obtained its 74% interest in Top Aces, Discovery announced a new equity subscription for shares of Top Aces whereby: (i) Discovery sold the majority of its remaining shares in Top Aces to the JP Morgan Group for $25 million; and (ii) Top Aces 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. This transaction valued Top Aces at $195.3 million.

57. Following the completion of the Conversion Transactions and the new share issuance, 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%.

58. Furthermore, following the sale, Clairvest and the Individual Defendants caused Discovery to use approximately $25 million of the funds from the transaction with the JP Morgan Group pre-pay amounts owed to Clairvest under its secured debenture, even though the debt was not due at that time.

**G. Insolvency**

59. On or about March 21, 2018, just over 3 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.

60. 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 (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.

61. 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.

62. 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 Sale Process, the Equity Interests be sold to Clairvest on the terms set out in the stalking horse agreements.

63. In the event that the relief sought in respect of the Sale Approval Motion is granted, then, as a result of the conduct of the Defendants preceding the CCAA Proceedings, as described herein, Clairvest will have 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, and the Debentureholders will have lost the entirety of the amounts owing under the Debentures.

## V. OPPRESSION REMEDY AND DAMAGES

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

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

66. 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 statutory obligations owed by the Defendants to Discovery and its stakeholders, statements made by some or all of the Individual Defendants, the terms of the Indenture, and commercially reasonable business practice.

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

(a) that Discovery would not divest itself of Top Aces equity except on terms that were commercially fair and reasonable, and that reflected the true market value of Top Aces;

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

(c) that Discovery would only enter into commercially reasonable financing agreements;

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

(e) that every director and officer of Discovery would act honestly and in good faith with a view to the best interests of the Discovery, and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances, as required by section 122 of the *CBCA*;

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

68. 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 to enter the Conversion Agreements, which resulted in the transfer of Top Aces equity to Clairvest at a significant undervalue;

(b) failing to obtain an independent and/or accurate valuation of Top Aces in connection with the Conversion Agreements; and

(c) actively taking steps to avoid the requirements of securities laws, rules, and regulations that would have prohibited such an undervalue transfer.

69. 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*.

70. 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.

## VI. LEGISLATION

71. The plaintiff pleads and relies upon the *CBCA*, as amended.

## V. SERVICE AND PLACE OF TRIAL

72. For service outside Ontario, the plaintiff relies on rules 17.02(a), (c), (f), (n) and (p).

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

[•], 2018

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| | | |
|---|---|---|
| STEPHEN CAMPBELL<br>Plaintiff | and | DISCOVERY AIR et al<br>Defendant |

Court File No.:

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**[Commercial List]**

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**


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Lawyers for the Plaintiff

# DOCUMENT/INFORMATION PRODUCTION LIST

1. All quarterly and annual non-consolidated financial statements for each of the following:

    a. Discovery Air Inc ("**Discovery**");

    b. Discovery Air Defense Services Inc. ("**DADS**"), aka Top Aces Inc. ("**Top Aces**");

    c. Discovery Air Innovations Inc. ("**Innovations**");

    d. Advanced Training System International, Inc. ("**ATSI**");

    e. Great Slave Helicopters Ltd. ("**GSH**");

    f. Air Tindi Ltd. ("**ATL**");

    g. Discovery Mining Services Ltd. ("**DMS**");

    h. Discovery Air Technical Services Inc. ("**DATS**");

    i. Discovery Air Fire Services Inc. ("**DAFS**"); and

    j. any and all other past or present subsidiaries of Discovery or entities beneficially owned or controlled by it.

    (the entities listed in subparagraphs (b) through (j) are collectively referred to as the **"Subsidiaries"**).

2. The following information in respect of DADS/Top Aces for each quarter since it was acquired by Discovery:

    a. sources of revenue and funding;

    b. itemized list of all aircraft owned at the end of each quarter, including the amount depreciated or written off;

    c. which (if any) aircraft are leased;

    d. amounts paid for options to acquire aircraft or related technology (e.g. sensor technology)

    e. parts or services requisitioned, purchased, and/or acquired;

    f. components or parts used, added, deleted or otherwise adjusted to inventories;

    g. amount of components and parts lost, stolen, transferred to other subsidiaries, or otherwise removed.

3. All documents in respect of the purchase or lease of aircraft, including options to purchase such aircraft, including:

    a. the amounts paid towards purchases, leases or options; and

    b. the accounting treatment of such payments;

4. All documents in respect of inter-company debt, including, without limitation, the amounts owing to DADS/Top Aces by Discovery or the Subsidiaries;

5. All documents and communications related to Discovery's acquisition of ATSI, including a list of all items acquired (whether or not disclosed on the balance sheets);

6. All documents in respect of the Top Aces brand, including

    a. the book value attributed to it;

    b. portion of the purchase price allocated to it by Discovery upon acquisition; and

    c. portion of the sale price allocated to it in any sale by Discovery;

7. All tax filings and schedules for each of the entities listed in paragraph 1;

8. All documents and communications in respect of the following agreements (collectively, the **"Conversion Agreements"**):

    a. December 20, 2016 Credit Agreement between DADS as Borrower, Clairvest GP Manageco Inc., as Administrative Agent, and various Lenders (**"December 2016 Credit Agreement"**);

    b. June 5, 2017 Credit Agreement between DADS as Borrower, Clairvest GP Manageco Inc., as Administrative Agent, and various Lenders (**"June 2017 Credit Agreement"**); and

    c. June 5, 2017 letter from Discovery Air Inc. and Discovery Air Defense Services to Clairvest Equity Partners IV Limited Partnership, Clairvest Equity Partners IV – A Limited Partnership, CEP IV Co-Investment Limited Partnership, DA Holdings Limited Partnership, and G. John Krediet (**"June 2017 Swap Agreement"**);

9. All documents and communications relating to the determination that the December 2016 and June 2017 Credit Agreements were "provided on reasonable commercial terms that are not less advantageous to the Corporation than if [they were] obtained from an arm's length party" as stated in the Discovery press releases dated December 20, 2016 and June 5, 2017.

10. All documents and communications in respect of the exercise of the options pursuant to the Conversion Agreements (**"Conversion Transactions"**);

11. All documents and communications in respect of the impact or effect of the Conversion Agreements or Conversion Transactions on Discovery's other debt or stakeholders, including

the 8.375% unsecured subordinated convertible debentures issued by Discovery pursuant to the indenture dated May 12, 2011, as amended in November 2014 ("**Debentures**") or the holders of the Debentures;

12. All documents and communications in respect of the going private transaction in May 2017 ("**Going Private Transaction**");

13. All documents and communications in respect of the Voting and Support Agreements between Discovery, Clairvest GP Manageco Inc. and certain shareholders in January 2017 ("**Voting and Support Agreements**");

14. All documents and communications in respect of any special committees of Discovery's board of directors, including

    a. purpose of the special committee;

    b. composition of the special committee; and

    c. documents and communications to, from, or between members of the special committee and/or its advisors;

15. All documents and communications in respect of funding, loans, or financing (including all efforts to seek funding, loans, or financing) for Discovery or the Subsidiaries, including, without limitation, in connection with

    a. DADS and/or Top Aces;

    b. the Contracted Airborne Training Services ("**CATS**") contract;

    c. the Conversion Agreements;

    d. Efforts to seek alternative financing to the Conversion Agreements;

16. All documents and communications in respect of Paul Bernards' conversations with representatives of Durig Capital Inc. (**"Durig Capital"**) in September and October 2017, including, without limitation, in respect of

    a. Durig Capital's request to convert (or obtain options to convert) some or all of the Debentures into shares of DADS;

    b. Durig Capital's offer to provide financing to Discovery or DADS at a rate similar to the 12% rate given to Clairvest;

    c. The offer communicated by Mr. Bernards to purchase the Debentures for 8.375% of their face value;

17. All documents referred to or incorporated in the Conversion Agreements, including, without limitation,

    a. Aircraft Security Agreement;

b. Disclosure Letter;

c. Initial Valuation;

including all documents referred to or incorporated therein;

18. All documents and communications in respect of the valuation of DADS/Top Aces, including, without limitation:

a. formal or informal valuations;

b. internal and external valuations;

c. documents and information upon which the valuations are based;

d. projections or forecasts; and

e. potential contracts and the likelihood of winning them;

19. All documents and communications in respect of the sale of DADS/Top Aces equity to the investor group led by JP Morgan ("**Investor Group**") in December 2017, including, without limitation:

a. communications with the Investor Group;

b. all documents and materials provided to the Investor Group including, without limitation, all financial statements and documents relating to the valuation of DADS/Top Aces;

20. All documents and communications in respect of prospective investors other than the Investor Group in respect of the sale of DADS/Top Aces equity including without limitation,

a. communications with such prospective investors;

b. all documents and materials provided to such prospective investors; and

21. All documents and communications in respect of the decision to use the proceeds of the sale to the Investor Group to make an early payment in respect of the secured debentures held by Clairvest Group Inc. or its affiliates.

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**
Proceeding commenced at TORONTO

**RESPONDING MOTION RECORD**

**(Returnable June 22, 2018)**

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