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COURT	COURT OF KING'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
APPLICANT	CORTLAND CREDIT LENDING CORPORATION	
RESPONDENTS	GENESIS INTEGRATION INC., and 965591 ALBERTA LTD.	
DOCUMENT	BRIEF OF LAW OF THE APPLICANT, CORTLAND CREDIT LENDING CORPORATION	
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PART I - INTRODUCTION

1. This Brief of Law is filed in support of an application (the "**Application**") before the Court of King's Bench of Alberta (the "**Court**"), made by Cortland Credit Lending Corporation ("**Cortland**") in its capacity as collateral and administrative agent for the lenders party to the Credit Agreement. At the current time, the only lender is Cortland.
2. The Application is for, among other things:
 - (a) an order (the "**Receivership Order**") appointing KSV Restructuring Inc. ("**KSV**") as receiver (in such capacity, the "**Receiver**")¹ over the current and future assets, undertakings and properties of 965591 Alberta Ltd. ("**965 Alberta**") and its wholly-owned subsidiary, Genesis Integration Inc. ("**Genesis**", together with 965 Alberta, the "**Debtors**");
 - (b) an approval and reverse vesting order (the "**RVO**") approving the transactions (the "**Transactions**") contemplated in the Share Purchase Agreement dated July 25, 2022 between the Receiver, as vendor, and Sequent AI Exchangeco Ltd. (the "**Purchaser**"), as purchaser (the "**SPA**");
 - (c) an order approving the fees, actions, conduct, and activities of KSV Advisory Inc. and its legal counsel as outlined in the Pre-Appointment Report of the Receiver dated September 2, 2022 (the "**Pre-Appointment Report**"); and
 - (d) an order, temporarily sealing Confidential Appendix 1 to the Pre-Appointment Report (the "**Confidential Appendix**") pending closing of the Transactions.
3. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Pre-Appointment Report.

¹ As used herein, the term Receiver, as applicable, refers to KSV Restructuring Inc. in its capacity as proposed Court-appointed receiver, and as Court-appointed receiver if and when appointed pursuant to the Receivership Order.

PART II – FACTS

4. The facts relevant to the Application are set out in detail in the Pre-Appointment Report. A summary of the key facts as they relate to the relief requested in the Application is set out in the following section.

A. Background

5. Genesis is in the business of designing and integrating audiovisual collaboration systems for both public sector and corporate clients. 965 Alberta is the sole shareholder of Genesis and does not have any other material assets and does not carry on any business operations.²
6. Genesis holds certain critical security clearances and other authorizations or approvals granted by the Government of Canada. These Permits and Licenses (as defined in the SPA) are not assignable and cannot be transferred to the Purchaser in a commercially reasonable timeframe with the degree of certainty required by the Purchaser (or any other purchaser). These Permits and Licenses are critical to Genesis' business as they allow it to fully service its Canadian public sector clients, which represent a significant portion of its business.³

B. Acceleration and Demands

7. 965 Alberta entered into the Credit Agreement with Cortland to fund the businesses and operations of Genesis. As of September 1, 2022, the amount outstanding under the Credit Agreement was \$9,424,365.42, plus legal fees, interest and costs, which continue to accrue (the "**Cortland Debt**").⁴ Genesis has guaranteed the Cortland Debt.⁵
8. The Credit Agreement provides that the Cortland Debt becomes immediately due and payable on the occurrence of an Event of Default (as defined in the Credit Agreement). The Debtors are in default under the Credit Agreement and related guarantee and Security Documents and, accordingly, on September 1, 2022, Cortland issued Notices of Intention to Enforce

² Pre-Appointment Report at para 2.0(1).

³ Pre-Appointment Report at para 2.0(6).

⁴ Pre-Appointment Report at para 1.0(3).

⁵ Affidavit of Sean Rogister sworn September 1, 2022 [*Rogister Affidavit*] at Exhibit E.

Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3, as amended (the "**BIA**") on the Debtors.⁶

9. The Debtors have acknowledged that the Cortland Debt has been accelerated and is immediately due and payable by them. The Debtors have waived the ten-day notice period under Section 244 of the *BIA* before Cortland can enforce on its security, and the Debtors have consented to Cortland bringing this Application.⁷
10. The Receiver's independent legal counsel, McMillan LLP ("**McMillan**") has reviewed the security granted to Cortland from the Debtors pursuant to the Security Documents and has issued an opinion, subject to customary assumption and qualifications contained therein, that the Security Documents are valid and enforceable against the Debtors' assets.⁸

C. Liquidation Analysis of the Debtors

11. The Receiver has prepared a liquidation analysis of the Debtors' businesses and assets based on their financial position as at June 30, 2022, other than the working capital assets and Cortland Debt, which was as at August 12, 2022 (the "**Liquidation Analysis**").⁹
12. The Liquidation Analysis provides that, in the event of a liquidation, Cortland would incur a substantial shortfall on its secured debt, and accordingly, there would be no recoveries for any of the Debtors' unsecured creditors.¹⁰

D. The SISP Results

13. On July 25, 2022, the Receiver and the Purchaser settled the terms of the SPA. The purchase price offered by the Purchaser is primarily comprised of the retention of the Cortland Debt and the obligations owing to the Critical Suppliers for a total approximate value of \$11 million.¹¹

⁶ Pre-Appointment Report at para 2.0(3).

⁷ Register Affidavit at paras 19, 23, and Exhibit K.

⁸ Pre-Appointment Report at para 5.1(5).

⁹ Pre-Appointment Report at para 7.0(1).

¹⁰ Pre-Appointment Report at para 2.0(4); the Confidential Appendix.

¹¹ Pre-Appointment Report at para 6.0 (1) and (3).

14. The SPA was used as a stalking horse bid in the sale and investment solicitation process (the "**SISP**"), which was launched by KSV Advisory Inc., an affiliate of the Receiver, on July 27, 2022.¹²
15. The SISP was designed and carried out in the same manner as it would have been if it were carried out in a receivership proceeding, which included disclosure of names of the Purchaser and Genesis in the initial marketing materials.¹³
16. Two parties each executed a confidentiality agreement pursuant to the SISP, however, no letters of intent were submitted by the bid deadline under the SISP as of August 26, 2022 (the "**Bid Deadline**").¹⁴
17. Based on the results of the SISP, the Purchaser was advised on August 26, 2022 that it was the successful bidder under the SISP and that the Debtors were prepared to complete the Transactions as contemplated by the SPA.¹⁵

E. Activity and Fee Approval

18. KSV Advisory Inc. and its counsel, McMillan, have tracked their fees and disbursements incurred in connection with the SISP, planning of the receivership proceedings, and finalizing the terms of the SPA for the period of July 1, 2022 to August 31, 2022, which total approximately \$67,291 and \$32,178, respectively.¹⁶

PART III - ISSUES

19. The following issues are before the Court:

- (a) Is it just and convenient for the Court to appoint KSV Restructuring Inc. as Receiver?
- (b) Should the Court approve the Transactions and grant the RVO?

¹² Pre-Appointment Report at para 2.0(5).

¹³ Pre-Appointment Report at para 2.0(5).

¹⁴ Pre-Appointment Report at paras 6.1(1)(a) and 6.0(4)(h).

¹⁵ Pre-Appointment Report at para 6.1(2).

¹⁶ Pre-Appointment Report at para 12.0(1).

(c) Should this Court approve the fees, activities and conduct of KSV Advisory Inc. as set out in the Pre-Appointment Report?

(d) Should a sealing order be granted in respect of the Confidential Appendix?

PART IV - LAW AND ANALYSIS

A. It is just and convenient for the Court to appoint the Receiver

20. A court may appoint a receiver pursuant to both Section 243 of the *BIA* and Section 13(2) of the *Judicature Act*, RSA 2000 c J-2 where it is just or convenient to do so. In determining whether it is just or convenient to appoint a receiver, the Court should have regard to all the circumstances of the case, the nature of the assets and the rights of interested parties.¹⁷

21. The Debtors have consented to the Receivership Order. This Court recently articulated the considerations applicable in determining whether to grant a consent Receivership Order in the *Proform Management* decision.¹⁸ There is no question that the Debtors have consented to the Order sought, that this Court has the jurisdiction to grant the Order sought, or that the Order sought is supported on a consideration of its merits.

22. In respect of the merits of the relief sought, the factors to consider in determining whether to appoint a receiver are set out in the *Paragon* decision.¹⁹ In this case, it is just and convenient to appoint KSV Restructuring Inc. as Receiver, including for the following reasons:

(a) the Credit Agreement and the Security Documents provide Cortland with the right to appoint the Receiver as a result of the defaults of the Debtors under the Credit Agreement and Security Documents.²⁰ The fact that a security agreement acknowledges the right of

¹⁷ [Elleway Acquisitions Limited v The Cruise Professionals Limited, 2013 ONSC 6866](#) at para 26 [*Elleway*].

¹⁸ [Servus Credit Union Ltd. v Proform Management Inc.](#), 2020 ABQB 316 at paras 57-63 [*Proform Management*].

¹⁹ [Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Company](#), 2002 ABQB 430 at paras 26-28, 316 AR 128 [*Paragon*].

²⁰ Register Affidavit at para 22 and Exhibit D, s. 9.3, Exhibit F, s. 23(q), and Exhibit G, s. 23(q).

the creditor to make an application for a receiver is strong support for the imposition of a receiver²¹;

- (b) the Debtors have consented to the appointment of the Receiver;
- (c) there is no known opposition by any interested party to the appointment of the Receiver;
- (d) out-of-court solutions were canvassed by Genesis with its unsecured trade creditors but no out-of-court solution could be secured²²;
- (e) the receivership proceedings provide the optimal court-supervised realization vehicle to preserve value for stakeholders and mitigate the most deleterious effects of the Debtors' insolvency. The remedy presented to the Court is expeditious, cost effective and, with many of the Receiver's discretionary powers curtailed, intrudes as little as reasonably necessary on the Debtors' businesses and operations; and
- (f) the receivership proceedings provide a platform for the Court to (i) consider the merits of the proposed RVO and related Transactions, and (ii) if it is so inclined, grant the requested relief, which is submitted is in the best interest of the Debtors' stakeholders, including Cortland, the Critical Suppliers and employees and customers of Genesis.

23. Moreover, in the absence of the Receivership Order, Cortland is not prepared to extend any further credit under the Credit Agreement or provide the Debtors with any waivers of its rights.²³ As a result, the Receivership Order and the other relief in the Application are the only remaining option to preserve value for the most stakeholders and avoid the devastating results of a liquidation.

24. In the circumstances, it is both just and convenient for the Court to appoint KSV as Receiver.

²¹ *Paragon*, *supra* note 19 at para 28; [Textron Financial Canada Ltd v Chetwynd Motels Ltd, 2010 BCSC 477](#) at paras 60 and 75; [Maple Trade Financial Inc v CY Oriental Holdings Ltd, 2009 BCSC 1527](#) at para 26.

²² Pre-Appointment Report at para 5.4(4)-(6).

²³ Pre-Appointment Report at para 5.1(4).

B. The SPA and Transactions should be approved pursuant to the RVO

1) Approving the Transactions

25. When asked to approve a transaction in a receivership context, a court is required to consider the factors set out in *Soundair* as follows:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.²⁴

26. In *170 Alberta*,²⁵ the Court of Appeal of Alberta confirmed the test in *Soundair* as the applicable test for determining whether a court should approve an asset sale by a court-appointed receiver.²⁶

27. In *170 Alberta*, the Court of Appeal of Alberta further noted that when approving a sale recommended by a receiver, the court is "not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances."²⁷

28. As the SISP was conducted in a manner analogous to a sale in a receivership, it should be treated similarly. In a receivership sale, a court should place a great deal of confidence in the receiver so that prospective participants in the sale process are assured it is unlikely that a court will interfere with a receiver's dealings and thus avoid commercial uncertainty. It is important that prospective purchasers know that if they act in good faith, bargain seriously

²⁴ [Royal Bank v Soundair \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#) at para 16 [*Soundair*]; [Bank of Montreal v River Rentals Group Ltd, 2010 ABCA 16](#) at para 12.

²⁵ *1705221 Alberta Ltd v Three M Mortgages Inc, 2021 ABCA 144 [170 Alberta]*.

²⁶ *Ibid* at para 19.

²⁷ *Ibid*; *Soundair*, *supra* note 24.

with a receiver, and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.²⁸

29. Transactions arising from a pre-filing sales process, like the SISP, are often labeled as "pre-pack transactions". As this Court has noted, these pre-pack transactions are still evaluated against the *Soundair* test and the principles of the applicable insolvency proceeding.²⁹

30. This Court confirmed that pre-pack transactions are not abusive of an insolvency proceeding,³⁰ but instead they address the specific considerations and economic realities of the insolvent business and the specific transactions in question.³¹ The Court should consider the impact on various parties and assess whether their respective positions would realistically be any different if an extended sales process were followed.³²

31. In this case, as shown by the results of the SISP,³³ the Liquidation Analysis,³⁴ and the Debtors' lengthy attempts to find alternative solutions short of an insolvency filing,³⁵ the SPA is not only the best alternative in certain circumstances, but it is the only alternative short of liquidation.

32. In this case the *Soundair* test, as applicable to pre-pack transactions, has been met by the SISP. The SPA and Transactions contemplated therein should be approved for the following reasons:

- (a) Efforts to Get the Best Price: (i) The SISP was run prior to the appointment of the Receiver in order to minimize costs and the potential value destruction which would occur should Genesis have to operate unnecessarily under the auspices of a receivership for over a month. It is contemplated that the Transactions will close within days of the Court granting the RVO, and will result in a less intrusive receivership proceeding to minimize the impact on the Debtors' operations until the Transactions

²⁸ *Soundair*, supra note 24 at para 14; [Alberta Treasury Branches v Elaborate Homes Ltd, 2014 ABQB 350](#) at paras 58-63.

²⁹ *Elleway*, supra note 17 at para 33; ; [Re Sanjel Corporation, 2016 ABQB 257](#) at para 70 [*Sanjel*].

³⁰ *Ibid* at paras 70-71.

³¹ *Elleway*, supra note 17 at para 33.

³² *Ibid* at para 34.

³³ Pre-Appointment Report at para 6.1.

³⁴ Pre-Appointment Report at para 7.0.

³⁵ Pre-Appointment Report at para 5.4.

are closed.³⁶ (ii) The market was widely canvassed by KSV Advisory Inc. in accordance with the terms of the comprehensive SISP. (iii) The purchase price offered by the Purchaser (valued at approximately \$11 million) materially exceeds the liquidation value of the Debtors' businesses and assets.³⁷ (iv) No bidder submitted a letter of intent by the offer deadline.³⁸ (v) A sale process that puts forward a "stalking horse" transaction, such as the one contemplated by the SPA, is frequently utilized in insolvency proceedings to attempt to obtain the best price for the business or assets being sold.³⁹ Stalking horse bids have been approved concurrently with sales processes in numerous receivership proceedings, including by this Court.⁴⁰ (vi) The feedback received was that the value of the Transactions provided in the SPA is significantly higher than what any potential purchaser was willing to pay for the Debtors.⁴¹

Based on the market that was widely canvassed and efforts to preserve value through minimizing costs, an immediate sale is the only realistic way to provide maximum recovery for Cortland, who holds a clear priority of economic interest to all others. Given the lack of additional bids and the economic realities of Genesis, any delay in consummating the Transactions will likely erode Cortland's collateral position.

- (b) Interests of the Parties: The SISP was designed to ensure that the process would be robust and run with integrity, transparency and fairness.⁴² Cortland is the only stakeholder with a demonstrable economic interest in the Debtors based on the Liquidation Analysis, however, the SPA and Transactions will also benefit other stakeholders including employees, customers, and Critical Suppliers.⁴³ The respective positions of parties with an economic interest in the proceeding would not realistically

³⁶ Pre-Appointment Report at para 11.0(2).

³⁷ Pre-Appointment Report at para 9.0(1)(c).

³⁸ Pre-Appointment Report at para 6.1(1)(d).

³⁹ [CCM Master Qualified Fund Ltd v Blutip Power Technologies Ltd, 2012 ONSC 1750](#) at para 7; [Danier Leather Inc \(Re\), 2016 ONSC 1044](#) at para 20.

⁴⁰ See for example e.g. *Re US Oil Sands Inc and US Oil Sands (Utah) Inc*, ABQB Court File No. 1701-12253; *Re Nimbus Water Systems Inc*, ONSC Court File No. CV-21-00667395-00CL; *Re O2 Industries Inc*, ONSC Court File No. CV-21-00663208-00CL; *Re Traverse Energy Ltd*, ABQB Court File No. 1901-16844; *Re Ladacor AMS Ltd, Nomads Pipeline Consulting Ltd and 2367147 Ontario Inc*, ABQB Court File No. 1803-09581.

⁴¹ Pre-Appointment Report at para 6.01(1)(c).

⁴² Pre-Appointment Report at para 9.0(1)(a).

⁴³ Pre-Appointment Report at para 2.0(4).

be any different if an extended SISP was adopted.⁴⁴ The stakeholders are not prejudiced by the pre-filing SISP.

- (c) Integrity of the SISP and No Unfairness: The SISP was commercially reasonable, including timelines, breadth of the marketing process and information made available to interested parties, and consistent with the terms of a traditional sale process that would be carried out in the context of a receivership proceeding. In addition, the SISP was flexible, such that any proposed transaction structure would be considered, whether it be for shares, or assets of Genesis and/or its wholly-owned subsidiary (Fusion), or any combination of these transactions.⁴⁵

33. There have been no allegations that the Transactions do not achieve the best possible price for the assets and property of the Debtors in the circumstances. Further, there have been no suggestions that Genesis or KSV Advisory Inc. acted improvidently in carrying out the SISP, or that the SISP has not been carried out with efficacy and integrity.

2) Granting the RVO

34. A traditional vesting order transfers the assets of a debtor to a purchaser leaving liabilities behind. A "reverse" vesting order transfers certain excluded assets (if any) and liabilities to a separate entity (in this case, Residual Co.), while other specified retained assets and liabilities remain in the corporation subject to the sale.

35. The benefits associated with a reverse vesting transaction are particularly relevant when there are regulatory licenses and other corporate attributes/assets that are not readily transferrable in an ordinary transaction, such as the case of Genesis.⁴⁶

36. Reverse vesting transactions have frequently been approved in insolvency proceedings. Courts have approved reverse vesting orders in numerous receivership proceedings pursuant to Section 243(1)(c) of the *BIA*, which provides the Court with broad powers similar to those

⁴⁴ Pre-Appointment Report at para 2.0(8).

⁴⁵ Pre-Appointment Report at para 9.0(1)(a).

⁴⁶ [Harte Gold Corp \(Re\), 2022 ONSC 653](#) at paras 70-71 [*Harte Gold*].

granted under Section 11 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA**").⁴⁷

37. Although the *BIA* does not expressly confer upon the Court the authority to grant reverse vesting orders in a receivership proceeding, a broad, liberal and purposive interpretation of the *BIA*, including Section 243(1)(c), implicitly provides such authority.⁴⁸
38. Such interpretation permits the Court to grant orders that facilitate the purpose of a receivership proceeding, which is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors" and to "ensure that the highest value is received for the assets so as to maximise (*sic*) the return to creditors."⁴⁹
39. The Court of Appeal of Alberta recently endorsed a broad interpretation of Section 243(1)(c) of the *BIA* stating that this Section gives "supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise."⁵⁰
40. As a result, the question is not whether the Court has jurisdiction to grant the RVO, but whether it is appropriate to do so in the unique circumstances of this particular proceeding.
41. In *Harte Gold*, Penny J. of the Ontario Superior Court of Justice [Commercial List] provided commentary and guidance regarding the issuance of reverse vesting orders. In *Harte Gold* the Court noted that approval of the use of a reverse vesting structure should involve close scrutiny, since "the frequency of applications based on court approval of an RVO structure has increased significantly in the past few years",⁵¹ and that most of those applications were "in the context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure."⁵² As a result, Penny J. noted that a court-appointed officer overseeing the process should be prepared to answer the following questions:

⁴⁷ [Re Vert Infrastructure Ltd, ONSC Court File No. CV-20-00642256-00CL](#) – Order granted June 8, 2021; [Re Pure Global Cannabis Inc, ONSC Court File No. CV-20-00638503-00CL](#) – Order granted January 7, 2021.

⁴⁸ [Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc, 2019 ONCA 508](#) at paras 76-77.

⁴⁹ *Ibid.*

⁵⁰ [DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2021 ABCA 226](#) at para 20.

⁵¹ *Harte Gold*, *supra* note 46 at para 25.

⁵² *Ibid.*

- (a) why is the RVO necessary in this case?
- (b) does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) is any stakeholder worse off under the RVO structure than they would have been under any other viable structure? and
- (d) does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (and other intangible assets) being preserved under the RVO structure?⁵³

42. The responses to the questions from the Court in *Harte Gold* are set out below:

- (a) The RVO is Necessary: The RVO is necessary in this case as Genesis holds permits and licenses which are non-transferable and allow Genesis to properly service the public sector industry, which since 2019, has represented approximately 80% of its total sales.⁵⁴

Despite Genesis' best efforts, an out of court resolution to its financial challenges could not be reached and the Purchaser is not prepared to consummate an acquisition of Genesis' business under any alternative structure.⁵⁵ The SISP was designed to determine if any other party would consider an alternative structure that provided greater value. The SISP allowed for any kind of transaction structure, or combination of transaction structures, to be put forward and be considered.⁵⁶ The SISP however generated no expressions of interest of any kind.

The efforts of the Receiver and Genesis and the results of the SISP are clear: there are no other viable options to preserve value in Genesis other than the Transactions and the RVO.

- (b) The RVO is Economically Superior: The RVO structure produces an economic result that is superior to any alternative, in that it preserves Genesis' permits, licenses and

⁵³ *Ibid*; see also [Arrangement relatif à Blackrock Metals Inc, 2022 QCCS 2828](#) at para 95.

⁵⁴ Pre-Appointment Report at para 9.0(2)(a)

⁵⁵ Pre-Appointment Report at para 2.0(6).

⁵⁶ Pre-Appointment Report at para 9.0(1)(a).

tax losses, without any corresponding unfavourable impact on stakeholders. The RVO structure derives the most value for Genesis' business and assets.⁵⁷

(c) No Prejudice to Stakeholders: There is no stakeholder prejudiced by the contemplated RVO structure relative to their treatment and outcome under any other viable alternative (if any). As noted, Genesis intends to retain a significant portion of Genesis' unsecured trade vendor debt owing to Critical Suppliers, who will otherwise receive no recovery in a liquidation.⁵⁸

(d) Value is Given: The consideration being paid for Genesis' business reflects the value of the licenses and permits and other intangible assets. The RVO structure enhances value and provides the best outcome for stakeholders, including the Debtors' secured creditors, employees, customers, and Critical Suppliers.⁵⁹

43. The RVO structure has been designed to make the Transactions as expeditious, cost effective, and is as unintrusive as possible to Genesis' operations, its employees, and its customers.

3) Objections of Convergent

44. As noted in the Pre-Appointment Report, on March 3, 2022, Convergent filed a statement of claim against Genesis claiming damages of approximately \$1.1 million stemming from a purported breach of a Master Subcontract Agreement between Convergent and Genesis (the "**MSA**").⁶⁰

45. Based on the written submissions of Convergent served on September 8, 2022, Cortland understands that Convergent opposes certain aspects of the Transactions. In particular, Convergent objects to the fact that the Transactions contemplate the retention of Genesis' obligations owing to unsecured creditors who the Purchaser deems to be Critical Suppliers, but not others, including unsecured claim of Convergent pursuant to the MSA. Convergent asserts this is "a form of preference".

⁵⁷ Pre-Appointment Report at para 9.0(2)(b)

⁵⁸ Pre-Appointment Report at para 9.0(2)(c)

⁵⁹ Pre-Appointment Report at para 9.0(2)(d).

⁶⁰ Pre-Appointment Report at para 5.2(2).

46. Convergint's proposed solution would be to allocate the value of the Purchase Price that is ultimately to be paid to the Critical Suppliers as Retained Liabilities and distribute such amounts to all unsecured trade creditors on a *pro rata* basis. In other words, Convergint is seeking to get the lion's share of the Purchase Price attributed to the Retained Liabilities of the Critical Suppliers. Convergint's objections are unfounded.
47. While it is a fundamental tenet of insolvency law that in the context of the allocation of liquidation proceeds all unsecured creditors are to receive equal treatment with their debts being paid *pari passu*, it is also fundamental that unsecured creditors cannot prevent a transaction from closing on the basis that they must get paid or else there can be no transaction for the business. That is simply not how the process is intended to work.
48. As noted in the case of *Cadillac*:⁶¹

[...] in the context of the sale of a company's business under the CCAA, there is no requirement that creditors be treated equally. That is not to say that their interests are to be ignored. Rather, the effects of the proposed sale on the creditors are one of the factors that must be considered. But they are considered in the larger context of the proposed sale and weighted against the other above noted factors, including the interests of the debtor and the stakeholders generally.

The above principle was applied in *Re Nelson Education Ltd.*, 2015 ONSC 5557, 29 C.B.R. (6th) 140 (Ont. S.C.J.) where Newbould J., in approving a sale of substantially all of Nelson's assets pursuant to a credit bid pursuant to the CCAA, noted at para. 39 that while there were some excluded liabilities and a small amount owing to former employees that would not be paid, the monitor indicated there was no reasonable prospect of any alternative solution that would provide recovery for those creditors. [Emphasis added]

49. In *Bellatrix*, this Court approved a transaction that provided for no recovery for approximately \$290 million of secured debt obligations, but nevertheless resulted in the payment or assumption of substantial unsecured obligations relating to certain assumed contracts, cure costs, and environmental and reclamation obligations.⁶²
50. Consistent with the purpose of the *BIA*, which includes ensuring that the highest value is received for the debtors' assets,⁶³ and the factors set out in *Soundair*, this Court in *Bellatrix*

⁶¹ [Grafton-Fraser v Cadillac, 2017 ONSC 2496](#) at paras 23-24.

⁶² [Re Bellatrix Exploration Ltd, 2020 ABQB 332.](#)

⁶³ *Ibid.*

focused its analysis on the effects of the proposed sale or disposition on the creditors and other interested parties. Specifically, while recognizing that creditor interests are important considerations when approving a transaction, this Court approved the transaction before it in *Bellatrix* notwithstanding that such approval would provide benefits to certain unsecured creditors, employees, and other stakeholders in circumstances where certain of the debtor's other creditors, even secured creditors, would not receive any recovery:⁶⁴

The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing [...]

The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix's creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.

It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. [Emphasis added]

51. As seen in the above authorities, it is common in insolvency proceedings for a purchaser to elect to assume certain unsecured obligations while excluding other unsecured obligations. This is not akin to a fraudulent preference. Affording a measure of discretion to a purchaser to assume some liabilities and not others maximizes value by allowing a purchaser to address the needs of employees, suppliers, pensioners and social stakeholders that are important, in its judgment, to the ongoing functioning of the business.
52. Similarly, in the ordinary course, receivers choose to disclaim certain contracts and assign others. This is routinely considered by courts to be appropriate. Those whose contracts are assigned are paid cure costs, and those who have their contracts disclaimed simply have an

⁶⁴ *Ibid* at 59-62.

unsecured claim against the estate for damages. Again, this is not considered to be prejudicial or preferential, but is simply a commercial reality in insolvency proceedings.⁶⁵

53. As set out in the Pre-Appointment Report and the SPA, the "Critical Suppliers" are those suppliers of goods and services to Genesis, whose ongoing supply is, in the view of the Purchaser, critical to the preservation of the going concern value of Genesis.⁶⁶ The goods and services of the Critical Suppliers cannot be replaced in a commercially reasonable time and/or at a commercially reasonable cost.
54. Unlike the Critical Suppliers, Convergent does not have ongoing business relationships with Genesis. It is for this commercial reason the obligations to Convergent and other similarly situated parties have had their obligations excluded. This is a common approach.
55. This Court recently approved a sale and investment solicitation process whereby the receiver entered into a definitive term sheet with a related party to the debtor who acted as a stalking horse bidder in the receivership proceedings of *Elcano Exploration*.⁶⁷ As in this case, the stalking horse bid contemplated approval of the transaction pursuant to a reverse vesting order. The definitive term sheet signed by the Receiver included a list of "Retained Liabilities" that would remain obligations of the Elcano entities post transaction, including any "obligation designated as a Retained Liability by Elcano" while other obligations were excluded.⁶⁸
56. Similarly, in the transactions approved by this Court in *Jam Hospitality* and *Balanced Energy*, the reverse vesting orders approved the lists of "Retained Liabilities" and "Transferred Liabilities" set out in those transactions. Included in the list of Transferred Liabilities were liabilities associated with certain non-critical contracts.⁶⁹
57. Notably, the RVO and each of the Approval and Reverse Vesting Orders granted in *Elcano Exploration*, *Jam Hospitality*, and *Balanced Energy*, contain the Alberta template language for approval and vesting orders that provides that the transactions approved shall not constitute

⁶⁵ [Re Urbancorp Cumberland 1 GP Inc, 2020 ONSC 7920](#) at paras 30-31.

⁶⁶ Pre-Appointment Report at para 1.0(5).

⁶⁷ [Re Elcano Exploration Inc et al, ABQB Court File No. 2101-08818](#) – Order granted January 7, 2022.

⁶⁸ *Elcano Exploration* – Definitive Term Sheet for RVO Transaction.

⁶⁹ [Jam Hospitality, ONSC Court File No. 2101-05667](#) – Order granted May 9, 2022; [Balanced Energy, ABQB Court File No. 2201-02699](#) – Order granted March 30, 2022.

nor be deemed to be a transfer at undervalue, fraudulent preference, or other reviewable transaction under the *BIA* or any other applicable federal or provincial legislation.

58. It is apparent that neither the *BIA*, the case law, nor commercial practice suggests there is anything unusual or improper regarding the proposed retention of the Retained Liabilities and vesting out of the Excluded Liabilities.
59. The relevant factors support the granting of the RVO. These factors include the evidence that the Transactions: (i) materially exceed the liquidation value of the Debtors; (ii) maximize the value of the Debtors' businesses and assets as evidenced by the SISP; (iii) permit the continued employment of the vast majority of the Debtors' employees; and (iv) allow for recoveries and ongoing business relationships with customers and the Critical Suppliers.
60. By contrast, what Convergent is proposing is that the SPA be re-written by judicial fiat such that the Critical Suppliers, who Genesis will have continuing business relationships with, will not be paid in full. The Purchaser did not bargain for such a transaction and cannot be compelled to agree to.
61. When considering the *BIA*, the case law and the relevant factors, it is clear the Court should approve the SPA, the Transactions and grant the RVO.

C. The Fees and Activities of the Receiver should be Approved

62. In *Target Canada*, the Court noted that there are good policy and practical reasons to grant the approval of a monitor's reported activities, including (a) allowing a monitor to bring its activities before a court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling a court to satisfy itself that a monitor's activities have been conducted in a prudent and diligent manner; (d) providing protection for a monitor not otherwise provided by the *CCAA*; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by a monitor.⁷⁰

⁷⁰ [Re Target Canada Co, 2015 ONSC 7574](#) at paras 2, 22-23.

63. These comments and the policy considerations identified by the Court in *Target Canada* apply with equal force to applications seeking approval of a receiver's report and the activities of a receiver described therein.⁷¹
64. The Court has jurisdiction to review and approve the activities of the Receiver if the Receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily.⁷²
65. The activities of the Receiver that are set out in the Pre-Appointment Report were necessary, consistent with the Receiver's duties and powers in the Receivership Order, and were undertaken with efficiency and reasonableness in the interests of the Debtors' stakeholders generally.
66. Further, the fees and disbursements of KSV Advisory Inc. and McMillan set out in Section 12.0 of the Pre-Appointment Report are reasonable and appropriate in the circumstances.⁷³
67. In *Belyea v Federal Business Development Bank*, Stratton JA of the New Brunswick Court of Appeal set out a non-exhaustive list of factors to be considered in determining whether a receiver's fees are fair and reasonable as follows:
- (a) the nature and extent of the value of the assets handled;
 - (b) the complications and difficulties encountered;
 - (c) the degree of assistance provided by the company, its officers or employees;
 - (d) the time spent;
 - (e) the receiver's knowledge, experience and skill;
 - (f) the diligence and thoroughness displayed by the receiver;
 - (g) the responsibilities assumed;

⁷¹ [Re Hanfeng Evergreen Inc, 2017 ONSC 7161](#) at para 15.

⁷² [Bank of America Canada v Willann Investments Ltd, \[1993\] OJ No. 1647 \(Gen Div\)](#) at paras 2-5, aff'd [\[1996\] OJ No. 2806 \(CA\)](#); [Lang Michener v American Bullion Minerals Ltd, 2005 BCSC 684](#) at para 21.

⁷³ Pre-Appointment Report at Section 12.0(3).

- (h) results of the receiver's efforts; and
- (i) the cost of comparable services.⁷⁴

68. The Receiver's fees, and those of its counsel, were incurred in connection with the planning of the receivership proceedings, finalizing the terms of the SPA, and carrying out the SISP.⁷⁵ The Receiver has acted in good faith and in the interest of creditors.⁷⁶

69. Cortland supports the Application for approval of the fees, actions, conduct, and activities of the Receiver and its legal counsel as outlined in the Pre-Appointment Report.

D. The Sealing Order should be granted in respect of the Confidential Appendix

70. In *Sierra Club of Canada v Canada (Minister of Finance)*, the Supreme Court of Canada (the "**SCC**") held that courts should exercise their discretion to grant sealing orders where (i) the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and (ii) the salutary effects of the order outweigh its deleterious effects.⁷⁷

71. In *Sherman Estate*, the SCC applied the test from *Sierra Club* differently, without altering its essence. According to *Sherman Estate*, a person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.⁷⁸

⁷⁴ [\[1983\] NBJ No. 41 \(CA\)](#) at para 9; [Bank of Nova Scotia v Diemer, 2014 ONCA 851](#) at para 33; [Re Confectionately Yours Inc, 36 CBR \(4th\) 200 \(CA\)](#) at para 42.

⁷⁵ Pre-Appointment Report at para 12.0(1).

⁷⁶ [BT-PR Realty Holdings Inc v Coopers & Lybrand, 25 CBR \(4th\) 24 \(On. Sup. Ct. Commercial List\)](#) at para 22.

⁷⁷ [2002 SCC 41](#) at para 53.

⁷⁸ [2021 SCC 25](#) at para 38.

72. Although the SCC was considering issues of personal privacy in *Sherman Estate*, it noted in citing *Sierra Club* that the term "important interest" can capture a broad array of public objectives including commercial interests.⁷⁹

73. The Confidential Appendix contains confidential and commercially sensitive information, including with respect to the valuation of the businesses and assets of the Debtors in a liquidation scenario.⁸⁰ If such document is not temporarily sealed, the information contained therein may negatively impact any future recoveries in the event that the Transactions do not close, and the Receiver is required to go back to market.⁸¹ No parties will be prejudiced if the information is sealed.⁸²

74. Cortland has provided the Notice to Media of Application to Restrict Access in accordance with the Notice to the Profession issued May 9, 2018.

75. In the circumstances, the temporary sealing of the Confidential Appendix is the least restrictive means to maintain the confidentiality of this commercially sensitive and confidential information.⁸³ The salutary effects of the sealing order outweigh the deleterious effects of restricting access to the Confidential Appendix.

PART V - CONCLUSION

76. For the reasons set out above, Cortland requests that this Honourable Court grant the relief requested in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th day of September, 2022

Dentons Canada LLP

Dentons Canada LLP
Lawyers for Cortland Credit Lending Corporation

⁷⁹ *Ibid* at para 41.

⁸⁰ Pre-Appointment Report at paras 7.0(1).

⁸¹ Pre-Appointment Report at para 7.1(1).

⁸² Pre-Appointment Report at para 7.1(2).

⁸³ Pre-Appointment Report at para 7.1(2).

LIST OF AUTHORITIES

LEGISLATION	
1.	<i>Bankruptcy and Insolvency Act</i>, RSC 1985, c B-3, as amended
2.	<i>Companies' Creditors Arrangement Act</i>, RSC 1985, c C-36
3.	<i>Judicature Act</i>, RSA 2000, c J-2
LEGISLATION	
4.	<i>1705221 Alberta Ltd v Three M Mortgages Inc</i>, 2021 ABCA 144
5.	<i>Alberta Treasury Branches v Elaborate Homes Ltd</i>, 2014 ABQB 350
6.	<i>Arrangement relatif à Blackrock Metals Inc</i>, 2022 QCCS 2828
7.	<i>Bank of America Canada v Willann Investments Ltd</i>, [1993] OJ No. 1647 (Gen Div), aff'd [1996] OJ No. 2806 (CA)
8.	<i>Balanced Energy Oilfield Services Inc</i>, ABQB Court File No. 2201-02699
9.	<i>Bank of Montreal v River Rentals Group Ltd</i>, 2010 ABCA 16
10.	<i>Bank of Nova Scotia v Diemer</i>, 2014 ONCA 851
11.	<i>Bellatrix Exploration Ltd (Re)</i>, 2020 ABQB 332
12.	<i>Belyea v Federal Business Development Bank</i>, [1983] NBJ No. 41 (CA)

13.	<u>BT-PR Realty Holdings Inc v Coopers & Lybrand, 25 CBR (4th) 24 (Ont. Sup. Ct. Commercial List)</u>
14.	<u>CCM Master Qualified Fund Ltd v Blutip Power Technologies Ltd, 2012 ONSC 1750</u>
15.	<u>DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2021 ABCA 226</u>
16.	<u>Elleway Acquisitions Limited v The Cruise Professionals Limited, 2013 ONSC 6866</u>
17.	<u>Servus Credit Union Ltd. v Proform Management Inc., 2020 ABQB 316</u>
18.	<u>Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Company, 2002 ABQB 430</u>
19.	<u>Grafton-Fraser v Cadillac, 2017 ONSC 2496</u>
20.	<u>Jam Hospitality Inc, ONSC Court File No. 2101-05667</u>
21.	<u>Lang Michener v American Bullion Minerals Ltd, 2005 BCSC 684</u>
22.	<u>Maple Trade Financial Inc v CY Oriental Holdings Ltd, 2009 BCSC 1527</u>
23.	<u>Re Confectionately Yours Inc, 36 CBR (4th) 200 (CA)</u>
24.	<u>Re Danier Leather Inc, 2016 ONSC 1044</u>
25.	<u>Re Elcano Exploration Inc et al, ABQB Court File No. 2101-08818</u>
26.	<u>Re Hanfeng Evergreen Inc, 2017 ONSC 7161</u>

27.	<u>Re Harte Gold Corp, 2022 ONSC 653</u>
28.	<u>Re Pure Global Cannabis Inc, ONSC Court File No. CV-20-00638503-00CL</u>
29.	<u>Re Sanjel Corporation, 2016 ABQB 257</u>
30.	<u>Re Target Canada Co, 2015 ONSC 7574</u>
31.	<u>Re Urbancorp Cumberland 1 GP Inc, 2020 ONSC 7920</u>
32.	<u>Re Vert Infrastructure Ltd, ONSC Court File No. CV-20-00642256-00CL</u>
33.	<u>Royal Bank v Soundair (1991), 4 OR (3d) 1 (ONCA)</u>
34.	<u>Sherman Estate v Donovan, 2021 SCC 25</u>
35.	<u>Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41</u>
36.	<u>Textron Financial Canada Ltd v Chetwynd Motels Ltd, 2010 BCSC 477</u>
37.	<u>Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc, 2019 ONCA 508</u>