Court File No: CL-26-00000261-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PAYSTONE HOLDINGS INC., PAYSTONE INC., ATOM GROWTH INC. and ATOM GROWTH (USA), INC.

FACTUM OF THE RESPONDENT, BDC CAPITAL INC.

July 9, 2026

McMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON M5J 2T3

Kourtney Rylands
kourtney.rylands@mcmillan.ca
Tel: 403.355.3326

Jeffrey Levine LSO#: 55582H
jasmine.landau@mcmillan.ca
Tel: 416.865.7281

Lawyers for BDC Capital Inc.

TO: THE SERVICE LIST

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PART I. - OVERVIEW

1. BDC Capital Inc. ("**BDC**") opposes certain of the language in paragraphs 16, 17 and 28 of the Sales and Investment Solicitation Process (the "**Proposed SISP**") proposed by AlixPartners Restructuring, Inc. as CCAA Monitor of Paystone Holdings Inc., Paystone Inc., Atom Growth Inc. and Atom Growth (USA), Inc. (the "**Monitor**") because the impugned language will have a chilling effect on bidders' interest in the Applicants' business and property. Further, the limited consultation rights in the Proposed SISP ignores that BDC may prove to be the fulcrum creditor in the Applicants' estate and should thus have consultation rights in respect of bids arising out of the Proposed SISP.

2. Capitalized terms not otherwise defined in this factum have the meaning ascribed to them in the Proposed SISP.

3. While paragraph 13(d) of the Proposed SISP contemplates that Qualified Bids will merely be required to provide for aggregate consideration sufficient to pay obligations subject to the Administration Charge and DIP Charge in full, in cash, paragraphs 16 and 17 provide Sandton Investments X (Luxembourg) S.a.r.l. ("**Sandton**") with the right to veto the Monitor's selection of any successful bid unless the bid provides for aggregate consideration sufficient to pay not only obligations sufficient satisfy the Administration and DIP Charges in full, but also sufficient to satisfy Sandton's pre-petition debt (the "**Senior Secured Debt**") in full. BDC accepts that Sandton, as the proposed DIP lender and as the Applicants' senior secured creditor, ought to be consulted as the Proposed SISP progresses. However, Sandton should not have a veto over the Monitor's selection of a successful bid arising out of the Monitor-run Proposed SISP merely because the successful bid does not provide for repayment of the Senior Secured Debt. Rather, this Court should retain the jurisdiction to hear submissions from the Monitor and other stakeholders should

the Monitor wish to select any Qualified Bid as the Successful Bid. This is particularly so where the quantum of the Senior Secured Debt is in dispute, as it presently is here.

4. Moreover, the Proposed SISP may yield Qualified Bids sufficient to see recovery for BDC on its subordinate secured debt irrespective of the quantum of the Senior Secured Debt. As such, BDC, together with Sandton, ought to be consulted by the Monitor as the Proposed SISP progresses as well. A blackline showing the changes that BDC proposes to the noted paragraphs of the Proposed SISP is attached to this Factum at Schedule C.

PART II. - FACTS

A. Secured Creditors' Interest in the Applicants

5. The Applicants owe BDC approximately $12.9 million as of June 30, 2026 (the "**BDC Debt**").[1] The BDC Debt is secured by a general security agreement over all of the Applicants' personal property and undertakings which security is subordinated to the Senior Secured Debt pursuant to a Priority Agreement.[2]

6. The Senior Secured Debt arose under credit facilities made available by a lending syndicate (the "**Original Debt**") that Sandton purchased on May 8, 2026, about one month before the commencement of these proceedings in a loan purchase transaction (the "**Loan Purchase Transaction**") and is subject to a forbearance agreement of the same date (the "**Forbearance Agreement**").[3] The face value of the debt Sandton purchased in the Loan Purchase Transaction was approximately $92 million. Sandton paid approximately $41 million for the purchased debt.[4] The Forbearance Agreement, among other things: (i) changed the repayment terms for the Senior

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[1] Fourth Report of the Monitor dated July 6, 2026 ("**Fourth Report**"), para. 3.2.2.
[2] Fourth Report, para. 3.2.1.
[3] Fourth Report, paras. 3.1.1 and 3.1.2.
[4] *Paystone Holdings Inc. (Re)*, 2026 ONSC 3693 at paras. 48-49.

Secured Debt (providing for blended payments of principal and interest instead of requiring only repayment on Maturity); (ii) moved the Maturity Date from December 31, 2027 to May 8, 2028; and (iii) provided a discount of $35,262,500 to the outstanding principal amount then owing on the Original Debt subject to various triggering events.[5]

7. The language in the Forbearance Agreement providing for the discount is as follows:

> **7.6 Loan Repayment Discount**
>
> Provided that (i) no Waiver Termination Event described in Section 8.1(d), (e), (f), (g) or (h) has occurred and (ii) the Agent has not accelerated the Obligations following the occurrence of a Waiver Termination Event, the Borrower shall be granted a discount in the amount of $35,262,500.00 (the "**Loan Repayment Discount**") to the then Outstanding Principal Amount. The Loan Repayment Discount shall be applied as a reduction of the Outstanding Principal Amount outstanding on the Maturity Date or upon any earlier repayment in full of the Obligations (other than as a result of acceleration of the Obligations following an occurrence of a Waiver Termination Event). For greater certainty, any Waiver Termination Event that is cured within the applicable cure period shall not disqualify the Borrower from receiving the Loan Repayment Discount.

8. The Monitor observes the following in its Fourth Report:

> …Pursuant to the Sandton Forbearance Agreement, Sandton agreed to extend the maturity date of the Senior Credit Facilities from December 31, 2027 to May 8, 2028, and, provided that a prescribed termination event (which includes a CCAA filing) had not occurred by the maturity date and the obligations in respect of the Senior Credit Facilities had not otherwise been accelerated, grant Paystone a discount of $35,262,500 to the outstanding principal amount owing at the maturity date. The Monitor understands that the Applicants' CCAA filing constitutes a prescribed termination event under the Senior Credit Facilities, and **accordingly the contingent future principal discount no longer appears to be available to the Applicants.**[6] [emphasis added]

9. BDC disagrees with the conclusion the Monitor reaches in the passage above because, among other things, the Monitor misconstrues the text of the Forbearance Agreement and the

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[5] Affidavit of Adam Zalev sworn June 5, 2026 at para. 82.

[6] Fourth Report, para. 3.1.3.

prescribed termination event to which the Monitor refers is void on account of the common law anti-deprivation rule and section 34 of the CCAA.

B. Language of the SISP With Which BDC Takes Issues

10. Paragraph 16 of the Proposed SISP provides in relevant part as follows:

> The Monitor will, in consultation with Sandton, review and evaluate each Qualified Bid and will, with the consent of Sandton (unless Qualified Bid(s) acceptable to the Monitor will repay in full in cash all DIP Facility Obligations and Senior Secured Obligations (as defined below)), (a) identify the highest or otherwise best bid (the "**Successful Bid**", and the Qualified Bidder making such Successful Bid, the "**Successful Bidder**"); and (b) identify the next highest or otherwise second best bid (the "**Back-Up Bid**", and the Qualified Bidder making such Back- Up Bid, the "**Back-Up Bidder**"),…[7]

11. The foregoing language permits the Monitor to identify the Successful Bid only "with the consent of Sandton" unless Sandton's Senior Secured Obligations are satisfied in full.

12. Paragraph 17 of the Proposed SISP is similarly worded and sets out the same restriction on the Monitor in connection with its identification of the Qualified Bid that might otherwise emerge from an Auction. Absent Sandton's consent, the Monitor is precluded from identifying a Successful Bid out of the Auction unless Sandton's Senior Secured Obligations are satisfied in full.[8]

13. Paragraph 28 of the Proposed SISP provides in relevant part as follows:

> If no Qualified Bid is received in the SISP that provides for the payment in full in cash of all DIP Facility Obligations and Senior Secured Obligations, or such other recovery in respect of the DIP Facility Obligations and Senior Secured Obligations as Sandton may agree to in its sole and absolute discretion, Sandton shall have the right, _*in lieu of the Monitor designating a Successful Bid in the SISP*_, to bring forward for Court approval a credit bid transaction to acquire all or a material

[7] Sales and Investment Solicitation Process, Appendix A to the proposed SISP Approval Order, Schedule D to the Fourth Report, para. 16.
[8] *Ibid.*, para. 17.

> portion of the Applicants' Business and Property in satisfaction of the DIP Facility Obligations and the Senior Secured Obligations.[9] [emphasis added]

14. Again, the Monitor is precluded from designating a Successful Bid in the Proposed SISP where a Qualified Bid is not sufficient to satisfy both the DIP Facility Obligations and Senior Secured Obligations in full.

15. Separately, while the Proposed SISP provides that the Monitor will consult with Sandton on the review and evaluation of Qualified Bids, it does not provide for the Monitor to consult with BDC.

PART III. - ISSUES AND LEGAL ARGUMENT

16. The issues on the Monitor's motion to approve the Proposed SISP are whether Sandton ought to have the right to veto the Monitor's selection of a Successful Bid and whether BDC ought to be afforded consultation rights.

A. Sandton Ought to be Denied Veto Rights

17. The factors to be considered on a SISP approval motion are well-known:

(a) The fairness, transparency and integrity of the proposed process;

(b) The commercial efficacy of the proposed process in light of the specific circumstances; and

(c) Whether the sales process will, in the circumstances, optimize the chances of securing the best possible price for the assets for sale.[10]

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[9] *Ibid.*, para. 28.
[10] *Tacora Resources Inc. (Re)*, 2023 ONSC 6126 at para. 166.

18. The first of the above factors involves transparency. Prospective bidders ought to be clear on the process they'll be subjected to and minimum requirements their bids must satisfy if their bid is to succeed. Here, prospective bidders face uncertainty as to whether their bid, even if the Monitor considers their bid to be the best bid, will be eligible for selection as the Successful Bid because Sandton has a veto right unless the Qualified Bid is sufficient to satisfy obligations secured by the proposed Administration and DIP Charge and the Senior Secured Debt in full. Normally this minimum bid requirement would not be offensive – minimum bid requirements are a common feature of CCAA SISPs.[11] Here, however, the quantum of the Senior Secured Debt is uncertain.

19. The Monitor has yet to receive any opinion from its counsel as to the quantum of the Senior Secured Debt, though, as described above, it appears to have concluded that the discount to the Original Debt set out in the Forbearance Agreement is no longer available to the Applicants because these proceedings constitute a "Waiver Termination Event" terminating the discount that Sandton granted the Applicants under section 7.6 of the Forbearance Agreement.[12] But terminating the discount upon the commencement of these proceedings offends the common law anti-deprivation rule and section 34 of the CCAA.

20. The common law anti-deprivation rule provides that a contractual provision that removes value from the debtor's estate to the prejudice of creditors upon the insolvency or bankruptcy of that debtor is invalid and unenforceable.[13] Section 34 of the CCAA effectively codifies the anti-deprivation rule,[14] rendering any offending contractual provisions null and void.[15]

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[11] *KEB Hana Bank v. Mizrahi Commercial (The One) LP et al.*, 2024 ONSC 3739 at para. 92.
[12] Fourth Report, para. 3.1.3.
[13] *In Re Hudson's Bay Company*, 2025 ONSC 5998, [***The Bay***] at para. 155.
[14] *The Bay* at para 160; CCAA section 34(1).
[15] CCAA section 34(5).

21. Justice Osborne (as he then was) considered the anti-deprivation rule and the application of section 34 of the CCAA in the context of a lease agreement in *In Re Hudson's Bay Company*. There, the lease in question provided that if no event of default had occurred or was continuing as of November 13, 2028, then the parties would execute and deliver to one another a reinstated original lease that had more favourable terms to the Hudson's Bay Company.[16] Justice Osborne declined to apply the anti-deprivation rule and section 34 of the CCAA, finding, among other things, that the November 13, 2028 date upon which the right would crystalize was over three years away, at which time further analysis would be needed to determine whether the Hudson's Bay Company still had the right.[17] As the right had not yet been acquired, the extant insolvency proceedings were not a trigger for the removal of anything from the debtors' estate and neither the anti-deprivation rule nor section 34 of the CCAA had been offended.

22. Here, Sandton already granted the discount of $35,262,500 to the Applicants on execution of the Forbearance Agreement "to the then Outstanding Principal Amount." While section 7.6 of the Forbearance Agreement providing for the discount further provides that the discount "shall be <u>applied</u> as a reduction of the Outstanding Principal Amount outstanding on the Maturity Date" [emphasis added], the discount *accrued* on execution of the Forbearance Agreement *before* the commencement of these proceedings. The Applicants don't have to wait until the Maturity Date, as the Monitor suggests in the Fourth Report, to determine whether the discount accrued. Thus, the existing rights missing for the debtor in *Hudson Bay* have already vested in the Applicants' estate, and the anti-deprivation rule and section 34(5) of the CCAA are engaged.

23. The result is that, in BDC's submission, the Senior Secured Debt is approximately $60

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[16] *The Bay*, at para 154.
[17] *The Bay* at paras 174 and 182 - 185.

million rather than over $92 million.

24. In any event, bidders should not face the resulting uncertainty as to a minimum monetary threshold their bids must overcome for the Monitor to have an opportunity to put the best Qualified Bid forward as the Successful Bid. The Court should decide the quantum of the Senior Secured Debt at a later date, on a full evidentiary recording permitting the Court to properly make a ruling on the interpretation of the Forbearance Agreement and the applicability of the anti-deprivation rule and section 34 of the CCAA. Bidders faced with that uncertainty are unlikely to bother participating in the SISP, which reduces rather than optimizes the chances of securing the best possible price for the assets for sale, contrary to what is required of a proper SISP.

B. BDC Should be Afforded Consultation Rights

25. Since both the principles in *Soundair* and section 36 of the CCAA contemplate consultation with creditors as a factor in determining whether to approve a transaction that results from a sales process,[18] SISPs commonly provide for consultation with affected creditors. Given the uncertainty over the quantum of the Senior Secured Debt and the real possibility that, even if the discount provided for in the Forbearance Agreement is not applied, the SISP may produce bids sufficient to provide recovery for BDC,[19] BDC may well be the Applicants' fulcrum creditor. The position of a fulcrum creditor in a restructuring proceeding is to be afforded weight. Just as Sandton is afforded consultation rights in the Proposed SISP, so too should BDC.[20]

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[18] *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ON CA), see bottom of page 23 of the pdf; *CCAA*, s. 36(3)(d).
[19] Indeed, BDC sought to bring forward a bid worth $115 million at the return of the pre-pack approval motion – see *Paystone Holdings Inc. (Re)*, 2026 ONSC 3693 at para. 117.
[20] *KEB Hana Bank v. Mizrahi Commercial (The One)* LP et al., 2024 ONSC 3739 at para. 113.

PART IV. - RELIEF SOUGHT

26. For the foregoing reasons, BDC requests that if the Proposed SISP is otherwise to be approved, that it be approved only with the modifications BDC proposes in Schedule C to this factum.

Jeffrey Levine / Kourtney Rylands

McMILLAN LLP
Brookfield Place,
181 Bay Street, Suite 4400,
Toronto, ON M5J 2T3

Kourtney Rylands
kourtney.rylands@mcmillan.ca

Jeffrey Levine (LSO#: 55582H)
jeffrey.levine@mcmillan.ca

Lawyers for BDC Capital Inc.

SCHEDULE "A"

LIST OF AUTHORITIESCASE LAW:

1. *In Re Hudson's Bay Company*, 2025 ONSC 5998

2. *KEB Hana Bank v. Mizrahi Commercial (The One) LP et al.*, 2024 ONSC 3739

3. *Paystone Holdings Inc. (Re)*, 2026 ONSC 3693

4. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ON CA)

5. *Tacora Resources Inc. (Re)*, 2023 ONSC 6126

I certify that I am satisfied as to the authenticity of every authority.

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date July 9, 2026

Jeffrey Levine, McMillan LLP

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

LEGISLATION

Companies' Creditors Arrangement Act, RSC 1985, c. C-36, ss. 34 and 36

Certain rights limited

34 (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(b) requiring the further advance of money or credit; or

(c) [Repealed, 2012, c. 31, s. 421]

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts

(7) Subsection (1) does not apply

(a) in respect of an eligible financial contract; or

(b) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(b) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

Restriction on disposition of business assets

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

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

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

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

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

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

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

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

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

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

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131

2007, c. 36, s. 78

2017, c. 26, s. 14

2018, c. 27, s. 269

SCHEDULE "C"

16. The Monitor will, in consultation with Sandton and BDC Capital Inc. ("**BDC**") , review and evaluate each Qualified Bid and will, ~~with the consent~~ in consultation with~~of~~ Sandton and BDC (unless Qualified Bid(s) acceptable to the Monitor will repay in full in cash all DIP Facility Obligations and Senior Secured Obligations (as defined below) in which case only consultation with BDC is required), (a) identify the highest or otherwise best bid (the "**Successful Bid**", and the Qualified Bidder making such Successful Bid, the "**Successful Bidder**"); and (b) identify the next highest or otherwise second best bid (the "**Back-Up Bid**", and the Qualified Bidder making such Back-Up Bid, the "**Back-Up Bidder**"), in each case, subject to paragraph 17 below. Any Successful Bid and Back-Up Bid will be subject to approval by the Court. For certainty, the Monitor may identify one or more Successful Bids, Successful Bidders, Back-Up Bids, or Back-Up Bidders for non-overlapping Qualified Bids, and bring one or more Approval Motions (as defined below) and seek one or more Approval Orders in connection therewith, and in such circumstances, the SISP shall be interpreted as referring to multiple Successful Bids, Successful Bidders, Back-Up Bids, Back-Up Bidders, Approval Motions and Approval Orders, as applicable. Notwithstanding the foregoing, the preferred transaction structure is an *en bloc* transaction involving all or substantially all of the Applicants' Property and/or Business.

17. In the event there is more than one Qualified Bid, the Monitor may elect to proceed with an auction process to determine the Successful Bid ("**Auction**"). Any such Auction will be conducted in accordance with procedures to be determined by the Monitor, in consultation with Sandton and BDC, and notified to the applicable Qualified Bidders no less than 24 hours prior to the commencement of the Auction. Any such Auction will commence at a time to be designated by the Monitor, and such Auction may, in the discretion of the Monitor, be held virtually via videoconference, teleconference or such other reasonable means as the Monitor deems appropriate. The Monitor will, ~~with the consent~~in consultation with ~~of~~ Sandton and BDC (unless Qualified Bid(s) acceptable to the Monitor will repay in full in cash all DIP Facility Obligations and Senior Secured Obligations in which case only consultation with BDC is required), select the Qualified Bid at the Auction that emerges as the Successful Bid.

28. If no Qualified Bid is received in the SISP that provides for the payment in full in cash of all DIP Facility Obligations and Senior Secured Obligations, or such other recovery in respect of the DIP Facility Obligations and Senior Secured Obligations as Sandton may agree to in its sole and absolute discretion, Sandton shall have the right~~, in lieu of the Monitor designating a Successful Bid in the SISP,~~ to bring forward for Court approval a credit bid transaction to acquire all or a material portion of the Applicants' Business and Property in satisfaction of the DIP Facility Obligations and the Senior Secured Obligations. For greater certainty, Sandton shall not be required to submit a Binding Offer or Deposit in the SISP in order to exercise its right to credit bid the DIP Facility Obligations and/or Senior Secured Obligations.

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McMILLAN LLP
Brookfield Place
181 Bay Street, Suite 4400
Toronto, ON M5J 2T3

Kourtney Rylands
kourtney.rylands@mcmillan.ca
Tel: 403.355.3326

Jeffrey Levine LSO#: 55582H
jeffrey.levine@mcmillan.ca
Tel: 416.865.7791

Lawyers for BDC Capital Inc.