

**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 VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP
POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY
THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

**FACTUM OF THE MONITOR
(SISP Approval Order)**

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TO: **THE SERVICE LIST**

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COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

**FACTUM OF THE MONITOR
(SISP Approval Order)**

PART I - INTRODUCTION

1. KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed monitor (in such capacity, the "**Monitor**") of Validus Power Corp. ("**Validus Parent**"), Iroquois Falls Power Corp. ("**IFPC**"), Bay Power Corp. ("**Bay**"), Kap Power Corp. ("**Kap**"), Validus Hosting Inc. ("**Hosting**"), Kingston Cogen GP Inc. ("**Kingston GP**" and collectively with each of the foregoing entities, the "**Companies**") and Kingston Cogen Limited Partnership ("**Kingston LP**" and together with the Companies, the "**Validus Entities**") brings this motion seeking approval of a sale and investment solicitation process for the Validus Entities.

2. On August 10, 2023, the Court granted an Order (the "**Receivership Order**") appointing KSV as the receiver and manager of the properties, assets and undertakings of the Validus Entities (in such capacity, the "**Receiver**").¹

¹ Second Report of KSV Restructuring Inc., in its capacity as the Court-appointed monitor (the "**Monitor**"), dated October 19, 2023 (the "**Second Report**"), section 1.0, para 2, Motion Record of the Monitor dated October 19, 2023 ("**MR**"), Tab 2, p 18; Order dated August 10, 2023 ("**Receivership Order**"), Appendix A to the Second Report, MR, Tab 2A, p 48.

3. On August 29, 2023, upon application by the Receiver, the Court granted an Initial Order in these CCAA proceedings (the “**Initial Order**”) that, among other things, appointed KSV as the Monitor. On September 8, 2023, the Court granted an extension of the Stay Period (as defined in the Initial Order) to December 1, 2023.²

4. This factum is being filed in support of the Monitor’s request for approval of, among other things:

- (a) a sale and investment solicitation process (“**SISP**”);
- (b) a stalking horse offer (the “**Stalking Horse Offer**”) made by Macquarie Equipment Finance Limited (“**Macquarie**”) and Far North Power Corp. (“**Far North**” and together with Macquarie, the “**Stalking Horse Bidders**”);
- (c) a break fee agreement dated as of October 16, 2023 (the “**Break Fee Agreement**”) between Macquarie and the Validus Entities, by the Monitor and the Bid Protections (as defined below) and the Bid Protections Charge (defined below) provided under that agreement;
- (d) an Unknown Contract Bar Process (defined below); and
- (e) extension of the Stay Period to December 31, 2023.³

5. Capitalized terms used herein and not otherwise defined have the meaning given to them in the Second Report of the Monitor dated October 19, 2023 (the “**Second Report**”).

² Second Report, section 1.0, para 5, MR, Tab 2, p 19.

³ Second Report, section 1.1, para 1, MR, Tab 2, p 20.

PART II - SUMMARY OF FACTS

6. The Validus Entities are a group of privately-held companies that own and operate power generation plants and sell capacity and power to the Independent Electricity System Operator (“IESO”) as a participant in its “capacity auction” market. The Property is principally comprised of four power plants in Ontario located in North Bay, Kapuskasing, Iroquois Falls and Kingston. Currently, the plants in Kingston and Iroquois Falls are operational; these plants are on standby and can supply power to the IESO if called upon as a participant in its capacity auction market. The Kapuskasing and North Bay plants are being maintained and secured but are not otherwise operational at this time.⁴

The Macquarie Security and Claim Amount

7. Macquarie is the senior secured lender of the Validus Entities. In April 2022, IFPC entered into a sale leaseback transaction with Macquarie pursuant to several transaction agreements (the “**Lease Transaction Documents**”), including; an Amended and Restated Lease Agreement (the “**Lease Agreement**”), an Amended and Restated Participation Agreement (the “**Participation Agreement**”) and various guarantees and security provided by the Validus Entities.⁵

8. A summary of the security held by Macquarie from the Validus Entities is as follows:

- (a) Validus Parent: pledge of Validus Parent’s interests in IFPC, Kap, Bay, Kingston LP and Kingston GP;
- (b) IFPC, Bay, Kingston LP and Kingston GP: general security and mortgages on all or substantially all real and personal property, including in respect of the four power plants (except for turbines, plant and equipment that Macquarie leases to IFPC under the Lease Agreement, which Macquarie owns); and

⁴ Second Report, section 2.0, para 1, MR, Tab 2, p 22.

⁵ Second Report, section 3.2, para 1 (a)-(c), MR, Tab 2, p 24.

(c) Hosting: pledge of “material agreements”.⁶

9. Under the Participation Agreement, the purchase price for the Leased Property was \$45 million plus \$5.85 million of HST. Of that \$45 million purchase price, \$9 million was agreed between the parties to be paid to IFPC upon IFPC and other Validus Entities meeting a certain condition, failing which such amount was to be used to prepay rent under the Lease Agreement. That condition was not met, and the \$9 million was ultimately used to prepay rent under the Lease Agreement.⁷

10. Under the Lease Agreement, IFPC agreed to, among other things: (i) make monthly rent payments to Macquarie of \$1.25 million (the “**Base Rent**”) plus HST during the 36 month base term of the Lease; and (ii) pay all other amounts, liabilities and obligations that IFPC is from time to time obligated to pay under the Lease Transaction Documents.⁸ The Lease Agreement also sets out various remedies to which Macquarie was entitled in the event of a default on the part of IFPC.⁹

11. Among the remedies available to Macquarie under the Lease Agreement is the remedy provided under Section 13.1(f) of the Lease Agreement, which permits Macquarie to demand payment from IFPC of liquidated damages in an amount equal to the sum of: (i) any unpaid Base Rent in arrears; (ii) the “Stipulated Loss Value” (the “**SLV**”) for the Leased Property; and (iii) interest on the foregoing amounts. The SLV is determined by way of Schedule 3 to the Lease Agreement. It was initially \$54 million but was reduced every time IFPC made a rent payment. The SLV payable by IFPC in the event of a default was to be the SLV as of the date of written notice that Macquarie was exercising its remedies. Upon payment of these amounts, pursuant to the remedy provided in Section 13.1(f) of the Lease Agreement, IFPC becomes the owner of all of the Leased Property.¹⁰

⁶ Second report, section 3.2, para 1(c), MR, Tab 2, p 24.

⁷ Second Report, section 3.2.1, para 2, MR, Tab 2, p 24.

⁸ Second Report, section 3.2.1, para 3, MR, Tab 2, p 24.

⁹ Second Report, section 3.2.1, para 4, MR, Tab 2, p 25.

¹⁰ Second Report, section 3.2.1, para 5, MR, Tab 2, p 25.

12. IFPC failed to make payments under the lease that came due on May 31, 2023, June 7, 2023 and July 7, 2023.¹¹

13. On July 24, 2023, Macquarie gave notice to IFPC that it was exercising its right to terminate the Lease Agreement and demanded payment under Section 13.1(f) of the Lease Agreement, which it calculated to be \$55,598,575, comprised of: (a) \$8.5 million in respect of unpaid Base Rent; (b) \$40.5 million in respect of the SLV; (c) \$6,370,000 in respect of HST payable on the above amounts; and (d) \$228,575 in respect of interest on the Base Rent.¹²

14. As of September 22, 2023, Macquarie calculates its claim to be \$57,218,822 (the “**Macquarie Claim Amount**”), including overdue interest to that date and HST, but excluding costs and overdue interest following that date.¹³

The SISP

15. From the outset of the proceedings, the primary purpose of the CCAA Proceedings was to run a SISP for the sale of the Property. In connection with the Receiver’s application for the Initial Order, the Receiver noted that it was in the process of negotiating an offer with Macquarie and Far North (formerly known as Hut 8 Power Inc.), a company controlled by Hut 8 Mining Corp. Since that time, the Monitor has been working with the Stalking Horse Bidders to settle the terms of the proposed SISP as well as the Stalking Horse Offer.¹⁴

16. The SISP motion has now been scheduled for November 1, 2023. A summary of the SISP timeline (adjusted for the delay of the proposed hearing date from October 26 to November 1) is as follows:¹⁵

¹¹ Second Report, section 3.2.1, para 6, MR, Tab 2, p 25.
¹² Second Report, section 3.2.1, para 7, MR, Tab 2, p 25.
¹³ Second Report, section 3.1, para 1(a), MR, Tab 2, p 23.
¹⁴ Second Report, section 4.1, para 2, MR, Tab 2, p 28.
¹⁵ Second Report, section 4.1, para 4, MR, Tab 2, p 29.

Milestone	Deadline ¹⁶
Motion to approve SISP	November 1, 2023
Monitor to commence marketing process	November 2, 2023
Bid Deadline	11:59 p.m. on December 7, 2023
Notification to Qualified Bidders of Auction (if any)	As soon as possible after the Bid Deadline
Auction (if any)	On or about December 13, 2023
Approval and RVO motion ¹⁷	December 21, 2023

17. The SISP provides that the Monitor may, in its discretion, seek Court approval to terminate the SISP and to implement the Stalking Horse Bid if no potentially interested parties have executed non-disclosure agreements and commenced due diligence on or prior to November 22, 2023, or if thereafter, all parties who executed non-disclosure agreements and conducted due diligence have advised the Monitor that they no longer intend to participate in the SISP.¹⁸

18. The Qualified Bid Deadline may be extended by the Monitor for no longer than seven days in the Monitor’s discretion, or by further Order of the Court. In such circumstances, the subsequent milestones listed in paragraph 16 above shall be extended by the same amount of time. The Monitor also has the discretion to extend any other milestone dates provided that the aggregate of all such discretionary extensions shall not exceed 14 days.¹⁹

19. Pursuant to the SISP, the Monitor will prepare and disseminate marketing materials, provide Potential Bidders who sign a confidentiality agreement with access to a virtual data room and request that bids be submitted by no later than the proposed bid deadline, December 1, 2023 (the “**Qualified Bid Deadline**”).²⁰

20. In order to be considered a “Qualified Bid” under the SISP, the bid must meet the criteria set out in the SISP including, among other things, provide for aggregate consideration in an estimated

¹⁶ To the extent any dates would fall on a non-business day, they shall be deemed to be the first business day thereafter.

¹⁷ The Court dates are subject to Court availability.

¹⁸ Second Report, section 4.1, para 5, MR, Tab 2, p 29 as such date was adjusted given the scheduling of the SISP motion on November 1.

¹⁹ Second Report, section 4.1, para 6, MR, Tab 2, p 29.

²⁰ Second Report, section 4.2, para 2, MR, Tab 2, p 30.

amount of \$60,228,822 or greater. That figure was calculated as the sum of the following amounts: (a) the Macquarie Claim Amount that has been calculated by Macquarie to be \$57,218,822 as of September 22, 2023; (b) the Priority Payments Closing Amount of \$1.5 million; (c) the Bid Protections of \$2.26 million; and (d) a \$750,000 minimum overbid. Qualified Bids must also provide for the purchase of Macquarie's interest in the Receiver's Certificates, if any, which are projected based on the cash flow forecast appended to the Second Report to be approximately \$1.3 million up to a maximum of \$1.5 million, plus fees and interest.²¹ Bids submitted for individual assets or plants may also be aggregated to form a Qualified Bid, including in conjunction with the Stalking Horse Offer to form an alternative bid.²²

21. In the event that no Qualified Bids are received by the Qualified Bid Deadline, the Stalking Horse Offer will be the Successful Bid. If one or more Qualified Bids is received by the Qualified Bid Deadline, the Monitor will notify such bidders that their bids have been accepted as Qualified Bids and thereafter, will proceed to conduct an auction ("**Auction**").²³

The Stalking Horse Offer

22. As set out above, the Stalking Horse Bidders have submitted the Stalking Horse Offer by way of: (a) an Offer Letter given by the Stalking Horse Bidders on October 16, 2023; (b) the Transaction Agreement; (c) the Terms and Conditions; and (d) the Break Fee Agreement. The Stalking Horse Offer is structured as a "sign and close" transaction. Macquarie and Far North have advised the Monitor that this "sign and close" structure has been adopted so that Macquarie and Far North are not deemed to control IFPC, nor deemed to be related to the Validus Entities, for income tax purposes prior to the time that the applicable Stalking Horse Bidder actually acquires control at the closing. If the bid provided for a closing that does not occur contemporaneously with the parties' execution of the Transaction Agreement, Macquarie and Far North have advised the Monitor that

²¹ Second Report, section 4.3, para 1 and section 6.0, para 3, MR, Tab 2, pp 30 and 46.

²² Second Report, section 4.3, para 2, MR, Tab 2, p 31.

²³ Second Report, section 4.4, paras 1 and 2, MR, Tab 2, p 32.

there is a risk such deeming would occur. The Stalking Horse Offer, however, is irrevocable, subject to the Terms and Conditions set out therein.²⁴

23. Certain of the key terms of the Stalking Horse Offer are as follows:

- (a) **Purchased Assets**: All of the shares and interests of Validus Parent held in Bay, Kap, Kingston GP and Kingston LP, newly issued shares in IFPC, certain closing promissory notes which will be issued in consideration of the conveyance of the Leased Property by Macquarie to IFPC (the “**Promissory Notes**”) and the Purchased Validus Parent Assets (defined below).²⁵
- (b) **Purchase Price**: The consideration being provided for the Purchased Assets is comprised of: (i) payment of the Priority Payments Closing Amount of \$1.5 million plus a secured indemnity in respect of any other Priority Payments for which Validus Parent is liable and for which are not satisfied by the payment of the Priority Payments Closing Amount (the “**Priority Payments Indemnity**”); (ii) funding of the Administrative Expense Closing Amount; (iii) the release by Macquarie of all obligations owing by the Validus Entities under the Lease Transaction Documents; and (iv) the transfer of the Leased Property by Macquarie to IFPC pursuant to the RVO.²⁶
- (c) **Employees**: Far North shall offer employment to employees it determines, in its sole discretion, on terms and conditions of employment that are substantially similar to and no less favourable than those in effect for each Employee set out in the Disclosure Schedule. The Stalking Horse Bidder may also engage an Alternative Operator, including NAES Corporation,²⁷ where appropriate agreements are reached with unions.²⁸

²⁴ Second Report, section 4.5, para 4, MR, Tab 2, p 33.

²⁵ Second Report, section 4.5, para 4, MR, Tab 2, p 34.

²⁶ Second Report, section 4.5, para 4, MR, Tab 2, p 25.

²⁷ NAES Corporation is a third party operator that has been in discussions with the Stalking Horse Bidders about potentially overseeing the post-closing operations of the Validus Entities, should the Stalking Horse Offer be the successful bid.

²⁸ Second Report, section 4.5, para 4, MR, Tab 2, p 37.

- (d) **Assumed Liabilities**: Include, among other things, all pre- and post-filing outstanding amounts relating to “Continuing Contracts”, ongoing employment obligations for retained employees, post-filing claims, obligations of IFPC under the Promissory Notes, priority municipal taxes; Intercompany Claims by a Purchased Entity on or behalf of another Purchased Entity and Priority Payments of the Purchased Entities.²⁹
- (e) **Excluded Liabilities**: All of the Validus Entities’ debts, obligations and liabilities, other than the Assumed Liabilities, and specifically including: (i) all Intercompany Claims that do not constitute Assumed Liabilities, including any Intercompany Claim asserted by Validus Parent against any Purchased Entity; (ii) amounts owing under the Receiver’s Certificates; and (iii) other identified excluded liabilities.³⁰
- (f) **Priority Payments Indemnity Charge**. To secure the Priority Payments Indemnity Charge, the Monitor will be granted a super-priority charge (the “**Priority Payments Indemnity Charge**”) on the Purchased Interests (excluding the Kingston GP Interests and the Kingston LP Interests) pursuant to the RVO.³¹
- (g) **Conditions**:
- (i) **Mutual Conditions**: (A) the Receivership Order, the Initial Order, the SISP Approval Order and the RVO shall have been issued, entered and shall be Final Orders; and (B) the Parties shall have agreed on and implemented the Implementation Steps within the required timeframe;³²
- (ii) **Stalking Horse Bidders Conditions**: (A) from the date of the Offer Letter, there shall not have occurred any change, effect, event or development that resulted in, or would

²⁹ Second Report, section 4.5, para 4, MR, Tab 2, p 36.

³⁰ Second Report, section 4.5, para 4, MR, Tab 2, p 37.

³¹ Second Report, section 4.5, para 4, MR, Tab 2, p 36.

³² Second Report, section 4.5, para 4, MR, Tab 2, p 38.

reasonably be expected to result in, a Material Adverse Effect; (B) each of the counterparties set forth on Part B of Exhibit 3.1(f) of the Terms and Conditions shall have confirmed in writing, to the Vendors, Far North and Macquarie that it will not exercise any termination rights under its Continuing Contract solely as a result of the transactions contemplated by the Transaction Agreement; (C) such number of the Validus Entities' employees that is determined by Far North, shall have accepted offers of employment from Far North or a Purchased Entity (at Far North's election), or, where allowable, with an Alternative Operator, no later than seven Business Days following the Qualified Bid Deadline; and (D) the Monitor shall have accepted and executed the Transaction Agreement.³³

(iii) Vendor Conditions: as of immediately prior to the Closing, Far North shall have sufficient funds to pay the Administrative Expense Closing Amount and the Priority Payments Closing Amount³⁴

(h) Outside Date: December 29, 2023.³⁵

(i) Termination: if the Monitor, Macquarie and Far North mutually agree in writing; if the Stalking Horse Offer is not selected as the Successful Bid (as determined pursuant to the SISP) or if the Court otherwise approves a transaction other than the Stalking Horse Offer, subject to certain restrictions; if the RVO is not granted by December 15, 2023; if the Effective Time has not occurred by December 29, 2023 or such later date as agreed to by the Monitor, Macquarie and Far North; upon the appointment of a trustee in bankruptcy or similar official by or in respect of any Validus Entity or any of the Property of any Validus Entity, other than with the prior written consent of Macquarie; upon the termination, dismissal or conversion of the Receivership Proceedings or the CCAA Proceedings; or

³³ Second Report, section 4.5, para 4, MR, Tab 2, p 38.

³⁴ Second Report, section 4.5, para 4, MR, Tab 2, p 39.

³⁵ Second Report, section 4.5, para 4, MR, Tab 2, p 38.

upon denial of the SISP Order or the RVO (or if any such order is stayed or varied without the consent of each of Macquarie and Far North).³⁶

24. As set out above, the security granted by Validus Parent to Macquarie in connection with its guarantee obligations of the Macquarie Claim Amount is limited to a pledge of shares of IFPC, Kap, Kingston LP, Kingston GP and Bay. Certain assets of Validus Parent that are not subject to the Macquarie security are included as purchased assets in the transaction (the “**Purchased Validus Parent Assets**”), including the following: (a) the Hut 8 Litigation; (b) the shares of Hosting; (c) employment contracts with Validus Parent; and (d) certain other commercial contracts related to the business.³⁷

The Break Fee Agreement and the Bid Protections Charge

25. Subject to Court approval, the Monitor and Macquarie have entered into the Break Fee Agreement. Pursuant to the Break Fee Agreement, the Monitor has agreed to a break fee of \$1.25 million (the “**Break Fee**”) plus an expense reimbursement of up to \$1 million (together with the Break Fee, the “**Bid Protections**”).³⁸ As security for payment of the Bid Protections, the Monitor is seeking approval of a charge (the “**Bid Protections Charge**”) on the Property; however, the Bid Protections are only payable out of the proceeds of sale on the closing of another Qualified Bid.³⁹

Unknown Contract Bar Process

26. Given the incomplete and unreliable nature of the Validus Entities' books and records, the proposed SISP Approval Order provides for a process to identify any unknown contract counterparties for the purposes of notifying any such party that an RVO will be sought at the conclusion of the SISP (the “**Unknown Contract Bar Process**”). Under the Unknown Contract Bar

³⁶ Second Report, section 4.5, para 4, MR, Tab 2, p 39.

³⁷ Second Report, section 4.7, para 1 and section 4.5, para 4, MR, Tab 2, pp 40 and 34.

³⁸ Second Report, section 4.8, para 1, MR, Tab 2, p 41.

³⁹ Second Report, section 4.8, para 4, MR, Tab 2, p 41.

Process, the Monitor will publish a notice in the Globe and Mail (National Edition) as well as other local publications, requesting parties to check the Monitor's website to ensure they are included on the "known contract" list and that their contracts are accurately listed. If any party does not come forward to notify the Monitor of a contract (and provide a copy of the same) prior to the "bar date", such party will be barred from being entitled to notice of the subsequent RVO hearing.⁴⁰

PART III - ISSUES, LAW & ANALYSIS

27. The issues to be determined in connection with this motion are as follows:

- (a) Should the SISP be approved and Stalking Horse Offer accepted for the purposes of serving as a "stalking horse" in the SISP;
- (b) Should the Break Fee Agreement, Bid Protections and Bid Protections Charge be approved;
- (c) Should the Unknown Contract Bar Process be approved; and
- (d) Should the other requested relief be granted.

28. For the reasons set out below, each of these questions is answered in the affirmative.

The SISP Should be Approved

29. The Court has the jurisdiction to approve the SISP.⁴¹ Courts have recognized that the broad remedial nature of the CCAA confers the power upon the Court to, among other things, approve sale and investment solicitation processes in respect of CCAA debtors and their property.⁴²

30. Courts have routinely recognized that the following factors, referred to as the *Nortel* criteria, are applicable when determining if a proposed sale process should be approved in the context of a

⁴⁰ Second Report, section 5.0, paras 1 and 2, MR, Tab 2, p 45.

⁴¹ CCAA, s 11; *Freshlocal Solutions Inc. (Re)*, [2022 BCSC 1616 \(CanLII\)](#) ["*Freshlocal Solutions*"], para 22;

⁴² *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ONSC\)](#) ["*Nortel*"] at para 36.

CCAA proceeding: (a) is a sale transaction warranted at this time? (b) will the sale benefit the whole “economic community”? (c) do any of the debtors’ creditors have a *bona fide* reason to object to the sale of the business? and (d) is there a better viable alternative?⁴³ Courts have found that there is a distinction in the application of the criteria set out in Section 36 of the CCAA when seeking approval of a SISP as opposed to the subsequent approval of a sale.⁴⁴

31. Additional factors that have been considered by Courts include:

- (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 sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.⁴⁵

32. These factors are also to be considered in light of the principles set out in *Royal Bank v Soundair* [“**Soundair**”].⁴⁶ As the Court pointed out in *Terrace Bay Pulp Inc. (Re)*, the *Soundair* principles largely overlap with the factors set out in Section 36(3) of the CCAA:

- (a) whether the Court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interest of all parties;
- (c) the efficacy and integrity of the process by which the offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.⁴⁷

⁴³ *Nortel*, *supra* at para 49.

⁴⁴ *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ONSC\)](#) at paras 16-17.

⁴⁵ *CCM Master Qualified Fund v. blutip Power Technologies* [“**CCM Master**”], [2012 ONSC 1750 \(CanLII\)](#) at para 6; *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107 \(CanLII\)](#) at para 20.

⁴⁶ *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#) at para 19.

⁴⁷ *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247 \(CanLII\)](#) at para 44.

33. In light of the above considerations, the proposed SISP should be approved. Among other things:

- (a) the primary stated purpose of these proceedings from the outset was to conduct a SISP for the Validus Entities;⁴⁸
- (b) it is critical for the SISP to start as soon as possible given, among other things, current workstreams that require the development of a comprehensive business plan in the near future as well as the upcoming IESO capacity auction;⁴⁹
- (c) the SISP has been developed by, and will be conducted by, the Court appointed Monitor, which will conduct such process in a fair and transparent manner in accordance with its statutory duties;⁵⁰
- (d) the SISP provides an opportunity to complete one or more transactions with greater value than the Stalking Horse Offer, if one is identified, which benefits all stakeholders;⁵¹
- (e) in the Monitor's view, the 35-day bid period duration of the SISP is sufficient in the circumstances to allow interested parties to perform diligence and submit offers given, among other things, the prior EY Sale Process conducted for IFPC, and the fact that such a process has been known in the market since at least August 11, 2023;⁵²
- (f) the duration of the SISP reflects a balancing between ensuring that sufficient time is available to attempt to identify a superior transaction, the upcoming IESO auction timelines/requirements and the costs of conducting this proceeding for a further period of time (which excess costs would be borne by stakeholders);⁵³

⁴⁸ Second Report, section 4.1, para 1, MR, Tab 2, p 28.

⁴⁹ Second Report, section 4.9, para 6, MR, Tab 2, p 43.

⁵⁰ Sale and Investment Solicitation Process, para 5, Schedule A to the Draft SISP Approval Order, MR, Tab 4, p 488.

⁵¹ Second Report, section 4.10, para 1(c), MR, Tab 2, p 44.

⁵² Second Report, section 4.10, para 1(e), MR, Tab 2, p 44.

⁵³ Second Report, section 4.10, para 1(e), MR, Tab 2, p 44.

- (g) the proposed terms of the SISP also allow for certain flexibility to allow the Monitor to extend certain deadlines;⁵⁴ and
- (h) the SISP provides flexibility for prospective bidders to submit bids for certain of the plants/assets, and for those bids, together with the Stalking Horse Offer, to be the Successful Bid.⁵⁵

The Stalking Horse Offer Should be Accepted

34. The Courts have also accepted that a “stalking horse” sale process can be a beneficial mechanism given the degree of certainty it provides to the stakeholders of a business. In *CCM Master Qualified Fund, Ltd.*, Justice Brown confirmed that “the use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.”⁵⁶

35. In bringing this motion, the Monitor considered whether the Stalking Horse Bidders’ offer warrants it being a stalking horse bid, as opposed to the Stalking Horse Bidders simply participating as bidders in the SISP. The Monitor’s considerations included that the Stalking Horse Offer provides a degree of certainty to the Validus Entities’ employees and other stakeholders that there is a going-concern solution for the business. It is principally for this reason that the Monitor pursued negotiations of the Stalking Horse Offer notwithstanding that those negotiations took longer than anticipated.⁵⁷

⁵⁴ Second Report, section 4.1, para 6, MR, Tab 2, p 29.

⁵⁵ Second Report, section 4.10, para 1(h), MR, Tab 2, p 44.

⁵⁶ *CCM Master*, *supra*, at para 7.

⁵⁷ Second Report, section 4.9, para 1, MR, Tab 2, p 42.

36. In *Boutique Euphoria Inc. (Re)*⁵⁸, the Quebec Superior Court set out the following non-exhaustive factors as important considerations in assessing whether a stalking horse bid process in particular should be approved:

- (a) Has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent? In other words, some assurances should exist that the horse chosen is indeed the right one.
- (b) Is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
- (c) Are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
- (d) Are the time lines contemplated reasonable to ensure a fair process at the second stage of the competition, namely that to become the successful over bidder?

37. More recently in *Re DCL Corporation*,⁵⁹ this Court considered the criteria that had been considered by the BC Court in *Freshlocal Solutions*⁶⁰, and found the following questions relevant to consideration of acceptance of a proposed stalking horse bid:

- (a) *How did the Stalking Horse Agreement Arise*
 - (i) Although the Stalking Horse Offer did not arise out of a competitive process, the offer was formulated after the EY Sale Process, which was an extensive marketing process for the IFPC Plant that did not yield a successful transaction.⁶¹

⁵⁸ *Boutique Euphoria Inc. (Re)*, [2007 QCCS 7129](#) at para 37.

⁵⁹ *DCL Corporation (Re)*, 2023 [ONSC 3686 \(CanLII\)](#) at para 24.

⁶⁰ *Freshlocal Solutions*, *supra*, at paras 35-72.

⁶¹ Second Report, section 4.9, para 7, MR, Tab 2, p 43.

- (ii) After indicating there was a proposed refinancing at the initial receivership hearing by Mr. Shortt, no such refinancing was consummated and the Validus Entities instead indicated that they intended to participate in the SISP;
- (iii) Further, the consideration contemplated by the Stalking Horse Offer significantly exceeds the aggregate value that the Validus Entities paid for the four plants in 2021/2022, being \$45 million. In considering the value being provided for by the Stalking Horse Offer, the Monitor considered the calculation of the Macquarie Claim Amount and believes it to be supportable by the Lease Transaction Documents.⁶²
- (iv) The Kap and Kingston plants are not presently operating and are in need of significant repair and are believed to have less value than IFPC.⁶³

(b) What are the Stability Benefits?

- (i) The Stalking Horse Offer is contemplated to preserve employment for the Validus Entities' Employees on terms and conditions that are substantially similar to existing employment terms.⁶⁴
- (ii) Employees of the Validus Entities have communicated to the Monitor that they are encouraged by the steps taken in these proceedings to date and were encouraged to learn that a stalking horse bid was being prepared by a reputable prospective purchaser. It is particularly important given the nature of the Validus Entities' business, and the concerns raised in the Receiver's pre-filing report about the risk of significant employee resignations, that the employee base be preserved;⁶⁵

⁶² Second Report, section 3.2.2, paras 2-4 and section 4.9, para 7, MR, Tab 2, pp 26 and 43.

⁶³ Second Report, section 4.10, para 1(i), MR, Tab 2, p 44.

⁶⁴ Second Report, section 4.1, para 1(b), MR, Tab 2, p 44.

⁶⁵ Second Report, section 4.9, paras 1 and 2, MR, Tab 2, p 42.

- (iii) The Validus Entities are more likely to be successful in the upcoming IESO capacity auction process if there is a stalking horse bidder as it provides a degree of certainty to IESO that there will be a going-concern solution for the business; and⁶⁶
 - (iv) The Stalking Horse Offer provides a mechanism to pay the Priority Payments of the Purchased Entities and the Priority Payments of Validus Parent, which include statutory deemed trust claims for unremitted source deductions.⁶⁷
- (c) *Does the Timing Support Approval?*
- (i) The finalization of the Stalking Horse Offer has taken longer than expected in part, due to the poor state of the Validus Entities books and records, making it difficult for the Stalking Horse Bidders to conduct due diligence without the assistance of the Monitor – the former general counsel of the Validus Entities was also engaged as an independent contractor to assist with the diligence process;⁶⁸
 - (ii) Certain due diligence materials that were created during this period will be made available in the virtual data room when it is established; and⁶⁹
 - (iii) Other parties have yet to start to participate in the SISP and it is an appropriate time for the SISP and Stalking Horse Offer to be approved.⁷⁰
- (d) *Who Supports or Objects to the Stalking Horse Agreement*
- (i) Importantly, the Stalking Horse Offer is supported by the Receiver, the Monitor and Macquarie, the Validus Entities' largest secured creditor;

⁶⁶ Second Report, section 4.9, para 5, MR, Tab 2, p 42.

⁶⁷ Second Report, section 4.10, para 1(g), MR, Tab 2, p 44.

⁶⁸ Second Report, footnote 3, MR, Tab 2, p 21

⁶⁹ Second Report, section 4.2, para 2(b), MR, Tab 2, p 30.

⁷⁰ Second Report, section 4.1, para 4 and section 4.2, para 1, MR, Tab 2, p 29.

- (ii) As of the date of the factum, the only party that is known to object are the “Validus Entities”, which in effect equates to the principals behind the Validus Entities who were unsuccessful in their objection to the appointment of the Receiver and who have also indicated they intend to be a competing bidder in the SISP – a number of the expected objections are not appropriately addressed at the SISP motion and only relevant to the ultimate approval (also addressed in further detail below); and
 - (iii) To the extent that former management are objecting in their capacity as potential bidders, it is not clear that they have standing in such capacity.⁷¹
- (e) *What is the True Cost of the Stalking Horse Agreement?*
- (i) The cost of the Stalking Horse Offer largely amounts to the agreement to the Bid Protections, which is discussed below; and
 - (ii) However, the Stalking Horse Offer provides significant benefit to many stakeholders including employees, contract counterparties, customers and creditors as significant amounts of debt are assumed or otherwise funded pursuant to the Stalking Horse Offer Terms. The benefits of accepting a stalking horse that provides such stability clearly outweigh the costs of the Bid Protections.⁷²
- (f) *Is there an Alternative?*
- (i) The only realistic alternative at this time is to proceed with a SISP in the absence of a stalking horse – there are risks with such a structure including absence of support from Macquarie, resignation of employees and shut down of the plants, all of which would predictably have a material impact on value;

⁷¹ *Skyepharma PLC v Hyal Pharmaceutical Corporation*, [2000 CanLII 5650 \(ONCA\)](#).

⁷² Second Report, section 4.9, paras 1-8, MR, Tab 2, pp 42-43

- (ii) The SISP, as structured, is designed for a broad canvassing of interest and provides for interest to be submitted not only through an RVO but other proposed structures – the terms provide the Monitor flexibility and there is no undue influence being exercised by the Stalking Horse Bidders which would foreclose against any other interested party submitting a bid;⁷³ and
- (iii) Without the stability that is provided by the Stalking Horse Offer, employees who are key to the ongoing regulatory maintenance requirements of the four plants could leave, which could cause significant disruption and erosion in value.⁷⁴ Employees have expressed concern about the delay in the commencement of the SISP and the Monitor observed firsthand the concerns of the employees as to the future of the business, resulting in low morale, which was particularly an issue at the early stages of these proceedings.⁷⁵

Known Objections and Issues Relevant to the SISP Order

38. The Stalking Horse Offer is not being presented for approval at this time other than approval to serve as a stalking horse in the SISP. If the Stalking Horse Bid is the Successful Bid in the SISP, further Court approval of such bid, including its terms, the proposed RVO structure and proposed tax treatment (including HST issues) and the inclusion or exclusion of assets are appropriately addressed in connection with the RVO Motion. Courts have expressly found that it is not necessary for the full terms of a stalking horse bid to be considered at the time of the SISP hearing and that such matters are appropriately addressed at the subsequent approval hearing.⁷⁶

⁷³ Second Report, section 4.1, para 6, MR, Tab 2, p 29.

⁷⁴ Second Report, section 4.9, para 3, MR, Tab 2, p 42.

⁷⁵ Second Report, section 4.9, para 2, MR, Tab 2, p 42.

⁷⁶ [Kingsett Mortgage Corporation, et al. v. Stateview Homes \(Minu Towns\) Inc., et al.](#) (July 19, 2023), Toronto, Superior Court of Justice (Commercial List), CV-23-00698576-00CL (Endorsement of Justice Steele) at paras 7, 12 and 17; [Fire & Flower Holdings Corp., et al. \[“Fire & Flower”\], 2023 ONSC 4048 \(CanLII\)](#) at para 23.

39. For the purposes of the SISP, the Monitor has considered the proposed “floor” purchase price offered by the Stalking Horse Offer including the credit bid by Macquarie of the full amount of its debt claim, calculated to be over \$57 million as of September 22, 2023, which the Monitor agrees is a relevant issue to the SISP motion.

40. The Validus Entities have made general assertions that the Macquarie Claim Amount is overvalued by at least \$9 million, and appear to oppose the Stalking Horse Offer on that basis. The Validus Entities have articulated several potential arguments, all of which have been considered by the Monitor and are addressed in its report.⁷⁷ The Monitor is not sure which, if any, of those arguments the Validus Entities intend to advance on this motion. The primary issues raised by the Validus Entities appear to be:

- (a) the Validus Entities have suggested that the Macquarie Claim Amount ought to be limited to the amount it actually advanced, plus interest. But the transaction between Macquarie and IFPC was a lease, not a loan, and contemplated Macquarie receiving more than simple repayment with interest.
- (b) Macquarie and IFPC amended the lease in early 2023. The amendments gave IFPC a four-month “rent holiday” from February through May and required it to make a balloon payment equal to those four deferred months of rent plus an additional \$1 million in May. IFPC never made that payment. Macquarie’s debt includes both those rent arrears and the SLV. The Validus Entities appear to assert that as the SLV is calculated on the basis that those rent payments were not made, the formula results in an overpayment to Macquarie. However, Macquarie’s calculation accurately tracks the language of the Lease and appears to have been what the parties contemplated.

⁷⁷ Second Report, section 3.1, para 1(a) and section 3.2.2, paras 2-4, MR, Tab 2, p 23 and 26.

41. Based on the issues raised by the Validus Entities to date, the Monitor believes that the Macquarie Claim Amount is supported by the terms of the Lease Transaction Documents.

42. In respect of the objections as to the tax treatment under the Stalking Horse Offer, including whether any input tax credits (“ITCs”) generated as a result of the transaction, such objections are appropriately heard at the approval motion and not the SISP motion. The treatment of the ITCs that would be generated from payment of HST under the Stalking Horse Offer is summarized in the Second Report.⁷⁸ This issue does not impact the floor price for the SISP as the corresponding HST resulting from the transaction will have to be paid by the buyer regardless of whether the ITCs are available to the buyer.⁷⁹ While the Monitor’s view is that the ITC treatment is consistent with applicable law, the issue is appropriately addressed at the sale approval hearing and not the SISP hearing.

43. The Monitor also considered the inclusion of the Purchased Validus Parent Assets, which are not subject to the Macquarie security, particularly the proposed acquisition of the claim and counterclaim in the Hut 8 Litigation, for the purposes of considering the fairness of the proposed process and the consideration that would be required to be provided by any Qualified Bid.⁸⁰

The Bid Protections and the Bid Protections Charge Should be Approved

44. The Courts have approved break fees and expense reimbursements in the context of stalking horse transactions when required by a stalking horse purchaser. Such bid protections are in recognition of the benefit being conveyed onto the estate by the stalking horse offer setting the floor for a sale process as well as the time and effort spent by the stalking horse buyer, who may be outbid in the sale process. The Monitor has considered the range of acceptable bid protections in the

⁷⁸ Second Report, section 4.6, paras 1-5, MR, Tab 2, pp. 39-40

⁷⁹ Sale and Investment Solicitation Process, para 9(a) and (c), Schedule A to the Draft SISP Approval Order, MR, Tab 4, p 482

⁸⁰ Second Report, section 3.9, paras 5-8, MR, Tab 2, p 28.

context of a stalking horse bid.⁸¹ The Court has also noted that bid protections with in the range of 1.8% and 5% may be seen as reasonable.⁸²

45. The proposed Bid Protections represent approximately 3.85% of the proposed Credit Bid Consideration before taking into consideration further costs of the Stalking Horse Bidders and certain other benefits under the Stalking Horse Offer such as the Administrative Expense Closing Amount.⁸³

46. Macquarie has spent extensive time and resources preparing and negotiating the proposed Stalking Horse Offer, which, as noted, included diligence activities that took longer than expected as a result of the Validus Entities' poor recordkeeping. These activities also generated due diligence materials that will be made available in the virtual data room for the benefit of other potential bidders.

47. Although the fact that the Stalking Horse Offer is a credit bid is a relevant factor in the context of requested bid protections, the Courts have recognized that it is not the only factor to be considered.⁸⁴ Bid protections have been approved in instances where the proposed stalking horse was submitting a credit bid.⁸⁵ Such approval is appropriate here given the benefits that are provided by virtue of the Stalking Horse Offer.

48. The proposed Bid Protections are in the range of reasonableness. The Monitor supports the approval of the Bid Protections.⁸⁶

49. The Court has the jurisdiction to grant Bid Protections Charge. Such charges have been approved in other recent decisions.⁸⁷ Although the Bid Protections Charge encumbers the Property, the Bid Protections themselves are only payable out of closing proceeds from a different successful

⁸¹ Comparative Summary of Break Fees, Appendix J to the Second Report, MR, Tab 2J, p 453

⁸² [CCM Master](#), *supra*, at para 13.

⁸³ Second Report, section 4.8, para 5, MR, Tab 2, p 41.

⁸⁴ [Fire & Flower](#), *supra*, at para 31.

⁸⁵ [Fire & Flower](#), *supra*, at para 32; *In The Matter of A Plan of Compromise or Arrangement of Green Growth Brands Inc.*, [2020 ONSC 3565](#).

⁸⁶ Second Report, section 4.8, para 5, MR, Tab 2, p 41.

⁸⁷ See for example: [In the Matter of LoyaltyOne, Co.](#) (March 20, 2023), Toronto, Superior Court of Justice (Commercial List), CV-23-00696017-00CL (Endorsement of Justice Conway).

transaction. It is a condition of the Stalking Horse Offer that the Bid Protections Charge be granted.⁸⁸ The Monitor believes such charge is reasonable in the circumstances.⁸⁹

The Unknown Contract Bar Process Should be Approved

50. Recent cases have expressed concern regarding the notice that is provided to contractual counterparties as to the treatment of their contracts in an RVO. In *Re PaySlate Inc.* (“**PaySlate**”),⁹⁰ the BC Court refused to approve a proposed RVO on the basis that, among other things, the debtor had not provided notice of the hearing for approval of the proposed RVO to counterparties of the “retained contracts” under the proposed transaction.⁹¹ The RVO in *PaySlate* was subsequently approved after, among other things, notice had been provided appropriate contract counterparties.⁹²

51. As part of the ultimate approval of a proposed transaction (which the Monitor expects will be through an RVO structure in any scenario), the Monitor intends to provide notice of the motion (the “**RVO Motion**”) to all known contractual counterparties. However, given the state of the Validus Entities’ books and records, the Monitor believes it is prudent to undertake the Unknown Contract Bar Process, which will allow significant advance notice for any party who is currently not known to the Monitor or the Stalking Horse Bidder to come forward to be added to the counterparty list for the purposes of receiving notice of the RVO Motion.⁹³

52. The Unknown Contract Bar Process will provide for publication in both national and local publications and does not bar any party from ultimately submitting unsecured claims in ResidualCo.⁹⁴

⁸⁸ Break-Up Fee Agreement made as of October 16, 2023, Appendix I to the Second Report, article 5.1.2, MR, Tab 21, p 449.

⁸⁹ Second Report, section 4.10, para 1 and 1(f), MR, Tab 2, pp 43 and 44.

⁹⁰ *PaySlate Inc. (Re)*, [2023 BCSC 608](#) (CanLII).

⁹¹ *PaySlate Inc. (Re)*, [2023 BCSC 608](#) (CanLII) at paras 64, 71 and 75.

⁹² *PaySlate Inc. (Re)* [2023 BCSC 977](#).

⁹³ Second Report, section 5.0, paras 2(c) and 3, MR, Tab 2, p 45.

⁹⁴ Second Report, section 5.0, para 2, MR, Tab 2, p 45.

PART IV - ORDER REQUESTED

53. For these and the other reasons noted above, the Monitor therefore requests an Order substantially in the form of the draft SISP Order included in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2023.

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Lawyers for the Monitor

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Freshlocal Solutions (Re)* [2022 BCSC 1616](#)
2. *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ONSC\)](#)
3. *Brainhunter Inc. (Re)*, [2009 CanLII 72333 \(ONSC\)](#)
4. *CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750 \(CanLII\)](#)
5. *Walter Energy Canada Holdings, Inc. (Re)*, [2016 BCSC 107 \(CanLII\)](#)
6. *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#)
7. *Terrace Bay Pulp Inc. (Re)*, [2012 ONSC 4247 \(CanLII\)](#)
8. *Boutique Euphoria Inc. (Re)* [2007 QCCS 7129](#)
9. *Skyepharma PLC v Hyal Pharmaceutical Corporation*, [2000 CanLII 5650 \(ONCA\)](#)
10. [Kingsett Mortgage Corporation, et al. v. Stateview Homes \(Minu Towns\) Inc., et al.](#) (July 19, 2023), Superior Court of Justice (Commercial List), Toronto, CV-23-00698576-00CL (Endorsement of Justice Steele)
11. *Fire & Flower Holdings Corp., et al.*, [2023 ONSC 4048 \(CanLII\)](#)
12. *In The Matter of A Plan of Compromise or Arrangement of Green Growth Brands Inc.*, [2020 ONSC 3565](#).
13. [In the Matter of LoyaltyOne, Co.](#) (March 20, 2023), Toronto, Superior Court of Justice (Commercial List), CV-23-00696017-00CL (Endorsement of Justice Conway)
14. *PaySlate Inc. (Re)*, [2023 BCSC 608](#)
15. *PaySlate Inc. (Re)* [2023 BCSC 977](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

General power of court

11 Despite anything in the [Bankruptcy and Insolvency Act](#) or the [Winding-up and Restructuring Act](#), if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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.

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

Court File No.: CV-23-00705215-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF VALIDUS POWER CORP., IROQUOIS FALLS POWER CORP., BAY POWER CORP., KAP POWER CORP., VALIDUS HOSTING INC. AND KINGSTON COGEN GP INC., EACH BY THEIR COURT APPOINTED RECEIVER AND MANAGER, KSV RESTRUCTURING INC.

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

Proceeding commenced at Toronto

**FACTUM OF THE MONITOR
(SISP Approval Order)**

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