

**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.

**RESPONDING FACTUM OF VALIDUS POWER CORP. et al.**  
(SISP Approval Order)

October 26, 2023

**MINDEN GROSS LLP**  
Barristers and Solicitors  
145 King Street West, Suite 2200  
Toronto, ON M5H 4G2

**Catherine Francis** (LSO# 26900N)  
cfrancis@mindengross.com  
Tel: 416-369-4137

Lawyers for Validus Power Corp.

TO: **THE SERVICE LIST**

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**PART I - OVERVIEW**

1. Validus Power Corp. ("**Validus**"), through its subsidiaries<sup>1</sup> (collectively, the "**Validus Entities**") owns and operates four power plants in Ontario: the North Bay Plant, the Kapuskasing Plant, the Iroquois Falls Plant and the Kingston Plant.<sup>2</sup>
2. Macquarie Equipment Finance Limited ("**Macquarie**") is the senior secured lender to Validus.
3. This factum is being filed in response to a motion by KSV Restructuring Inc. ("**KSV**"), in its capacity as the Court-appointed Monitor of the Validus Entities, for, among other things, the following relief:

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<sup>1</sup> Iroquois Falls Power Corp. ("**IFPC**"), Bay Power Corp. ("**BPC**"), Kap Power Corp. ("**KPC**"), Validus Hosting Inc., Kingston Cogen Limited Partnership and Kingston Cogen GP Inc. (together, "**Kingston**")

<sup>2</sup> Affidavit of Todd Shortt sworn August 7, 2023

- (a) Approving a sale and investment solicitation process (the “**SISP**”) for the Validus Entities and authorizing and empowering KSV as Monitor to implement the SISP;
- (b) Approving the stalking horse offer between the Validus Entities and KSV and Macquarie and Far North Power Corp. as assignee for the purpose of constituting the “stalking horse bid” in the SISP (the “**Stalking Horse Offer**”);
- (c) Authorizing and empowering the Monitor to enter into a break fee agreement with Macquarie (the “**Break Fee**”) and approving the Break Fee and the Expense Reimbursement, as defined in the Monitor’s Motion Record.

4. Without prejudice to any other issues to be raised in response to the Monitor’s motion, some of the key concerns of the Validus Entities were summarized in an *Aide Memoire* submitted for the scheduling hearing held on October 20, 2023, namely that approval of the Stalking Horse Offer requires the Court to:

- (a) Approve the indebtedness allegedly owing to Macquarie, as the Stalking Horse Offer involves Macquarie making a credit bid based on the entirety of its alleged indebtedness;
- (b) Approve a structure whereby the Validus Entities, through the Monitor, pays \$6,435,000 to Macquarie in Harmonized Sales Tax (“**HST**”) for remittance to CRA, but the input tax credit generated by the HST payment is

unavailable to offset outstanding HST liabilities to CRA, to the detriment of CRA and all other creditors of the Validus Entities.

5. As set out below, apart from the debt issues, there are other concerns with the proposed Stalking Horse Offer.

## **PART II - SUMMARY OF FACTS**

6. Prior to the financing provided by Macquarie, Validus already owned the North Bay Kapuskasing Plants.<sup>3</sup>

7. Macquarie provided financing for Validus to purchase the Iroquois Falls and Kingston Plants, through a Securities Purchase Agreement dated December 9, 2021 that closed on or about April 7, 2022. The financing was structured as a sale and leaseback transaction between Macquarie and IFPC (the "**Lease**").<sup>4</sup>

8. Pursuant to the Lease, as amended by an Amended and Restated Lease Agreement dated February 24, 2023 (the "**Lease Amendment**"), IFPC was required to pay monthly Base Rent in the amount of \$1,250,000.00 plus HST.<sup>5</sup>

9. Macquarie advanced \$36,000,000.00 towards the purchase of the Iroquois Falls and Kingston Plants. Macquarie did not advance the \$9,000,000.00 balance of its facility, but rather applied the funds as prepaid Base Rent.

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<sup>3</sup> Affidavit of Todd Shortt sworn August 7, 2023

<sup>4</sup> Affidavit of Todd Shortt sworn August 7, 2023

<sup>5</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023, Exhibit "C"

10. In addition to the prepaid Base Rent, the Validus Entities made 10 lease payments of \$1,250,000.00 plus HST each to Macquarie.

11. The Validus Entities struggled in their operations, partly as a result of a breakdown in the relationship between Validus and BPC, on the one hand, and Hut 8 Mining Corp. (“**Hut 8**”), in respect of a lease in North Bay, Ontario. This dispute resulted in the Validus Entities losing an important source of revenue. The dispute with Hut 8 had a snowball effect on the rest of the Validus Entities’ operations.<sup>6</sup>

12. Under the February 24, 2023 Lease Amendment, Macquarie granted an approximately four-month “rent holiday”.<sup>7</sup>

13. On June 9, 2023, Macquarie delivered letters demanding payment of the Base Rent and HST payable on May 31, 2023 and notices of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act* (the “**BIA**”).<sup>8</sup>

14. On July 24, 2023, Macquarie demanded payment of all Base Rent and HST in arrears and accelerated and demanded immediate payment of the remainder of the “Secured Obligations”. Macquarie claimed that the aggregate indebtedness as of July 31, 2023 was \$55,598,575.<sup>9</sup>

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<sup>6</sup> Affidavit of Todd Shortt sworn August 7, 2023

<sup>7</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023, Exhibit “C”

<sup>8</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023

<sup>9</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023

15. On July 31, 2023, Macquarie served an Application Record returnable on August 2, 2023 seeking the appointment of KSV as Receiver of the Validus Entities, supported by an Affidavit of Joshua Hamilton Stevens sworn July 31, 2023.<sup>10</sup>

16. Macquarie stated in its Application Record that it intended to submit a stalking horse bid to the Receiver pursuant to a SISP process under the *Companies' Creditors Arrangement Act* (“**CCAA**”).<sup>11</sup>

17. On August 2, 2023, KSV was appointed as Interim Receiver of the Validus Entities and the receivership motion was adjourned to August 10, 2023.<sup>12</sup>

18. Todd Shortt (“**Shortt**”), a director and the president and chief executive officer of each of the Validus Entities, filed two affidavits in response to the receivership motion, sworn August 7, 2023 and August 10, 2023.<sup>13</sup>

19. Shortt's August 10, 2023 affidavit raised the following issues and concerns regarding Macquarie's debt calculation:

5. As I stated in my August 7, 2023 affidavit, I didn't understand the amounts claimed by Macquarie, as Macquarie only advanced \$36 million toward the purchase of the Iroquois Falls Plant and the Kingston Plant and Validus has already paid back millions of dollars to Macquarie.

6. Subsequent to my August 7, 2023 affidavit, Macquarie's lawyers have provided an accounting of the indebtedness they are claiming, as well as a breakdown of the Validus expenses that they claim to have paid with Validus's money. Attached hereto and marked as Exhibit “A” to this my affidavit are copies of a series of emails providing this information.

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<sup>10</sup> Application Record dated July 31, 2023

<sup>11</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023, para. 104

<sup>12</sup> Order dated August 2, 2023

<sup>13</sup> Affidavits of Todd Shortt sworn August 7, 2023 and August 10, 2023

7. The debt claimed by Macquarie is overstated by more than \$9 million.
8. As indicated above, although structured as an equipment lease, Macquarie provided a financing facility.
9. As set out in the documents, Macquarie only advanced \$36 million. The balance of \$9 million was allocated by Macquarie to base rent payments (i.e. repayments of the financing).
10. In addition to the \$9 million of prepaid base rent payments allocated by Macquarie at the outset, Validus made 10 base rent payments from April 2022 to January 2023 of \$1,412,500 including HST, for a total of \$14,125,000.
11. Ignoring HST, Macquarie advanced \$36 million and has received \$12.5 million in base payments from April 2022 to January 2023, for a net amount of \$23.5 million.
12. Macquarie's calculation of its alleged current indebtedness double counts the six base rent payments due from February 2023 onward. Macquarie seeks payment of \$8.5 million in base rent payments allegedly due from February 2023 to July 2023, together with interest on those payments at 18% per annum.
13. I am not clear how the \$8.5 million was arrived at, as six base rent payments (February, March, April, May, June and July 2023) would only add up to \$7.5 million. So this appears to be an overstatement of \$1 million.
14. Moreover, Macquarie double counts the \$8.5 million, as Macquarie seeks payment of the Stipulated Loss Value as of July 2023, without crediting the \$8.5 million.
15. In addition, the Stipulated Loss Value used by Macquarie does not credit the entirety of the \$9 million which was applied by Macquarie as prepaid base rent at the outset of the loan relationship.
16. If the double counting is removed, the financing I arranged provides more than enough funds to pay Macquarie.
17. I have also reviewed the schedule of expenses that Macquarie claims it paid on behalf of Validus, which was sent last night.
18. These are not all Validus expenses, and no support is provided.



19. For example, the expenses include \$326,426 paid to Torys, various amounts paid to “Macquarie Energy Canada” and \$149,123 paid for unidentified “Travel and Accommodation”.<sup>14</sup>

20. Attached to Shortt’s affidavit was a lengthy series of email communications between counsel for Macquarie and counsel for the Validus Entities regarding Macquarie’s debt calculation.<sup>15</sup>

21. On August 10, 2023, KSV was appointed as Receiver of the Validus Entities.<sup>16</sup>

22. On August 18, 2023, Justice Osborne released his Endorsement regarding the appointment of the Receiver. The Endorsement noted the following:

While there was, as at the hearing of the Application, some dispute as to the precise amount and whether or not there had been double counting as to certain input factors, the Applicants submit that the total outstanding amount was, as of July 31, 2023, \$55,598,575. The Respondents expressly conceded in argument that the amount was at least in excess of \$40 million.<sup>17</sup>

23. On August 29, 2023, pursuant to an Application brought by KSV in its capacity as Receiver of the Validus Entities, an Initial Order was made in respect of the Validus Entities pursuant to the CCAA.<sup>18</sup>

24. The Endorsement of Justice Osborne specifically noted the following concerns expressed by the Validus Entities at the hearing:

24. The Potential Purchaser has indicated that it is not prepared to

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<sup>14</sup> Affidavit of Todd Shortt sworn August 10, 2023

<sup>15</sup> Affidavit of Todd Shortt sworn August 10, 2023, Exhibit “B”

<sup>16</sup> Order Appointing Receiver dated August 10, 2023

<sup>17</sup> Endorsement of Justice Osborne dated August 18, 2023, para. 22

<sup>18</sup> August 29, 2023 Order

pay arrears owing to the CRA in respect of HST remittances owing. I observe as noted by counsel that completion of the contemplated transaction under the CCAA will reverse the priority of the HST obligation.

25. The Receiver submits that any other purchaser will likely also require that the HST obligation be reversed with the result that the super priority status of this obligation, absent a CCAA proceeding, is very likely to be an impediment to any going concern transaction in this case.

26. Here, the HST obligations exceed approximately \$6 million. I note, as submitted by counsel for the Respondents, that there are input tax credits. It is not clear as to the extent to which those input tax credits will reduce the arrears owing, and the CRA has not conducted an HST audit. Court approval of any transaction resulting from a sales process is for another day, but it will be a factor, presumably, in such approval, how the HST obligations are treated so as to not separate those from potential benefits achieved by the application of input tax credits.

25. On October 19, 2023, the Monitor served its Motion Record seeking approval of the SISP, the Stalking Horse Offer (Stalking Horse Agreement) and other relief. Pursuant to a scheduling appointment held on October 20, 2023, the Monitor's motion was scheduled for November 1, 2023.

### **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

#### **Standing of the Validus Entities**

26. In a letter dated October 24, 2023, sent after the scheduling hearing, Macquarie took the position that the Validus Entities have no interest in the proceedings and no capacity or standing to make any arguments related to the SISP, the Macquarie debt, the HST treatment or any other issues.<sup>19</sup>

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<sup>19</sup> Letter from Torys LLP to Minden Gross LLP dated October 24, 2023

27. Macquarie relies on *Skyepharma PLC v Hyal Pharmaceutical Corporation*, 47 O.R. (3d) 234, 2000 CanLII 5650 (Ont. C.A.) and *Canadian Airlines Corp., Re*, 2000 ABQB 442, para 143 for this position.

28. In *Skyepharma*, the Ontario Court of Appeal held that an unsuccessful bidder for assets in a receivership has no standing to appeal an order approving the sale. As a result, the appeal was quashed. This is irrelevant to the present situation.

29. The cited provision in *Canadian Airlines Corp.* addresses the interests of shareholders versus creditors in a CCAA proceeding:

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company***, *supra*.

30. Again, this case is irrelevant to the present situation.

31. In the present case, the Stalking Horse Offer is structured such that the only parties who will benefit from Macquarie's bid are Macquarie itself, Hut 8 and any payables having priority over Macquarie.

32. The quantum of the Macquarie debt, Break Fee and Expense Reimbursement and overbid, combined with the short time line (versus the time taken for Macquarie and Hut 8 to enter into the Stalking Horse Offer) and the imminent deadline for participation in the Independent Electricity System Operator (“**IESO**”) capacity auction, reduce the likelihood that any other bidder will be in a position to submit a qualified bid, leading almost inevitably to approval of the Stalking Horse Offer.

33. This structure will prejudice the Validus Entities, and all of the other creditors and shareholders, including but not limited to Canada Revenue Agency (“**CRA**”).

34. Indeed, the Monitor is seeking approval of a Unknown Contract Bar Process to identify creditors, such that they have not even been identified.

35. The Validus Entities have a right and responsibility to raise concerns related to the Macquarie debt, the SISP process and terms and the HST treatment.

### **The Macquarie Debt**

36. As indicated above, the debt issue was raised in Shortt’s affidavits sworn August 7 and 10, 2023. Macquarie has been fully aware of these concerns from the inception of these proceedings.

37. On a simple analysis, leaving aside HST (for which Macquarie would have obtained an input tax credit), Macquarie advanced \$36,000,000.00 and received repayments of \$12,500,000.00 (10 payments of \$1,250,000.00 excluding HST, which

Macquarie would have remitted to CRA). Macquarie also received reimbursement of expenses incurred in 2023 through its control over the Validus Entities' bank accounts.<sup>20</sup>

38. Thus, Macquarie advanced \$36,000,000.00 and has received repayments of \$12,500,000.00, for a net amount of \$23,500,000.00 (excluding HST).

39. The Lease provides for an annual Late Rate of 18%.<sup>21</sup>

40. Assuming that the Late Rent figure represents or approximates Macquarie's rate of return on its loans, and without considering the declining balance as a result of the interim lease payments made by the Validus Entities, the one-year return on an advance of \$36,000,000.00 at 18% would be \$6,480,000.00. This would suggest a net amount (after crediting the lease payments of \$12,500,000.00) of \$29,980,000.00, after one year.

41. Yet, only 15 months after advancing funds, Macquarie was claiming a debt of \$55,598,575 (inclusive of HST). It is submitted that it is incumbent on the Court to take a hard look at Macquarie's calculations to determine whether there is either double-counting or an improper penalty that was triggered by the Validus Entities' default, contrary to the anti-deprivation rule.

42. The position of the Validus Entities is that Macquarie has either double counted in calculating its debt or, if the "strict interpretation" of the Lease allows such double counting, then the Lease includes an impermissible penalty that was triggered by the insolvency of the Validus Entities.

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<sup>20</sup> Affidavit of Todd Shortt sworn August 20, 2023

<sup>21</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023, Exhibit "C", p. 11

43. Very simply, Macquarie's debt calculation includes all of the missed Base Rent payments (including the Base Rent payments deferred under the "rent holiday" provided for in the Lease Amendment), plus interest on the missed Base Rent payments at the Late Rate of 18%, plus the Stipulated Loss Value under Schedule 3 of the Lease as if Macquarie has and will only ever receive 16 Base Rent payments.<sup>22</sup>

44. In other words, Macquarie claims the missed Base Rent payments twice, first as part of the calculation (together with interest at the Late Rent interest rate) and secondly, by using a Stipulated Loss Value without crediting the missed Base Rent payments.<sup>23</sup>

45. In addition, Macquarie has failed to credit the sum of \$525,000.00, which was part of the \$9,000,000.00 originally held back from the Validus Entities, and which Macquarie claims to have applied as a prepayment of Base Rent payable on September 7, 2024.<sup>24</sup>

46. It is submitted that, if this is how the Lease strictly reads, it was an error. It makes no logical sense that, once Macquarie recovers the missed Base Rent payments with the Late Rent interest, it is still entitled to the Stipulated Loss Value as if it had not recovered these payments.

47. Moreover, such a calculation violates the anti-deprivation rule and will result in Macquarie being unjustly enriched by recovering millions of dollars more than it is owed, to the detriment of all other stakeholders of the Validus Entities.

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<sup>22</sup> Six Base Rent payments on account of the \$9,000,000.00 that was not advanced in the first place and 10 Base Rent payments actually made

<sup>23</sup> In addition

<sup>24</sup> Supplementary Responding Motion Record of Validus dated August 10, 2023, Affidavit of Todd Shortt sworn August 10, 2023, Exhibit B, pp. 21 and 22

48. The “anti-deprivation rule” is a common law rule that prevents contracts that frustrate statutory insolvency schemes.

49. Until the decision of the Supreme Court of Canada (“**SCC**”) in *Chandos Construction Ltd v Deloitte Restructuring Inc* (“*Chandos*”),<sup>25</sup> the status of the anti-deprivation rule remained uncertain. Any such uncertainty was laid to rest by the SCC’s decision in *Chandos*. A contractual provision will violate the rule if it removes value from the estate of an insolvent entity, to the detriment of the company’s creditors.

50. Notably, the majority of the SCC explicitly rejected a purpose-based or intention-based test, instead adopting an effects-based test, thus divorcing the rule from its original conception as a rule against fraudulent conduct. One of the rationales for doing so was expressed as follows:

[36] Moreover, an intention-based test would encourage parties who can plausibly pretend to have bona fide intentions to create a preference over other creditors by inserting such clauses. Parties will often be able to state some commercial rationale for provisions altering contractual rights in the event of a counterparty’s insolvency, such as guarding against the risk of the counterparty’s non-performance. An intention-based test would render the rule ineffectual, save in the most flagrant cases of deliberate circumvention of insolvency law.<sup>26</sup>

51. In the present case, Macquarie invoked the Stipulated Loss Value provision after issuing formal demands and a BIA notice. As accepted by the Court, the Validus Entities were clearly insolvent. The Stipulated Loss Value under the Lease already calculates and takes into consideration Macquarie’s loss of future rental stream. The inclusion of

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<sup>25</sup> *Chandos Construction Ltd v Deloitte Restructuring Inc*, [2020 SCC 25](#)

<sup>26</sup> *Chandos*, SCC, *supra*, para 36

interest on the missed Base Rent payments at the annual Late Rate of 18% already generously compensates Macquarie for the missed/late Base Rent payments.

52. A simple comparison between Macquarie's position if the Base Rent payments had been made on time versus late illustrates the nature of the penalty which Macquarie is seeking.

53. Leaving aside the failure to account for the \$525,000.00 referred to above, if the Validus Entities had made all of the Base Rent payments on time, then Macquarie would have received the six Base Rent payments totalling \$8,500,000.00 (plus HST).<sup>27</sup>

54. Rather than being entitled to a Stipulated Loss Value of \$40,500,000.00 (plus HST), as claimed, Macquarie would have been entitled to a Stipulated Loss Value of \$33,300,000.00 (plus HST) <sup>28</sup> Thus, Macquarie would have recovered in total \$41,800,000.00 (plus HST).

55. Instead of just adding interest at the Late Rate of \$228,575.00, Macquarie also added the \$8,500,000.00, thus increasing its claim to \$49,228,575.00 (without HST) and \$55,598,575 with HST.

56. This is not right. In addition to the double-counting/penalty issue, the inflation of Macquarie's claim and bid significantly impacts the SISP/minimum bid, discouraging other bidders.

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<sup>27</sup> Supplementary Responding Motion Record of Validus dated August 10, 2023, Affidavit of Todd Shortt sworn August 10, 2023, Exhibit B, p. 21

<sup>28</sup> Lease Agreement, Schedule 3



**The HST Issue**

57. The HST issue/concern was raised at the hearing to convert the proceedings to a CCAA proceeding and, as discussed, was addressed in the August 29, 2023 Endorsement.

58. The Monitor and Macquarie take the position that it is premature to address this issue, as the Monitor is only seeking approval of the Stalking Horse Offer for the purpose of the SISP, not seeking approval of the Stalking Horse Offer itself.

59. This is problematic, as the treatment of HST and in particular the contemplated issuance of a Reverse Vesting Order that transfers all HST liabilities to Residualco while effectively assigning the input tax credit for the \$6,450,000 to the purchaser, appears to be an integral part of the Stalking Horse Offer.

60. As the Monitor takes the position that this issue is premature, it will not be fully addressed in these submissions. In any event, it should be fully addressed on full and proper notice to CRA.

**Other Issues Related to the SISP, Stalking Horse Offer and Break Fee****A. The Stalking Horse Offer Should Not be Approved**

61. The Stalking Horse Offer should not be approved and the SISP should be amended to remove reference to the Stalking Horse Offer, the Break-Up Fee, the maximum amount of the Expense Reimbursement (as such terms are defined in the Stalking Horse Offer) and the minimum overbid increment of \$750,000.

62. There is no dispute that the CCAA confers broad jurisdiction on courts to approve a SISP, including a “stalking horse” sale process, in respect of the business or assets of an applicant, prior to or in the absence of a plan of compromise or arrangement.

63. In exercising the broad powers to facilitate restructurings under the CCAA, the Court considers a number of factors in connection with the approval of a SISP and the approval of a stalking horse agreement.<sup>29</sup>

64. In assessing whether a stalking horse bid process should be approved by the Court, the Quebec Superior Court set out the following non-exhaustive factors as important considerations in *Boutique Euphoria Inc. (Re)*<sup>30</sup>:

- (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?

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<sup>29</sup> *Nortel Networks Corporation (Re)*, [2009 CanLII 39492 \(ONSC\)](#) at para 49.; *Boutique Euphoria Inc. (Re)* [2007 QCCS 7129](#) at para 37 ; *DCL Corporation (Re)*, 2023 [ONSC 3686 \(CanLII\)](#) at para 24; [Freshlocal Solutions](#), *supra*, at paras 35-72.

<sup>30</sup> *Boutique Euphoria Inc. (Re)* [2007 QCCS 7129](#) at para 37.

- (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?

65. Subsequently, the BC Court in *Freshlocal Solutions*<sup>31</sup> and this Court in *Re DCL Corporation*<sup>32</sup>, identified the following relevant questions the Court ought to consider in assessing the merits of a proposed stalking horse bid:

- (a) How did the stalking horse agreement arise?
- (b) What are the stability benefits?
- (c) Does the timing support approval?
- (d) Who supports or objects to the stalking horse agreement?
- (e) What is the true cost o the stalking horse agreement? and
- (f) Is there an alternative?

66. The Validus Entities submit that when considering the facts of this case in light of the above questions, the Stalking Horse Offer should not be approved. The factors that support not approving the Stalking Horse Offer are considered below.

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<sup>31</sup> *Freshlocal Solutions Inc. (Re)*, [2022 BCSC 1616 \(CanLII\)](#) [*“Freshlocal”*], at paras. 24-32

<sup>32</sup> *DCL Corporation (Re)*, [2023 ONSC 3686 \(CanLII\)](#), [*“DCL”*] at para 24.

i. ***How did the Stalking Horse Offer arise?***

67. Similar, to the facts in *Freshlocal*, the Monitor acknowledges that it did not undertake any competitive process in order to identify the stalking horse bidder.<sup>33</sup>

68. Rather, in this case the secured creditor, Macquarie, has been driving the entire process from prior to the commencement of these CCAA proceedings with a view to credit bidding through a stalking horse agreement for substantially all of the assets of the Validus Entities.

69. Specifically, Macquarie indicated in its July 31, 2023 Application Record its intention of being a stalking horse bidder in a SISP and that a condition of that bid would be that the SISP and resulting transaction be implemented within proceedings under the CCAA (approximately 90 days prior to the motion to approve the Stalking Horse Offer).<sup>34</sup>

70. On August 11, 2023, Hut 8 announced that it had entered into a support agreement with Macquarie in support of an opportunity to acquire certain assets of the Validus Entities through a stalking horse bid that was intended to be submitted to the Receiver.<sup>35</sup>

71. The Monitor in this case, given the unique way in which these CCAA proceedings were initiated, starts from the premise that it worked with the Stalking Horse Bidders (that had pre-ordained themselves as such prior to the commencement of these CCAA proceedings).<sup>36</sup>

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<sup>33</sup> Monitor's Factum dated October 23, 2023 at para. 37(a)(i);

<sup>34</sup> Affidavit of Joshua Hamilton Stevens, sworn July 31, 2023, para. 104; Second Report of the Monitor dated October 19, 2023 [the "**Second Report**"], section 1.0 Introduction at para. 3.

<sup>35</sup> Second Report, section 1.0 Introduction at para. 4.

<sup>36</sup> Second Report, section 4.1 SISP, para. 2.

72. The Monitor's only rationale for why a competitive process was not undertaken is that one of the four plants, being the Iroquois Falls Plant, was marketed previously under the EY Sale Process. The assets being offered for sale under the SISP and that are the subject matter of the Stalking Horse Offer are significantly broader than just the Iroquois Falls Plant.

73. Given the extensive period it has taken to bring forward the SISP, some canvassing of the market prior to entering into the Stalking Horse Offer should have occurred.

74. This is highlighted by the fact that the Monitor references parties that have contacted it on an unsolicited basis since the commencement of the interim receivership proceedings on August 2, 2023. The Monitor provides no rationale as to why it did not engage any of these unsolicited parties about the potential of being a stalking horse bidder in a SISP process.<sup>37</sup>

**ii. *What are the Stability Benefits?***

75. The Monitor emphasizes that the Stalking Horse Offer preserves employment and that the employees were 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.

76. The Monitor does not give one example of an employee that has advised they would resign if a stalking horse was not approved. Quite the opposite, the Receiver's

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<sup>37</sup> Second Report, section 4.2 Solicitation of Interest, para. 1(c).

pre-filing reports addressed the risk of significant employee resignations and in the 90 days following and that KSV has been able to stabilize the workforce.

77. In this case, where the stalking horse bidder is the secured creditor of the Validus Entities and has indicated its desire to purchase the assets since the end of July 2023, it is submitted that approval of a stalking horse agreement is not necessary to provide this stability.

78. The Monitor also indicates that the Validus Entities are more likely to be successful in the upcoming IESO capacity auction process – which requires bids on November 29, 2023. Originally this same auction process was given to this Court as the urgency to grant the Initial Order on August 29, 2023 and yet two months have passed prior to the motion for approval of a SISP.<sup>38</sup>

79. The Monitor also refers to payment of priority payments under the Stalking Horse Offer as a stability benefit that the agreement offers. However, any cash bid submitted under the SISP would result in the priority payments being paid by virtue of the fact that those amounts have priority. This is not a benefit that any bid in the SISP would not offer.

**iii. *Does the Timing Support Approval?***

80. The Validus entities agree that a SISP is appropriate, however, the timing does not support approval of the Stalking Horse Offer. The Receiver/Monitor has stabilized the business in the past 90 days and there is no indication of any customers or employees threatening to leave if the agreement is not approved by the Court.

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<sup>38</sup> Second Report, Exhibit “E” - Endorsement of Justice Osborne dated August 29, 2023, at para. 29.

81. The SISP's Bid Deadline is contemplated to be after the November 29, 2023 IESO auction submission deadline and the Monitor has confirmed that the submission will be made by the Applicants. Approving the Stalking Horse Bid does not change this.

**iv. *What is the true cost of the Stalking Horse Offer?***

82. The Validus Entities submit that the approval of the Stalking Horse Offer will have a chilling effect on the SISP to be undertaken for the following reasons.

83. In order to be considered a "Qualified Bid" under the SISP, a bid must meet the criteria set out in the SISP including, among other things, provide for aggregate consideration in an estimated amount of \$60,228,822 or greater. This figure was calculated by the Monitor 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.

84. As set out above, there is a genuine issue to be decided as to the actual amount of the Macquarie Claim Amount that has been calculated by Macquarie to be \$57,218,822 as of September 22, 2023. If the Validus Entities are correct, the Stalking Horse Bid could be inflated by up to \$9,000,000.00. It is submitted that this higher amount will deter interested parties from participating in the SISP.

85. While the Monitor submits that the Break Fee and Expense Reimbursement are in the range of such amounts that Canadian Courts have approved in other CCAA Proceedings, this should not be the end of the analysis by this Court. In this case, where the stalking horse bidder is a secured creditor of the Applicants and is credit bidding its debt, the Validus Entities submit that the amount of Bid Protections are not reasonable.

86. In *DCL*, for instance the stalking horse bidder was an affiliate of the term lenders and it had no break fee or expense reimbursement.<sup>39</sup> The Validus Entities submit that no break fee or expense reimbursement is appropriate when a secured creditor is acting as a stalking horse bidder. Essentially by credit bidding, the secured creditor is foreclosing on its security and if it had done so in a foreclosure process it would not be entitled to any additional amounts above its indebtedness in that case.

87. There is no rationale provided by the Monitor as to why an overbid amount of \$750,000 is required. The Validus Entities submit that this amount is not insignificant on its own and may have a chilling effect especially when coupled with the above amounts.

**v. *Is there an Alternative?***

88. The Validus Entities submit that the SISP can be undertaken without approval of the Stalking Horse Offer and Macquarie can assert its bid as part of the SISP.

89. In the event that there are no other bidders, Macquarie's bid can be accepted as the Successful Bid at the conclusion of the SISP process and in the event that there are other Qualified Bidders, they will not be subjected to having to beat the Macquarie credit

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<sup>39</sup> [\*DCL Corporation \(Re\), 2023\*](#), supra. at paras. 10-13; Second Report, Appendix "J".



bid by approximately \$3 million (being the combination of the Bid Protections and the Overbid Amount) in order to participate in the process.

90. In light of all the above concerns, the Validus Entities submit that the Stalking Horse Offer should not be approved.

**PART IV - ORDER REQUESTED**

91. It is submitted that Stalking Horse Offer should not be approved and that the SISP should be modified to address the concerns set out herein.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of October, 2023.

*Catherine Francis*

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Catherine Francis

**MINDEN GROSS LLP**  
Barristers and Solicitors  
2200 - 145 King Street West  
Toronto, ON M5H 4G2

**Catherine Francis** (LSO# 26900N)  
cfrancis@mindengross.com  
Tel: 416-369-4137

Lawyers for Validus Power Corp.

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. et al.

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

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

Proceeding commenced at Toronto

**RESPONDING FACTUM**

**MINDEN GROSS LLP**

Barristers and Solicitors  
145 King Street West, Suite 2200  
Toronto, ON M5H 4G2

**Catherine Francis (LSO No. 26900N)**

cfrancis@mindengross.com  
Tel: 416-369-4137

Lawyers for Validus Power Corp.