

**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
(the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SPRINGER AEROSPACE HOLDINGS
LIMITED AND 1138969 ONTARIO INC. (together,
the "Applicants")

FACTUM OF THE APPLICANTS
(Approval and Vesting Order)
(returnable April 11, 2023)

April 9, 2023

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PART I – OVERVIEW

1. The Applicants bring this motion for approval of a transaction arising out of the sale and investment solicitation process (“**SISP**”). The SISP culminated in one conditional offer to purchase the Applicants’ business as a going concern, and a conditional refinancing offer. The Applicants have, with the supervision of the Monitor, pursued the offer to purchase on a going concern basis. The Applicants have finalized a share purchase transaction and now seek this Court’s approval.

2. The transaction, as set out in the share purchase agreement dated March 28, 2023 (the “**SPA**”), contemplates the sale of the business on a going-concern basis to a corporate entity, 1000488927 Ontario Inc. (the “**Purchaser**”), owned by Thomas and Vicary Fremlin, Daniel Springer, and Christopher Grant. The Fremlins are business owners, philanthropists, and key figures in the Sault Ste. Marie and Echo Bay communities. Daniel Springer and Christopher Grant are current management involved in the operation of the business. Together, they will continue the Applicants’ business for the benefit of employees, customers, and the Northern Ontario community.

3. The Proposed Transaction should be approved. Apart from the preservation of the business as a going concern, the Purchase Price (as defined in the SPA) is \$5.5 million in cash, which results in substantial recovery for Desjardins. Desjardins was consulted as the transaction was being negotiated, and has confirmed that it consents to the Proposed Transaction.

4. The sale of the business on a going-concern basis avoids the destruction of value that would occur in a liquidation. The Applicants’ real estate is located in a remote region with large hangars and an airport. The specialized nature of the real estate, coupled with the time and cost needed to market it, means it is unlikely that there be more recovery for creditors in a liquidation.

5. The Applicants bring this motion for an Order, in the form attached at tab 3 (page 155) of the Applicants' Motion Record (the "**AVO**"), which, among other things:

- (a) approves the transaction contemplated in the SPA (the "**Proposed Transaction**") pursuant to which the Purchaser will acquire all the issued and outstanding shares (the "**Purchased Shares**") of Springer Aerospace Holdings Limited ("**Hold Co**");
- (b) adds a new corporation, 1000488910 Ontario Inc. ("**Residual Co**"), as an Applicant in this proceeding, and vests all liabilities of the Applicants (the "**Vested Liabilities**") in Residual Co except: all liabilities associated with existing and ongoing customer contracts; all liabilities in connection with current employees of 138969 Ontario Inc. ("**OpCo**"); and all liabilities in respect of a vehicle and certain leased equipment (together, the "**Continuing Liabilities**");
- (c) vests the Purchased Shares in the Purchaser upon delivery of a certificate by the Monitor confirming that the Proposed Transaction has closed;
- (d) approves the distribution by the Monitor of the proceeds of the Proposed Transaction (the "**Proceeds**") as follows (the "**Distribution**"):
 - i. first, in payment of all amounts due to the Applicants' counsel, the Monitor, and the Monitor's counsel as of the closing date, which the SPA contemplates to be within 10 days of the AVO ("**Closing Date**");
 - ii. second, in payment of all amounts due under the DIP Facility (as defined in the initial order made in this proceeding on November 23, 2022 (the "**Initial Order**")¹) as of the Closing Date;

¹ A copy of the Initial Order is at page 79 of the motion record.

- iii. third, in payment of all amounts outstanding pursuant to the key employee retention plan (the “**KERP**”) approved in the Court’s endorsement dated February 27, 2023;
 - iv. fourth, in payment of all payables of the Applicants which, by operation of law, rank in priority to the security interest held by Caisse Desjardins Ontario Credit Union Inc. (“**Desjardins**”), as of the Closing Date (“**Priority Payables**”); and
 - v. fifth, in payment of the amounts (or portion thereof) due to Desjardins;
- (e) authorizes the Monitor, after the Distribution, to assign Residual Co in bankruptcy, to act as bankruptcy trustee, and to withhold a \$20,000 reserve from the Proceeds to pay the costs of the bankruptcy (the “**Bankruptcy Reserve**”);
 - (f) extends the Stay Period (as defined in the Initial Order) until the later of the bankruptcy of Residual Co and April 30, 2023 (the “**CCAA Termination Date**”);
 - (g) discharges the Monitor and terminates this CCAA proceeding and all court-ordered charges upon the CCAA Termination Date;
 - (h) grants limited releases in favour of all of the Applicants’ current directors, officers, employees, independent contractors, and advisors, including the Monitor, the Monitor’s legal counsel, and the Applicants’ legal counsel, as well as Residual Co’s sole director and officer (together, the “**Released Parties**”);
 - (i) seals Confidential Exhibits “1” and “2” to the affidavit of Christopher Grant sworn April 6, 2023 (the “**Grant Affidavit**”), which exhibits contain confidential appraisals;

- (j) approves the Monitor's reports and activities; and
- (k) approves the fees and disbursements of the Monitor and its counsel, together with an accrual to complete the administration of the proceeding.

PART II – FACTS

A. The Applicants' business is unique in Canada and vital to the Northern Ontario economy and communities

6. The Applicants operate one of the largest aircraft maintenance, repair and overhaul businesses in Canada. Established in 1972, their business is the only operation of its kind in Northern Ontario. The Applicants' customers include aircraft manufacturers, commercial airline operators, government agencies, and private companies and individuals.²

7. The Applicants currently have 60 employees and 8 contractors. They are the second largest employer in the region and the only source of employment in the aviation sector in Northern Ontario. Employees would need to relocate to find employment in the aviation sector if the Applicants were to shut down.³

8. The Applicants' business comprises local, national, and international economic relationships. The spectrum of the Applicants' stakeholders spans from local suppliers in Northern Ontario to large, international corporate customers. The Applicants service aircraft and fleets serving Indigenous and fly-in communities that rely on aircraft for food, medicine, goods and transportation. Other indirect stakeholders of the Applicants include the towns and municipalities

² Affidavit of Christopher Grant sworn April 6, 2023, page 16 of the Applicants' motion record (the "**Grant Affidavit**"), paras. 4, 5.

³ Grant Affidavit, para. 6; Fourth Report of the Monitor dated April 7, 2023 (the "**Fourth Report**"), para. 16.

that benefit from the taxes and investments generated by the Applicants' activities and the substantial capital that the business injects into the Northern Ontario economy.⁴

B. The SISP culminated in the Proposed Transaction

9. On December 22, 2022, the Applicants obtained an order (the “**SISP Order**”) approving a SISP.⁵ The purpose of the SISP was to solicit interest for refinancing, sale or investment transactions, including with respect to the Applicants' assets (whether *en bloc* or piecemeal) and/or the Applicants' business. The SISP was designed as a dual-phase process, with Phase I soliciting non-binding offers, and Phase II allowing bidders to conduct more extensive due diligence and submit binding offers.⁶

10. The Applicants conducted the SISP in accordance with the SISP Order and with the assistance of the Monitor. The SISP was broadly advertised. 350 potential bidders were contacted; 12 conducted due diligence.⁷

11. During Phase I, several potential bidders asked for an extension of time. As permitted by the SISP Order, Phase I of the SISP was extended, with the consent of the Monitor, by two weeks. The Court extended Phase II of the SISP by endorsement dated February 27, 2023. As a result, Phase II of the SISP ended on March 21, 2023 (the “**Phase II Deadline**”).⁸

12. While there were a number of parties that expressed interest to the Monitor and Applicants about the purchase of the business, only one viable transaction resulted from the SISP, being the

⁴ Grant Affidavit, paras. 5, 6.

⁵ A copy of the SISP Order is at page 100 of the motion record.

⁶ Grant Affidavit, paras. 9, 10; Fourth Report, para. 31.

⁷ Grant Affidavit, paras. 11, 12; Fourth Report, para. 35.

⁸ Grant Affidavit, paras. 13-16; Fourth Report, para. 34.

Proposed Transaction. The only other offer made on the Phase II Deadline was an offer to refinance on unsatisfactory terms.⁹

C. Key terms of the Proposed Transaction

13. They key terms of the Proposed Transaction, as set out in the SPA, are as follows:¹⁰

- (a) The Purchaser will purchase all the issued and outstanding shares of Hold Co. Since Hold Co holds title to the lands and buildings comprising the Applicants' facilities (the "**Land**") and owns all the issued and outstanding shares of the operating company, OpCo, the Purchaser effectively acquires, through the Purchased Shares, all of the Applicants' assets and going-concern business.
- (b) The Purchase Price is \$5.5 million, payable in cash. The Purchaser paid a 10% (\$550,000) deposit. The Purchase Price will be adjusted up or down, depending on whether the balance owing under the DIP Facility as of the Closing Date is more or less than \$500,000, on a dollar-for-dollar basis.
- (c) The Applicants shall seek and obtain Court approval and a reverse vesting order ("**RVO**"). Pursuant to SPA, the Applicants are required to seek and obtain an RVO vesting all liabilities of the Applicants, other than the Continuing Liabilities, in Residual Co., and the Continuing Liabilities remain uncompromised. If the Applicants do not obtain the RVO, the Proposed Transaction may be terminated by the Purchaser.

⁹ Grant Affidavit, paras. 17-19; Fourth Report, paras. 36-38.

¹⁰ Grant Affidavit, paras. 21-27; Fourth Report, para. 39; a copy of the executed SPA is at page 121 of the motion record.

(d) The Monitor shall distribute the Proceeds to creditors. Assuming a Closing Date of April 21, 2023, the Applicants estimate the following amounts for Priority Payables, with the balance of the Proceeds to be distributed to Desjardins (subject to the Bankruptcy Reserve):

- i. approximately \$270,000 in outstanding and accrued professional fees;
- ii. approximately \$500,000 under the DIP Facility;
- iii. \$70,000 under the KERP charge;
- iv. \$6,730.10 for HST accrued after the Initial Order (subject to tax refunds currently under audit);
- v. approximately \$260 in source deductions; and
- vi. approximately \$10,000 in property taxes.¹¹

(e) The SPA has the following closing conditions:

- i. that the Court grant the AVO;
- ii. that the shareholders of the Purchaser execute a unanimous shareholder agreement;
- iii. that the Development Corporations (as defined in the Grant Affidavit) agree to release their security interest in the property municipally known as 421 Lakeview Road, Echo Bay, Ontario; and

¹¹ Grant Affidavit, para. 26.

- iv. that Desjardins agree to release any guarantee given in respect of the Applicants' obligations to Desjardins (including personal guarantees), except any guarantee by Export Development Canada.

14. In addition to the AVO, all closing conditions are expected to be met prior to the Closing Date. In particular:

- (a) the shareholders are working on a unanimous shareholder agreement in good faith and with due diligence;
- (b) one of the Development Corporations, being the Community Development Corporation of Sault Ste. Marie & Area (“CDC”), has confirmed to the Applicants that it will not oppose the Proposed Transaction and will release its security interest in 421 Lakeview. CDC has shared its position with the boards of directors of the two remaining Development Corporations—being, East Algoma Community Futures Development Corporation, and Nickel Basin Federal Development Corporation—and CDC expects that those other two Development Corporations will also formally provide the same consents in advance of the closing of the Proposed Transaction;¹² and
- (c) the terms of Desjardins' release of the personal guarantees have been negotiated and will be documented following the granting of AVO, as the case may be.¹³

15. The implementation of the Proposed Transaction involves the following necessary restructuring steps (the “**Restructuring Steps**”) to be effected through the AVO: the addition of

¹² Fourth Report, paras. 50(x), 59.

¹³ Grant Affidavit, para. 50.

Residual Co as an applicant; the vesting of the Vested Liabilities in Residual Co and the discharge of same as against the Applicants; and the transfer of affected claims and encumbrances onto the Proceeds.¹⁴

D. The reverse vesting structure is necessary to preserve licenses and certifications

16. The Applicants operate in a highly regulated industry. Their business requires numerous licenses and certifications, in Canada as well as in the jurisdiction where the customers' planes are operated.¹⁵

17. The Applicants' current licenses include, among others: organisational licenses, such as the Applicants' certification as an Approved Maintenance Organization by Transport Canada; aircraft-specific certifications, which are necessary to be legally allowed to work on specific models of aircraft, such as Cessna airplanes; and work-specific certifications, which are required to perform specific categories of work on aircraft, such as electrical work, work on avionics, paint, structural repairs, etc.¹⁶

18. None of the Applicants' licenses and certifications are transferable. The Purchaser could therefore not viably acquire the Applicants' business as a going-concern except in a share transaction and "reverse" vesting structure. A purchaser would need to invest substantial time (estimated at 2-3 years) and costs – including the administrative and legal costs of the regulatory process itself, but also the costs of maintaining essentially inoperable assets over that period – to

¹⁴ Grant Affidavit, para. 28.

¹⁵ Fourth Report, para. 17.

¹⁶ Grant Affidavit, paras. 29-31.

re-obtain the necessary certifications. Such time and cost make it so that there likely is no other viable going-concern transactional structure than a share acquisition coupled with an RVO.¹⁷

PART III – ISSUES

19. The issues on this motion are:

- (a) Should the Court approve the SPA and grant a “reverse” vesting order?
- (b) If so, should the Court grant the attendant relief sought for the orderly implementation of the Proposed Transaction? Specifically:
 - i. Should Residual Co be added as an Applicant?
 - ii. Should the Court extend the Stay Period?
 - iii. Should the Court allow the Monitor to assign Residual Co in bankruptcy following the implementation of the Proposed Transaction and the Distribution?
 - iv. Should the Court grant CCAA termination orders effective following the implementation of the Proposed Transaction?
- (c) Should the Court grant the release sought for the Released Parties?
- (d) Should the Court seal the confidential exhibits to the Grant Affidavit?
- (e) Should the Court approve the Monitor’s reports, fees and activities?

¹⁷ Grant Affidavit, para. 32; Fourth Report, paras. 44, 45, 47-50.

A. The Court should approve the SPA and vest the Vested Liabilities in Residual Co

i. The Court has jurisdiction to make “reverse” vesting orders

20. “Reverse” vesting orders facilitate the sale of a business through the acquisition of the shares of the debtor company rather than its assets. RVOs are typically used to preserve licenses and permits that are not transferable or difficult to assign. Among other things, RVOs allow insolvent companies operating in heavily regulated industries to sell their business as fully-licensed going-concerns, a complete package which attracts more value for stakeholders.¹⁸

21. It has become well established that the Court has jurisdiction to grant an RVO under s. 11 of the CCAA if “appropriate in the circumstances.”¹⁹ In Ontario, the Court also has jurisdiction to “vest in any person an interest in real or personal property” under s. 100 of the *Courts of Justice Act*.²⁰

22. In deciding whether to grant an RVO and approve the underlying transaction, Courts have had regard, by analogy, to the factors applied in respect of the approval of sales of assets, namely, the *Soundair* factors and the factors set out in s. 36(3) of the CCAA.²¹

23. The *Soundair* factors are well established. They are: (i) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently; (ii) the interests of

¹⁸ See *Southern Star Developments Ltd. v Quest University Canada*, [2020 BCCA 364](#) (Harris J.) (“*Quest*”); *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) (Penny J.) (“*Harte Gold*”); *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, [2022 ONSC 6354](#) (McEwen J.) (“*Just Energy*”); and *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#) (Paquette J.) (original English version) (leave to appeal denied, [2022 QCCA 1073](#)) (“*Blackrock*”).

¹⁹ See *Quest* paras. 29, 30; *Harte Gold*, paras. 18, 37; *Just Energy*, para. 29; and *Blackrock*, paras. 87, 94.

²⁰ [R.S.O. 1990, c. C.43](#); see *In the Matter of CannaPiece Group Inc.*, [2023 ONSC 841](#) (Osborne J.) (“*Cannapiece*”), para. 52.

²¹ See *Harte Gold*, paras. 19-21; *Just Energy*, paras. 30-32; *Blackrock*, paras. 87, 95; and *Cannapiece*, paras. 53, 54.

all parties; (iii) the efficacy and integrity of the process by which offers have been obtained; and (iv) whether there has been unfairness in the working out of the process.²²

24. The section 36(3) factors include: (i) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (ii) whether the monitor approved the process leading to the proposed sale or disposition; (iii) 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; (iv) the extent to which the creditors were consulted; (v) the effects of the proposed sale or disposition on the creditors and other interested parties; and (vi) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

25. However, Courts have stated that reverse vesting orders remain an exceptional remedy. The “reverse” vesting structure must be justified over a “traditional” vesting order. In particular, the Courts have considered the following questions to be material: Why is the RVO necessary in this case? Does the RVO structure produce an economic result at least as favourable as any other viable alternative? Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? Does the consideration being paid for the debtor’s business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure?²³

26. The above factors are largely intertwined, and none is determinative. Rather, an RVO remains a discretionary remedy. As stated by the Supreme Court in *Century Services*, an order is

²² *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#).

²³ See *Harte Gold*, para. 38; *Cannapiece*, para. 58; *Just Energy*, paras. 33, 34; and *Blackrock*, para. 96.

within the jurisdiction of the Court, under s. 11 of the CCAA, if it furthers efforts to achieve the remedial purpose of the CCAA, which purpose is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.²⁴

ii. An RVO structure is necessary and appropriate

27. The SPA and the RVO meet the above criteria and should be granted.

28. The Proposed Transaction is the only viable transaction to emerge from the SISP. The SISP was a Court-approved, transparent, and commercially reasonable process. It was broadly advertised and extensive efforts were made to market the business and assets. The SISP was conducted under the supervision of the Monitor and in accordance with the SISP Order.²⁵

29. The Proposed Transaction allows the Applicants to continue as a going-concern, which is in the interest of all stakeholders, including employees, suppliers, customers, and the Northern Ontario economy. A going-concern preserves existing economic relationships and business opportunities.²⁶

30. The Proposed Transaction and the RVO structure will result in as little disruption as possible, if any, given the continuation of the Applicants' business with the same corporate entities, all current employees, and the existing and experienced management team. This will be particularly facilitative, for example, with respect to customer and employee contracts which will not need to be assigned or renegotiated, since they form part of the Continued Liabilities.²⁷

²⁴ *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#), paras. 15, 70; see *Quest*, para. 30; and *Harte Gold*, para. 32.

²⁵ Grant Affidavit, paras. 9-20, 34; Fourth Report, para. 50.

²⁶ Grant Affidavit, paras. 33, 59; Fourth Report, paras. 46, 50.

²⁷ Grant Affidavit, paras. 33, 35; Fourth Report, para. 50.

31. As seen above, the sale of the Applicants' business as a going-concern is likely not a viable proposition outside of a share purchase and RVO structure because the necessary licenses and certifications are not transferable to another entity.²⁸

32. The \$5.5 million consideration for the share transfer is fully payable in cash and allows the repayment of all Priority Payables. The Proposed Transaction is also expected to lend substantial recovery for Desjardins, the primary secured lender and most significant creditor of the Company.²⁹ The Proposed Transaction was negotiated in consultation with the Monitor, Desjardins, and other key stakeholders.³⁰

33. The Proposed Transaction is not conditional on further due diligence or financing. In addition to the AVO, the Proposed Transaction is not predicated on onerous obligations that would make closing subject to material risk or delay. Closing is expected within 10 days of the AVO.³¹

34. The Proposed Transaction will not cause prejudice to any creditor. The Priority Payables will be paid in full. Desjardins consents to the Proposed Transaction. The Development Corporations (as defined in the Grant Affidavit) have consented to subordinate their interest. Continuing Liabilities, including all liabilities in connection with ongoing customer contracts and current employees, are uncompromised.

²⁸ Grant Affidavit, paras. 29-32, 35, 37(f); Fourth Report, paras. 44, 45, 47-50.

²⁹ Fourth Report, paras. 51-74.

³⁰ Grant Affidavit, paras. 26, 55, 56.

³¹ Grant Affidavit, para. 24(h), 25, 38, 50.

35. Vested Liabilities will not be paid, but this is not a result of the AVO or the Proposed Transaction. It is due to the value of the Applicants, as tested in the SISP, which value is insufficient to satisfy prior-ranking claims, including the secured debt to Desjardins.³²

36. Furthermore, creditors are unlikely to recover more in a bankruptcy or liquidation scenario,³³ for the following reasons:

- (a) the SISP solicited offers for a purchase of the Applicants' assets, but the Applicants received none.³⁴
- (b) the value of the Applicants' licenses and certifications will be lost in a liquidation scenario because they are not transferable.³⁵
- (c) it is uncertain whether a liquidation of the Land and the Applicants' equipment and inventory would be economically or practically viable because those assets are specialized and remotely located, with few potential acquirers, none of which are local.³⁶
- (d) the value of the Applicants' work in progress would be lost in a liquidation or bankruptcy scenario – in addition to the practical and economical prejudice caused to customers who would need to recover unfinished, potentially not-airworthy aircraft from remote Echo Bay.³⁷

³² See *Just Energy*, para. 57; and *Blackrock*, para. 109; Grant Affidavit, para. 26.

³³ Fourth Report, paras. 47, 50.

³⁴ Grant Affidavit, para. 37(a).

³⁵ Grant Affidavit, paras. 32, 37(f); Fourth Report, paras. 44, 45, 47-50.

³⁶ Grant Affidavit, paras. 37(a), (b), (g); Fourth Report, paras. 47, 50.

³⁷ Fourth Report, paras. 20, 47, 50.

- (e) a liquidation would require time, which would delay creditor recovery. A listing proposal obtained by the Monitor with respect to the Applicants' main parcel recommends a four- to five-week marketing process and contemplates that it would take approximately 13 to 16 weeks in total to sell the real property.³⁸
- (f) a liquidation would involve additional costs, such as: the professional costs of a receiver or bankruptcy trustee; the professional costs of transactional lawyers; the fees and commissions of brokers and agents; and holding costs during the process such as insurance, taxes, maintenance, and utilities. Those costs would reduce creditor recovery.³⁹
- (g) there is no recent appraisal for the Applicants' real property. Their value is uncertain. Moreover, the Applicants' liquidation value is likely lesser than their value as a going-concern. The most recent appraisal for the Land, dated April 6, 2020, confirms that the liquidation value for the Land is substantially lower than its value as an ongoing operation.⁴⁰

37. The Proposed Transaction, on the other hand, provides certainty to creditors and stakeholders, with \$5.5 million in cash Proceeds. Closing is expected within 10 days of the AVO, and the Distribution shortly thereafter.⁴¹

38. The Monitor supports the Proposed Transaction.⁴² Desjardins does not oppose the Proposed Transaction. Counsel are not aware of any opposition.

³⁸ Grant Affidavit, para. 37(b); Fourth Report, paras. 47, 50.

³⁹ Grant Affidavit, para. 37(d); Fourth Report, paras. 47, 50.

⁴⁰ Grant Affidavit, para. 37(c).

⁴¹ Grant Affidavit, paras. 24(h), 25, 38, 50.

⁴² Fourth Report, para. 50.

39. For those reasons, the Court should approve the SPA and grant the “reverse” vesting orders sought as part of the AVO.

B. The Court should grant the relief sought for the orderly implementation of the Proposed Transaction

i. Adding Residual Co as an Applicant

40. Adding Residual Co as an Applicant is necessary and appropriate. Residual Co will be a “debtor company” to which the CCAA applies, such that the Court will have CCAA jurisdiction to grant the orders sought in respect of Residual Co, including in regards to vesting and bankruptcy.

ii. Bankruptcy of Residual Co⁴³

41. The Court has jurisdiction to direct the Monitor to assign Residual Co in bankruptcy under sections 11 and 23(1)(k) of the CCAA. The latter provides that the Monitor “shall carry out any other functions in relation to the company that the court may direct.”

42. A bankruptcy of Residual Co is appropriate. The Proceeds will not be sufficient to pay the Vested Liabilities in full. Residual Co will have no operations or assets. It will not file a plan, nor conduct a claims process. The proposed bankruptcy will facilitate the orderly wind-up of Residual Co. This is typical in RVO transactions.⁴⁴ Furthermore, the amount of the Bankruptcy Reserve is appropriate for a no-asset bankruptcy.

⁴³ Grant Affidavit, paras. 51, 52.

⁴⁴ See *Harte Gold*, paras. 91-93.

iii. Extension of Stay Period

43. The Court has jurisdiction to extend the Stay Period under s. 11.02(2) and (3) of the CCAA if the extension is appropriate and the Applicants have acted, and are acting in good faith and with due diligence.⁴⁵

44. The extension sought is necessary and appropriate for the orderly implementation of the Proposed Transaction. This should be done under a stay of proceedings to preserve the *statu quo*. The continued stay will allow the parties and professionals to devote their attention to closing. The Applicants are acting in good faith and with due diligence to implement the Proposed Transaction.⁴⁶

iv. CCAA termination orders

45. The Court has jurisdiction under s. 11 to order the termination of a CCAA proceeding without a plan of arrangement. This is typical in matters where the restructuring consists in a sale and distribution, such as under an RVO or an asset sale, rather than a formal plan. The termination orders included in the AVO are in the form commonly used on the Commercial List.

46. It is appropriate to terminate the CCAA proceedings after the implementation of the Proposed Transaction, the Distribution, and the bankruptcy of Residual Co. Upon the vesting of the Vested Liabilities, the Applicants will be solvent and will not need to file a plan nor require CCAA relief.⁴⁷

⁴⁵ See *Harte Gold*, paras. 87-90; and *Just Energy*, para. 70.

⁴⁶ Grant Affidavit, para. 57; Fourth Report, paras. 75-79.

⁴⁷ Fourth Report, paras. 80-84.

C. The Court should grant the release sought as part of the AVO

47. Courts regularly grant third party releases in connection with RVOs. The jurisdiction to do so is found in s. 11 of the CCAA. The Courts have referred to the *Metcalfé*⁴⁸ and *Lydian*⁴⁹ factors. While those factors were developed in connection with third-party releases included in plans of arrangement, the Courts apply them, with necessary alterations, in the context of RVOs.⁵⁰

48. Those factors are: (i) whether the claims to be released are rationally connected to the transaction or restructuring efforts; (ii) whether the transaction can succeed without the releases; (iii) whether the parties being released have made a contribution; (iv) whether the releases benefit stakeholders generally; (v) whether stakeholders have knowledge of the nature and the effect of the releases; and (vi) whether the releases are fair, reasonable and not overly-broad. The factors are all part of a global analysis. It is not necessary for each to be satisfied and no single factor is determinative; rather, the relief is discretionary.⁵¹

49. The release sought is directly connected to the CCAA proceeding and the Proposed Transaction. It is to facilitate a transaction that will make funds available to creditors. It is also directly tied to the success of the Proposed Transaction, being conditional on the delivery of the Monitor's certificate confirming that closing has occurred.

50. The release is also properly limited in scope. It is limited to the CCAA period, excluding any claims and liabilities that pre-date the Initial Order or post-date the Monitor's certificate. It is further restricted to claims or liabilities that relate to the Applicants or the CCAA proceedings,

⁴⁸ *Metcalfé & Mansfield Alternative Investments II Corp. (Re)*, [2008 ONCA 587](#), para. 70 (leave to appeal to SCC dismissed, [2008 CanLII 46997](#)).

⁴⁹ *Lydian International Limited (Re)*, [2020 ONSC 4006](#) (Morawetz C.J.), para. 54.

⁵⁰ See *Harte Gold*, paras. 79, 80; *Just Energy*, para. 67; and *Blackrock*, paras. 128-130.

⁵¹ See *Re Green Relief Inc.*, [2020 ONSC 6837](#) (Koehnen J.) ("**Green Relief**"), paras. 27, 28; and *Harte Gold*, para. 80.

such as acts done in connection with the SPA or the Restructuring Steps. The release excludes any liability for gross negligence or wilful misconduct, and any claim against directors that relate to contractual rights, or that are based on misrepresentations or wrongful or oppressive conduct.⁵²

51. The Released Parties have contributed and continue to contribute to the restructuring efforts and the Proposed Transaction. The Court recognizes that a restructuring cannot succeed without a Monitor, Monitor's counsel, and Company's counsel.⁵³ As well, the Company's management have been instrumental to the conduct of this proceeding, having, among other things, continued to manage the Company's business and affairs while navigating the restructuring process and the SISP. The Company's directors have also provided personal guarantees, secured over their personal assets, for the Purchaser's financing, without which there would be no Proposed Transaction.⁵⁴

52. The proposed release does not cause any prejudice as there are no known objections to the release nor, to counsel's knowledge, any pending or extant claims against the Released Parties. The proposed release was disclosed in the motion materials, including a draft order, served on the service list.

53. The Monitor supports the release sought.⁵⁵

54. The Court should therefore grant the release.

⁵² See s. 5.1(2) of the CCAA.

⁵³ See *Green Relief*, para. 50.

⁵⁴ Grant Affidavit, paras. 47, 48.

⁵⁵ Fourth Report, para. 10(x).

D. The Court should make the sealing order sought

55. The Applicants seek a sealing order with respect to the listing proposal obtained by the Monitor as well as the latest appraisal for the Land. Those documents include, among other things, confidential valuation information that would jeopardize further sale efforts should the Proposed Transaction fail to close.⁵⁶

56. The Court has jurisdiction to grant sealing orders under s. 137(2) of the *Courts of Justice Act*. The Court will apply the *Sherman Estate* factors.⁵⁷ Valuation information is regularly sealed in connection with approval and vesting orders. As noted by this Court in *Danier Leather*, there is a public interest in maximizing recovery in an insolvency that goes beyond each individual case. The relief sought meets the *Sherman Estate* test and is appropriate in the circumstances.⁵⁸

E. Approval of Monitor's reports, fees and activities

57. The Applicants are seeking the approval of the Monitor's reports and activities since their last approval granted in the SISP Order. The Monitor's activities since then, including in connection with the SISP, have been reported to the Court and stakeholders in three subsequent Monitor's reports. Those activities are appropriate and in the best interest of stakeholders.⁵⁹ The Applicants are also seeking the approval of the Monitor and its counsel's fees described in the Fourth Report.⁶⁰

⁵⁶ Grant Affidavit, paras. 53, 54; Fourth Report, paras. 92-93.

⁵⁷ *Sherman Estate v Donovan*, [2021 SCC 25](#), para. 38; those factors are whether: (i) court openness poses a serious risk to an important public interest; (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.

⁵⁸ See *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (Penny J.), para. 84; *Alderbridge Way GP Ltd. (Re)*, [2022 BCSC 1436](#) (Fitzpatrick J.), paras. 26, 27; and *Just Energy*, para. 72.

⁵⁹ See *Laurentian University of Sudbury*, [2022 ONSC 5850](#) (Morawetz C.J.) ("*Laurentian*"), para. 17.

⁶⁰ Fourth Report, paras. 85-91; see *Laurentian*, para. 12.

PART IV – RELIEF REQUESTED

58. For the reasons above, the Applicants submit that this Honourable Court should grant the relief requested and issue an order substantially in the form of the draft order at tab 3 of the Applicants' motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of April, 2023.

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Lawyers for the Applicants

SCHEDULE A – LIST OF AUTHORITIES

- 1 *Southern Star Developments Ltd. v Quest University Canada*, [2020 BCCA 364](#) (Harris J.)
- 2 *Harte Gold Corp. (Re)*, [2022 ONSC 653](#) (Penny J.)
- 3 *Just Energy Group Inc. et. al. v Morgan Stanley Capital Group Inc. et. al.*, [2022 ONSC 6354](#) (McEwen J.)
- 4 *Arrangement relatif à Blackrock Metals Inc.*, [2022 QCCS 2828](#) (Paquette J.) (original English version) (leave to appeal denied, [2022 QCCA 1073](#))
- 5 *In the Matter of CannaPiece Group Inc.*, [2023 ONSC 841](#) (Osborne J.)
- 6 *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
- 7 *Century Services Inc. v Canada (Attorney General)*, [2010 SCC 60](#)
- 8 *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, [2008 ONCA 587](#), (leave to appeal to SCC dismissed, [2008 CanLII 46997](#))
- 9 *Lydian International Limited (Re)*, [2020 ONSC 4006](#) (Morawetz C.J.)
- 10 *Re Green Relief Inc.*, [2020 ONSC 6837](#) (Koehnen J.)
- 11 *Sherman Estate v Donovan*, [2021 SCC 25](#)
- 12 *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#) (Penny J.)
- 13 *Alderbridge Way GP Ltd. (Re)*, [2022 BCSC 1436](#) (Fitzpatrick J.)
- 14 *Laurentian University of Sudbury*, [2022 ONSC 5850](#) (Morawetz C.J.)

SCHEDULE B – RELEVANT STATUTES

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.

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.

Monitors

23 (1) The monitor shall

(k) carry out any other functions in relation to the company that the court may direct.

[Courts of Justice Act, R.S.O. 1990, c. C.43:](#)

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Sealed documents

137 (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANTS
(Approval and Vesting Order)
(Returnable April 11, 2023)**

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